

## SPECIALIZED JUDICIAL EMPOWERMENT

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### Abstract

Specialized courts have emerged as a useful addition to courts of general jurisdiction in the contemporary world. These courts allocate judicial resources by assigning complex and technical cases to specialized judges and resolve social problems through legal and non-legal remedies. Countries around the world recognize the benefits of entrusting a specialized judiciary in alleviating generalist courts' dockets, delivering high-quality judgments, and advancing the consistency of law. In the United States, specialized benches have been established at both the federal and state levels. In recent decades, Europe has also experienced steady growth in judicial specialization.

In 2014, the People's Republic of China joined this global trend by setting up three new types of specialized courts in the fields of intellectual property, finance, and the Internet. Drawing on case studies and interviews with Chinese legal practitioners, this Article will illustrate the distinctive role played by specialized courts in authoritarian states. It suggests that subject-matter expertise enables specialized courts to be a unique laboratory for crafting and piloting innovative policies. More importantly, their jurisdictional limitations place these courts in a humble spot on the judicial subordinacy-supremacy spectrum, allowing them to review local bureaucracies' decision-making in a soft and restrictive form. As such, one may expect specialized courts to continue to grow as a competent policymaking body and a versatile governance tool, especially in states where courts are dependent on but, nonetheless, empowered by the regimes.

Yet the Chinese experience only tells us one side of the story. Should the ruling elites of a regime have the power to define and re-define the jurisdictional boundary of generalist and specialized courts, the creation and allocation of specialized jurisdiction would ultimately depend upon the pedigree and reputation of the regime's original legal system as well

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as the political relevance of certain subject matters for the time being. Specialized judicial empowerment may, therefore, inform the ongoing discussion about the institutional design of authoritarian courts and, in particular, the strategic use of courts in striking a balance between the subversion of the rule of law and the orderly administration of private spheres.

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INTRODUCTION

The expansion of judicial power in many regimes—be they democratic or authoritarian—has been extensively documented by scholars.<sup>1</sup> Either driven by a genuinely progressive constitutionalization of rights or a strategic choice of political elites,<sup>2</sup> judicial empowerment

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1. See MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 1 (1964); see also ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 2 (2000); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 2 (2002); Yvonne Tew, *Strategic Judicial Empowerment*, AM. J. COMP. L. 1, 24 (forthcoming).

2. See Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 93 (2000) (“[J]udicial power has recently been expanded in many countries through the constitutional entrenchment of rights and the establishment of judicial review.”); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003); Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819 (2004).

granted courts the authority to review acts of powerful legislatures and executives and to weigh in on contentious policy issues.<sup>3</sup> Over the years, “the influence of courts on politics and the influence of politics on courts” has attracted extensive attention from political and social scientists to explore the potential and limits of judicial institutions.<sup>4</sup> Important theories of judicial politics portray the empowerment of courts as a deliberate action taken by threatened, incumbent ruling parties in hopes of shifting the responsibility of controversial policy decisions from political realms to the judiciary and securing a form of “political insurance” to challenge future legislation passed by their successors.<sup>5</sup> Autonomous courts are also considered beneficial for authoritarian states to consolidate party hegemony and reinforce democratic credentials.<sup>6</sup> Yet many empowered courts have not limited their grip to serving those in power. These courts have gone on to contend with political actors and make a significant impact on social movements and public policy, such as free speech and lesbian and gay rights.<sup>7</sup> At the supranational level, a recent empirical study drew on cases and survey data to demonstrate the interplay between law and politics in Europe. It showed that judges in member states of the European Union (EU) were able to make strategic use of precedent and preliminary references from the Court of Justice of the European Union (CJEU) to influence domestic policy and “challenge the position of their governments.”<sup>8</sup> When applying EU law, “judges’ political motivations [were found to] play a role in how they cooperate[d] with the CJEU.”<sup>9</sup>

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3. See C. NEAL TATE & TORBJÖRN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* 4 (1995).

4. OXFORD UNIV. PRESS, *THE OXFORD HANDBOOK OF LAW AND POLITICS* 11–12 (Keith Whittington et al. eds., 2008); see Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT’L J. CONST. L. 296, 296–97 (2017) (“Over the last quarter century, scholars have documented the expansion of judicial power and the consequent judicialization of politics.”); see also Patricia J. Woods & Lisa Hilbink, *Comparative Sources of Judicial Empowerment: Ideas and Interests*, 62 POL. RES. Q. 745, 745 (2009) (“Th[e] increase in judicial involvement in policy making has led to a virtual explosion in work on comparative and supranational judicial politics.”).

5. Hirschl, *Constitutional Courts*, *supra* note 2, at 1854–60; see GINSBURG, *supra* note 2, at 18 (“Political uncertainty leads to the adoption of judicial review as a form of insurance to protect the constitutional bargain.”).

6. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1687, 1741 (2015).

7. See, e.g., Imelda Deinla, *Public Support and Judicial Empowerment of the Philippine Supreme Court*, 36 CONTEMP. SOUTHEAST ASIA 128 *passim* (2014); Steven D. Schaaf, *Contentious Politics in the Courthouse: Law as a Tool for Resisting Authoritarian States in the Middle East*, 55 L. & SOC’Y REV. 139 *passim* (2021); Miriam Smith, *Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada*, 33 POL. & SOC’Y 327 *passim* (2005).

8. Juan A. Mayoral, *Judicial Empowerment Expanded: Political Determinants of National Courts’ Cooperation with the CJEU*, 25 EUR. L.J. 374, 374–75 (2019).

9. *Id.* at 385.

China is no exception in empowering its judiciary. Despite being traditionally perceived as pawns of the party-state, the influence of Chinese courts has been extended in recent decades. Today, the nation's highest court, the Chinese Supreme People's Court (SPC), may create abstract rules through judicial interpretations in the absence of cases or controversies as well as issue exemplary cases to guide local courts' adjudication when written statutes are silent and ambiguous.<sup>10</sup> Courts across the country also exercise the power of judicial review to examine executive actions and the legality of certain regulatory documents.<sup>11</sup> With the obstacles to the independence of the judiciary remaining in place, reforms have been carried out to, for example, elevate the control of court budgets from grassroots to provincial governments,<sup>12</sup> disconnect judges' salaries and compensations from their administrative ranks,<sup>13</sup> and trim the effects of local protectionism through the judicial accountability system.<sup>14</sup> Moreover, the promotion of judicial dynamism ("sifa nengdong") in China has allowed courts to consider extra-legal factors during adjudication and to participate in public administration.<sup>15</sup> The

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10. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981, effective June 10, 1981); Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People's Court on the Judicial Interpretation Work] (promulgated by the Sup. People's Ct., Mar. 9, 2007, effective Apr. 1, 2007), art. 6.

11. Zhongguo Renmin Gongheguo Xingzheng Susongfa (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990); Zhonghua Renmin Gongheguo Xingzheng Susongfa (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015), arts. 53, 64.

12. Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding (中共中央关于全面深化改革若干重大问题的决定) [Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Deepening the Reform] (promulgated by the Communist Party of China, Nov. 12, 2013, effective Nov. 12, 2013), art. 9 (32).

13. Wang Yijun, *2016nian Zhongguo Faquan Dengji Jiangyu Xingzheng Zhiji Tuogou* (2016年中国法官等级将于行政职级脱钩) [Chinese Judicial Ranks Will be Decoupled from Administrative Ranks], ZHONGQING ZAIXIAN (中青在线) [China Youth Online] (Jan. 24, 2016), <http://politics.people.com.cn/n1/2016/0124/c1001-28079709.html> [https://perma.cc/48FZ-UT 7P].

14. See Zuigao Renmin Fayuan Sifa Zerenzhi Shishi Yijian Shixing (最高人民法院司法责任制实施意见(试行)) [Opinions of the Supreme People's Court on the Implementation of the Judicial Accountability System (for Trial Implementation)] (promulgated by the Sup. People's Court, July 25, 2017, effective Aug. 1, 2017).

15. Wang Shengjun (王胜俊), *Bawo Sifa Guilü Jianchi Nengdong Sifa Nuli Tuidong Renmin Fayuan Gongzuo Kexue Fazhan* (把握司法规律 坚持司法能动 努力推动人民法院工作科学发展) [Grasp the Rules of the Judiciary, Insist on Judicial Dynamism, Strive to Promote the Scientific Developments of People's Courts' Work], RENMIN FAYUANBAO (人民法院报)

online accessibility of judicial decisions since the late 2000s also constructed a convenient avenue for judges nationwide to consult each other on statutory interpretation when deciding controversial and novel matters.<sup>16</sup> Still, the empowerment of Chinese courts, although incremental, has led to assorted challenges and problems. To just name a few, whether Chinese judges, especially those who have not undertaken any formal legal training or passed the bar, should engage in judicial policymaking or innovations, and whether and to what extent Chinese courts may continue to maintain and even gain more power without posing a threat to the party hegemony.

Inspired by the challenges mentioned above, this Article aims to map and illustrate the causes and consequences of an emerging trend of specialized judicial empowerment in China. Since 2014, China has established three types of specialized courts: (1) intellectual property (IP) courts in Beijing, Shanghai, Guangzhou, and Hainan; (2) financial courts in Beijing and Shanghai; and (3) Internet courts in Beijing, Hangzhou, and Guangzhou.<sup>17</sup> Through case studies and semi-structured interviews with Chinese legal practitioners, this Article seeks to unpack and gauge the role that the specialized judiciary plays in the legal and economic developments of contemporary China and, more generally, in the governance of authoritarian regimes. By empowering a fragment of the judiciary—a group of judicial elites—this Article suggests that China is building a unique lab staffed by specialized and experienced experts to formulate and pilot innovative legal policies before the country ventures the policies into other regions. Benefitting from their status as specialized institutions, these courts' personnel, budgets, and judicial works are under the direct supervision of higher-level authorities, which, to some extent, shield them from local protectionism and offer extra leeway to challenge bureaucrats' decisions at the grassroots level. More importantly, constrained by jurisdictional limitations, specialized courts are likely to lay their focus on matters of IP, finance, and cyberspace rather than intervene in constitutional or fundamental rights issues that might induce political contestations or social unrest. As more skillful, less powerful agents, specialized courts can make refined and innovative

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[People's Ct. Daily] (May 6, 2010), <https://www.chinacourt.org/article/detail/2010/05/id/407279.shtml> [<https://perma.cc/YN7H-GXUL>].

16. Zuigao Renmin Fayuan Yinfu Guanyu Sifa Gongkai de Liuxiang Guiding he Guanyu Renmin Fayuan Jieshou Xinwen Meiti Yulun Jiandu de Ruogan Guiding de Tongzhi (最高人民法院印发《关于司法公开的六项规定》和《关于人民法院接受新闻媒体舆论监督的若干规定》的通知) [Notice of the Supreme People's Court on Issuing the Six Measures on Judicial Openness and Several Provisions on People's Courts Accepting News Media Supervision] (promulgated by Sup. People's Ct., effective Dec. 8, 2009), art. 5.

17. Chenyang Zhang, *Magnificent Four-Level Pyramid – China's Court System*, CHINA JUST. OBSERVER (May 18, 2019), <https://www.chinajusticeobserver.com/a/magnificent-four-level-pyramid-chinas-court-system> [<https://perma.cc/GW7A-E4LU>].

policies and rectify the abuse of local powers detrimental to national economic growth without intimidating state power.

To study comparative sources and consequences of judicial empowerment, China presents a unique case for several reasons. First, the Chinese legal system has been undertaking many changes toward globalization and localization. As a result, one may observe the evolving judicial roles in an East Asian jurisdiction embedded with civil law origins, amid its infusion of the Western common law concepts. Second, given the judicial appointments during the early days of China, a closer examination of the revival of judicial specialization will advance a deeper understanding of the impact of judicial elites on law and policy. Furthermore, much like other one-party dominant states, the judiciary in China is apt to expand its power cautiously and incrementally within the tolerance of the ruling party. That is, while advancing their individual and institutional agenda by delivering high-quality, influential judgments or experimenting with innovative policies, judges will ensure that these activities are aligned well with the core interests of political elites. This phenomenon may become even more salient in jurisdictions where judges do not enjoy tenure and can be disciplined or removed by political elites in the absence of predetermined rules. In general, China provides a vivid example of how national governments may work with judicial elites to further their economic agenda and how courts in authoritarian regimes can innovate within constraints and grow with caution.

This Article acknowledges that several other types of specialized courts were established in China before the 1990s, including forest courts, farming courts, military courts, courts of railway and transportation, and maritime courts. Some of these courts have been abolished because of the reduction in demand.<sup>18</sup> Others were restructured because they were in close connection with, or even under the direct supervision of, relevant bureaus.<sup>19</sup> By contrast, the newly established IP courts, financial courts, and Internet courts appear to have a higher standard for selecting judges and keep a finer line with local authorities. This Article will therefore lay its focus on the three new types of specialized courts to capture the revival of judicial specialization in China starting in 2014. In addition, this Article distinguishes specialized courts from specialized adjudication tribunals, which are set up inside some generalist courts. Because these tribunals do not enjoy the same institutional status as specialized courts, their judicial recruitments and budgets follow the rules that apply to generalist courts.

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18. Cheng Hu, *Lun Woguo Zhuanmen Fayuan Zhidu de Fansi yu Chonggou* (论我国专门法院制度的反思与重构) [The Reflection and Reconstruction of the System of Specialized Courts in China] 3 *ZHONGGUO YINGYONG FAXUE* (中国应用法学) [China Applied Juris.] 175, 175–95 (2019).

19. *Id.*

This Article proceeds in four parts. First, Part I introduces the emerging judicial specialization in the contemporary world, followed by an account of how China joined this global trend by setting up courts of limited jurisdiction focusing on IP, finance, and the Internet in 2014. Then, Part I illustrates the general characteristics of the three new types of specialized courts and explains the possible causes of the revival of judicial specialization in China. Through theoretical and case analyses, Parts II and III document and assess the role that specialized courts play as innovative laboratories for policymaking and as skillful but constrained fora for judicial review. Finally, Part IV gauges different approaches to the expansion of judicial powers adopted by states, where courts have traditionally served a subordinate, instrumental function. Using China as an example, it expounds on the possibilities and challenges of entrenching a fragmented, specialized judiciary as an authoritarian solution to judicial empowerment. Results of semi-structured interviews with Chinese legal practitioners who handled cases either in IP, finance, or Internet courts will also be discussed. Part IV concludes by elaborating on the strategic design of generalist and specialized jurisdiction by authoritarian states.

## I. THE RISE OF SPECIALIZED COURTS

Unlike general courts, which handle cases on a broad array of legal claims, specialized courts exercise “limited and frequently exclusive jurisdiction in one or more specific fields of the law.”<sup>20</sup> In recent decades, specialized courts have emerged as a useful addition to courts of general jurisdiction over the globe. In the United States, for instance, a specialized judiciary has been established to handle certain cases, especially those of a complex and technical nature, such as tax, patent, and commercial matters.<sup>21</sup> In addition, a great variety of specialized courts, often called “problem-solving courts,” leverage collaborative, multidisciplinary, and therapeutic approaches to provide criminal offenders with rehabilitative treatment to modify their behavior and reduce recidivism.<sup>22</sup> Similarly, in Europe, there has been steady growth in the number of specialized courts over recent decades.<sup>23</sup> According to a

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20. Markus B. Zimmer, *Overview of Specialized Courts*, 2 INT’L J. CT. ADMIN. 46, 46 (2009).

21. See Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 384–406 (1990).

22. Kimberly A. Kaiser & Kristy Holtfreter, *An Integrated Theory of Specialized Court Programs*, 43 CRIM. JUST. & BEHAV. 45, 45–50 (2016); see also Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 36–49 (2005).

23. EUR. COMM’N FOR THE EFFICIENCY OF JUST., EUROPEAN JUDICIAL SYSTEMS 75–76 (2008); see EUR. COMM’N FOR THE EFFICIENCY OF JUST., EUROPEAN JUDICIAL SYSTEMS CEPEJ EVALUATION REPORT 80–85 (2020); see also Carolina Arlota & Nuno M. Garoupa, *Do Specialized Courts Make a Difference? Evidence from Brazilian State Supreme Courts*, 27 EUR. BUS. L. REV.

report issued by the European Commission, “the number of speciali[z]ed courts [among its member states] has increased from 0.75 in 2016 to 0.81 [sic] per 100[, ]000 inhabitants in 2018.”<sup>24</sup> Globalization of the economy also boosted this trend. Germany, for example, set up two specialized courts, staffed by bilingual judges with extensive expertise and experience in commercial law, to strengthen its judicial competence in handling cross-border business disputes.<sup>25</sup> In the United Kingdom, a new court, currently under construction in London, strives to become a global legal hub to tackle economic crimes, fraud, and cybercrimes.<sup>26</sup>

The benefits of entrusting a specialized judiciary to handle certain cases have been widely recognized. Judges sitting in specialized courts either have strong expertise in specific areas of law before their appointments or become more familiar with the relevant rules and technical aspects of certain cases through day-to-day adjudication.<sup>27</sup> Cases of complex nature, such as IP, cross-border commercial, and tax, often require generalist judges to spend more time and effort in fact-finding and navigating applicable laws and policies.<sup>28</sup> Funneling these cases into specialized courts may therefore relieve the caseload burdens of generalist judges and support a more efficient judicial decision-making process.<sup>29</sup> Proponents of specialized adjudication also explain that

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487, 487 (2016) (“Many European jurisdictions have embraced court specialization as a top priority for judicial reform.”).

24. EUROPEAN JUDICIAL SYSTEMS CEPEJ EVALUATION REPORT, *supra* note 23, at 84.

25. *The Advantages of the Commercial Court*, COM. CT., <https://www.commercial-court.de/en/commercial-court> [<https://perma.cc/G6LZ-UVZA>] (last visited Dec. 23, 2020).

26. MINISTRY OF JUSTICE & HM COURTS & TRIBUNALS SERVICE, *World-Class Fraud and Cybercrime Court Approved for London’s Fleetbank House Site*, GOV.UK (July 4, 2018), <https://www.gov.uk/government/news/worldclass-fraud-and-cybercrime-court-approved-for-londons-fleetbank-house-site> [<https://perma.cc/6RN6-B37L>].

27. Dreyfuss, *supra* note 21, at 378 (“a specialized court’s judges would either be chosen for their special expertise or because new appointees could quickly acquire experience in the court’s specialty.”); Vanessa Casado Perez, *Specialization Trend: Water Courts*, 49 ENV’T L. 587, 592 (2019) (“Judges working on a particular subject area will not only know in detail the rules applicable to the specialized area, they will also be more educated on the technical aspects of the facts and regulations of that subject area.”).

28. See Zimmer, *supra* note 20, at 46 (“[L]imited jurisdiction courts . . . deal with those issues with much greater frequency, develop the expertise to adjudicate disputes that involve those issues more efficiently and expeditiously than their counterparts . . . [S]pecialized court judges . . . typically do not need to be educated by the bar and, given their expertise, are much more capable of reducing the scope of the legal framework to the vital issues on which resolution of the cases depends.”); see Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991) (“[Specialized courts] relieve the caseload burdens of other courts.”); see also Ellen R. Jordan, *Specialized Courts: A Choice*, 76 NW. U. L. REV. 745, 747 (1981) (“[G]enuinely contested cases may be poorly suited to a generalist court. Complex tax and patent cases, and highly technical regulatory questions, strain the capacity to understand of even the wisest judge, if he [or she] has not spent a career immersed in the field.”).

29. Jordan, *supra* note 28, at 747–48.



specialized courts can deliver high-quality judgments because of their accessibility to larger resources and their judicial staff's jurisdiction-specific expertise and experiences.<sup>30</sup> Some argue that the labor division between generalist and specialized judges may increase public confidence in the judiciary and access to justice.<sup>31</sup> But even in the absence of complex or technical issues, transferring certain cases from generalist court dockets to a specialized judiciary, such as small claims courts introduced in the United States and Brazil, is likely to reduce litigants' costs in money and time.<sup>32</sup> Furthermore, judicial specialization can also achieve the consistent and coherent interpretation of laws by "produc[ing] a bench small enough to maintain the collegiality necessary to speak with a single voice."<sup>33</sup>

Since 2014, China has joined the global trend of judicial specialization by setting up several new courts of limited jurisdiction, focusing on disputes involving intellectual property, finance, and the Internet. These courts are illustrated below in Table I. The IP courts operate at the appellate level and handle appeals from the basic-level people's courts in the province or the prefectural-level city where the IP court sits.<sup>34</sup> They

30. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 549 (2008) ("Experts are likely to write better opinions. They are more familiar with the overall statutory or doctrinal scheme, enabling them to draft opinions that are more coherent and consistent with existing law, to avoid 'accidental errors', and to develop creative solutions to difficult problems."); see also Dreyfuss, *supra* note 21, at 378 ("[T]he [specialized] court's expertise should enable it to craft better opinions, especially in fields where a small number of cases are now distributed rather thinly among the regional courts.").

31. Perez, *supra* note 27, at 591–93; Bruff, *supra* note 28, at 331; Zimmer, *supra* note 20, at 47; e.g., Ulf Bjällås, *Experiences of Sweden's Environmental Courts*, 3 J. CT. INNOVATION 177, 183 (2010).

32. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENT COURTS AND TRIBUNALS 14 (2009) ("Many generalist trial and appellate courts are suffering from a crippling backlog of cases, requiring plaintiffs and defendants to wait years before receiving a hearing.").

33. Dreyfuss, *supra* note 21, at 378; see Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990) ("[Specialized] courts promote the coherence of a statutory scheme . . . Coherence . . . demands not only that the legal rules of a statutory scheme be consistent but also that they reflect a unitary vision of that scheme."); see also Jordan, *supra* note 28, at 748 ("Limiting certain kinds of litigation to a single specialized court would assure uniformity and predictability in the law.").

34. Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding (全国人大常委会关于在北京、上海、广州设立知识产权法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2014, effective Aug. 31, 2014), art. 3; Quanguo Renmin Daibiao Dahui Changweihui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding (全国人民代表大会常务委员会关于设立海南自由贸易港知识产权法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing the Intellectual Property Right Court of the Hainan Free Trade Port] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2020, effective Jan. 1, 2021), art. 2.

also hear first-instance cases that are highly technical, such as patents, technical know-how, and new plant varieties.<sup>35</sup> In addition, the Beijing IP Court exercises exclusive jurisdiction over claims against the State Council's decisions that grant or declare IP rights.<sup>36</sup> Meanwhile, two financial courts were established in Shanghai and Beijing to take over all civil, commercial, and administrative cases in relation to finance that were originally subject to the jurisdiction of intermediate people's courts.<sup>37</sup> Furthermore, the first instance of Internet-related disputes in Beijing, Hangzhou, and Guangzhou, arising from e-commerce, online infringement, and other activities in cyberspace, was taken out of the general court dockets and funneled into the newly built Internet courts in the regions.<sup>38</sup> Leveraging modern technologies, the three Internet courts provide disputants with digital services throughout the litigation process.<sup>39</sup>

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35. Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding, *supra* note 34, at art. 2.

36. Zuigao Renmin Fayuan Guanyu Beijing Shanghai Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (2020 Xiuzheng) (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定 (2020 修正)) [Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai, and Guangzhou over Cases (2020 Amendment)] (promulgated by the Sup. People's Ct., Dec. 29, 2020, effective Jan. 1, 2021), art. 5.

37. Quanguo Renda Changweihui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding (全国人大常委会关于设立上海金融法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing the Shanghai Financial Court] (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 27, 2018, effective Apr. 28, 2018), art. 2; Quanguo Renmin Dabiao Dahui Changwu Weiyuanhui Guanyu Sheli Beijing Jinrong Fayuan de Jueding (全国人民代表大会常务委员会关于设立北京金融法院的决定) [Decision of the Standing Committee of the National People's Congress to Form the Beijing Financial Court] (promulgated by the Standing Comm. of the Nat'l People's Cong., Jan. 22, 2021, effective on Jan. 23, 2021).

38. Zuigao Renmin Fayuan Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding (最高人民法院关于互联网法院审理案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trials of Cases by Internet Courts] (promulgated by the Sup. People's Ct., Sept. 6, 2018, effective Sept. 7, 2018), art. 2.

39. *Id.* at art. 1; see Jason Tashea, *China's All-Virtual Specialty Internet Courts Look Set to Expand into Other Areas of the Law*, ABA J. (Nov. 1, 2019), <https://www.abajournal.com/magazine/article/china-all-virtual-specialty-internet-courts> [<https://perma.cc/L3TP-SVMR>] (“[T]he Chinese court system is looking to leverage technology to create a more efficient process. To do that, [I]nternet courts are incubating new technologies and processes.”).

**Table I: The Three New Types of Specialized Courts in China**

<b>Court Type</b>	<b>Hierarchical Level</b>	<b>Location</b>	<b>Year of Founding</b>	<b>Dispute Types</b>	<b>Appeal Court</b>
<b>IP court</b>	Intermediate, appellate court	Beijing	2014	Civil & administrative	Beijing High People's Court or Supreme People's Court
		Shanghai	2014	Civil & administrative	Shanghai High People's Court or Supreme People's Court
		Guangzhou	2014	Civil & administrative	Guangdong High People's Court or Supreme People's Court
		Hainan	2020	Civil, administrative, & criminal	Hainan High People's Court or Supreme People's Court
<b>Financial court</b>	Intermediate, appellate court	Shanghai	2018	Civil, administrative, & commercial	Shanghai High People's Court
		Beijing	2021	Civil, administrative, & commercial	Beijing High People's Court

<b>Internet court<sup>40</sup></b>	Basic-level, trial court	Hangzhou	2017	Civil & administrative	Intermediate People's Court of Hangzhou
		Beijing	2018	Civil & administrative	No. 4 Intermediate People's Court of Beijing or Beijing IP Court
		Guangzhou	2018	Civil & administrative	Intermediate People's Court of Guangzhou or Guangzhou IP Court

Unlike specialized judges in certain jurisdictions, who are sometimes considered less prestigious and sophisticated than their peers sitting in generalist courts,<sup>41</sup> the overall criteria for judges appointed to the IP, financial, and Internet courts in China are stricter than generalist courts at the same level. For instance, judges serving on IP courts are required to “have had at least six years of adjudication experience in relevant

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40. There are differing opinions about whether Internet courts established in China should be categorized as specialized courts, as Internet courts were not explicitly exemplified in a statutory provision prescribing specialized courts. The Internet courts established in Hangzhou, Beijing, and Guangzhou, which exercise limited jurisdiction over Internet-related disputes arising in the region, fall into the scope of “specialized courts” defined by previous literature such as Zimmer (2009) and Revesz (1990). This Article, therefore, includes Internet courts as one of China’s new types of specialized courts. *Guanyu Renmin Fayuan Zuzhifa Zhuanmen Fayuan Shezhi de Ruogan Sikao* (关于《人民法院组织法》专门法院设置的若干思考) [Some Thoughts on the Establishment of Specialized Courts Prescribed by the Organic Law of People’s Courts], 4 FAZHI YANJIU (法治研究) [Rule of Law Studies] 3, 6 (2017); see Zimmer, *supra* note 20; see also Revesz, *supra* note 33.

41. See Dreyfuss, *supra* note 21, at 381 (“Because of the repetitive nature of the docket, appointments to a specialized bench might not be as highly prized as other federal judgeships. With less prestige—and presumably, the same bad pay as other federal judges—it may be harder to attract the truly talented.”); see also Zimmer, *supra* note 20, at 49 (“Generally, specialized judges are accorded less prestige and status than judges who are generalists.”).

fields” and show a “relatively strong ability to preside over trials and draft rulings.”<sup>42</sup> Similarly, twenty of the first twenty-two judges appointed to the Shanghai Financial Court when it was established in 2018 received a master’s degree, and all of them had served on an intermediate people’s court for several years before the appointment.<sup>43</sup> Not only do these specialized judges have working experience on generalist courts, but their judgments are also reviewed on appeal by a generalist court at a higher level. Through appellate review, commonly recognized shortcomings of decisions given by specialized benches—such as overlooking the interconnection between legal fields and lacking a comprehensive outlook of laws and societal needs—can be mitigated.<sup>44</sup>

The rise of specialized courts in China largely stems from the proliferation of complex and novel disputes arising in relevant fields and the increasing demand for jurisdiction-specific expertise to adjudicate such disputes. Over the last decade, the Internet has become an essential tool for many Chinese people to work, socialize, transact, and entertain.<sup>45</sup> As the Internet transforms many aspects of people’s lives, its virtual, cross-regional, and decentralized nature is also “updating legal concepts,

42. Zuigao Renmin Fayuan Guanyu Yinfa Zhishi Chanquan Fayuan Faguan Xuanren Gongzuo Zhidao Yijian Shixing de Tongzhi (最高人民法院关于印发《知识产权法院法官选任工作指导意见(试行)》的通知) [Notice of the Supreme People’s Court on Issuing the Guiding Opinions on Selecting and Appointing Judges for Intellectual Property Rights Courts (for Trial Implementation)] (promulgated by the Sup. People’s Ct., Oct. 28, 2014, effective Oct. 28, 2014), art. 4. According to a SPC report issued in August 2017, aiming “to create a ‘talented highland’ for intellectual property adjudication,” ninety quota judges were selected for the specialized courts and 78.9% of them obtained a master’s degree or higher. *Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Gongzuo Qingkuang de Baogao* (最高人民法院关于知识产权法院工作情况的报告) [Report of the Supreme People’s Court of People’s Republic of China concerning the Work of Intellectual Property Courts], CHINA COURT (Sept. 2, 2017), <https://www.chinacourt.org/article/detail/2017/09/id/2988073.shtml> [<https://perma.cc/6TWG-REAG>].

43. Shan Ran, *Woguo Shouge Jinrong Fayuan Luohu Shanghai Tamen Jiang Chengwei Shoupi Faguan* (全国首个金融法院落户上海, 他们将成为首批法官) [The Nation’s First Financial Court Is Established in Shanghai; They Will Become the First Group of Judges], SHANGHAI FAZHI BAO (上海法治报) [Shanghai Legal Daily] (July 14, 2018), [https://www.sohu.com/a/241166394\\_391513](https://www.sohu.com/a/241166394_391513) [<https://perma.cc/5G27-N9RL>].

44. Opinion of the Consultative Council of European Judges on the Specialisation of Judges, at 7, COM (2012) 15 final (Nov. 13, 2003); see Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 ABA J. 425, 425–26 (1951) (arguing that a specialized court for patent litigation should not be created since generalist courts allow judges to review patent cases with ample context).

45. In 2017 alone, over 533 million Chinese netizens shopped online, and the profits made by e-commerce platforms, such as Alibaba and JD, exceeded 218 billion yuan. See CHINA INTERNET NETWORK INFO. CTR., *Zhongguo Hulian Wangluo Fazhan Zhuangkuang Tongji Baogao* (中国互联网络发展状况统计报告) [Statistical Report on the Development of China’s Internet Network] 36–37, 63–64 (Jan. 2017).

judicial practices, and public expectations for judicial services.”<sup>46</sup> Newly-established Internet courts thus aim to break the geographical boundaries between disputing parties by employing technologies and virtual platforms and to formulate rules by adjudicating and researching controversial and unprecedented legal issues.<sup>47</sup> Meanwhile, globalization and technological innovations from China joining the World Trade Organization (WTO) led to an array of challenges facing the adjudication of cross-border financial and IP cases. A competent, predictable legal environment is a necessity for China to realize its ambition of becoming a global economic powerhouse.<sup>48</sup> But the rapid development of the Chinese financial market was followed by outdated rules, ambiguities and gaps in written statutes, and inconsistent legal applications by local judges.<sup>49</sup> On the one hand, entrusting specialized benches in Shanghai and Beijing—the hotbeds for finances and free trade in China—allows many financial cases with large amounts of money in dispute to be handled by experienced judicial experts. These judges are also capable of precipitating strategies and policies when new types of cases or circumstances arise.<sup>50</sup> On the other hand, the dramatic increase in the number and complexity of IP disputes borne out of the first decade of China’s WTO membership imposed heightened requirements for judicial

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46. Qiao Wenxin & Yu Jianhua, *Shewang Jiufen Huajie Mairu Xinshidai* (涉网纠纷化解迈入新时代) [Internet-Related Dispute Resolution Entered into a New Era], RENMIN FAYUAN BAO ( 人 民 法 院 报 ) [People’s Ct. Daily] (Aug. 19, 2017), [http://rmfyb.chinacourt.org/paper/html/2017-08/19/content\\_129146.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2017-08/19/content_129146.htm?div=-1) [https://perma.cc/F444-8WNT].

47. Zhu Shenyuan, *Hangzhou Huliwanwang Fayuan Chengli Xinwen Fabuhui Fabugao* (杭州互联网法院成立新闻发布会发布稿) [The Release of the News Conference Regarding the Establishment of Hangzhou Internet Court], ZHEJIANG FAYUANWANG (浙江法院网) [Zhejiang Court] (Aug. 18, 2017), [http://www.zjsfgkw.cn/art/2017/8/18/art\\_109\\_2456.html](http://www.zjsfgkw.cn/art/2017/8/18/art_109_2456.html).

48. ORG. FOR ECON. CO-OPERATION & DEV., OECD INVESTMENT POLICY REVIEWS: CHINA 2003 PROGRESS AND REFORM CHALLENGES 10, 15–17 (2003).

49. Wang Lina, *Jinrong Fayuan Weihe Sheli* (金融法院为何设立?) [Why Was the Financial Court Established], CAIJING (May 6, 2018), <http://magazine.caijing.com.cn/20180506/4447796.shtml> [https://perma.cc/Y8VM-JWDT]; Dong Yizhi, *Weishenme Yaozai Shanghai Chengli Shoujia Jinrong Fayuan* (为什么要在上海成立首家金融法院?) [Why Was Establishing the First Financial Court in Shanghai Necessary?], TAI MEITI (Apr. 3, 2018), <https://www.tmtpost.com/3166369.html> [https://perma.cc/MZ84-LQXF]; see US-CHINA BUS. COUNCIL, USCBC 2013 CHINA BUSINESS ENVIRONMENT SURVEY RESULTS 17 (2013), [https://www.uschina.org/sites/default/files/USCBC%E2%80%94942013Member%20Survey\\_0.pdf](https://www.uschina.org/sites/default/files/USCBC%E2%80%94942013Member%20Survey_0.pdf) [https://perma.cc/89FH-W779] (“[R]ules and regulations are not applied consistently or equitably in China.”).

50. Wang Lina, *supra* note 49. On the first day of the establishment of the Shanghai Financial Court, the Court received twenty complaints, of which the total amount in controversy exceeded one billion yuan. Li Weifeng, *Jindong Fayuan, Jinrong Fazhi de Sifa Xianfeng* (金融法院, 金融法治的司法先锋) [Financial Court, the Judicial Pioneer of Financial Governance by Law], 11 FAZHI YU SHEHUI (法治与社会) [L. & Soc’y] 15, 17 (2018).

expertise and legal certainty.<sup>51</sup> During the year when the first IP court was established, China received over 1.5 million domestic and foreign patent applications, and its annual expenditure on research and development was only behind the United States around the world.<sup>52</sup> Fueled by the national thrust toward innovation, specialized courts were formed in major cities to tackle IP cases, especially those with complex and technical elements, aiming to relieve the caseload burden of generalist courts and strengthen judicial protection of IP rights.<sup>53</sup>

While the specialized courts in China seek to promote the efficiency and quality of adjudication no less than those in other democratic and authoritarian regimes around the world, they may also function as a judicial window that shows global investors the capability of Chinese courts to resolve economic-related disputes promptly and fairly. The diversity and expanse of China are one of its biggest attractions to foreign money and corporations. It is also, however, a major obstacle to transacting business in the People's Republic. Many statutory provisions promulgated in the early years of reform and opening-up (“gaige kaifang”) no longer suit China's transition from a command economy to a market-oriented economy and its involvement in the global economic landscape. National laws may not address all the situations that arise in the ordinary course of affairs, creating opportunities for local judges to apply and interpret the law with considerable discretion across regions. Furthermore, as sober-eye observers have extensively illustrated, judicial works of Chinese courts are subject to both internal and external influences. Not only may the adjudication committee in each court review

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51. Zhang Xiaoning, *Zhongguo Rushi Shinianlai Zhishi Chanquan Anjian Shuliang Jizeng*, (中国入世十年来知识产权案件数量猛增) [The Number of Intellectual Property Cases Drastically Increased Over the Ten Years Since China Joined WTO], ZHONGXIN WANG (中新网) [China News Serv.] (Dec. 20, 2011), <https://www.chinacourt.org/article/detail/2011/12/id/470287.shtml> [<https://perma.cc/3EDY-3C77>]; see Du Ying & Zhang Ke, *Zhongguo Zhishi Chanquan Zhuanmen Fayuan de Jianguo* (中国知识产权专门法院的建构) [Construction of Specialized Intellectual Property Court in China], 6 CAIJING FAXUE (财经法学) [FIN. & ECON. L. REV.] 29, 30 (2016).

52. *Are Patents Indicative of Chinese Innovation?*, CHINA POWER (Feb. 15, 2016), <https://chinapower.csis.org/patents/> [<https://perma.cc/36LV-C88V>]; see *Is China a Global Leader in Research and Development?*, CHINA POWER (Jan. 31, 2018), <https://chinapower.csis.org/china-research-and-development-rnd/> [<https://perma.cc/5ZM8-U629>] (“Chinese R&D spending still lagged that of the US by nearly \$89 billion in 2018, but the gap between the two countries is rapidly narrowing.”).

53. Jieru Jiang, *China Specialized IP Courts: Substance or Theater? Part I*, 54 IES NOUVELLES – J. LICENSING EXECs. SOC'Y 9, 9–13 (2019); see The Supreme People's Court of China, *Zhongguo Fayuan Zhishi Chanquan Sifa Baohu Zhuangkuang* (2014) (中国法院知识产权司法保护状况 (2014)) [Intellectual Property Protection by Chinese Courts in 2014] (Apr. 20, 2015), <https://wipolex.wipo.int/en/text/371329>.

and sway judicial outcomes without hearing the case,<sup>54</sup> but higher courts are also able to have a voice in cases handled by lower courts in the region.<sup>55</sup> Given that “local courts are financially beholden to local governments” and judges are appointed by the standing committee of the People’s Congress at the same level, “local party bosses . . . have often influenced the work of the courts.”<sup>56</sup> The ability of judges to make impartial and consistent decisions thus concerns foreign businesses furthering their investment in the Chinese market. Such reservations were shown by several official reports issued by transnational organizations. According to surveys fielded to the member companies of the U.S.-China Business Council, the percentage of businesses that remained optimistic about their prospects in the Chinese market dropped from 58% in 2011 to 24% in 2015—“the lowest number reported in ten years.”<sup>57</sup> The *2016 American Business in China White Paper* cited “inconsistent regulatory interpretation and unclear laws” as one of the top five business challenges facing foreign companies in China.<sup>58</sup> While being the largest recipient of foreign direct investment in 2020, China was ranked 88th by the Rule of

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54. The adjudication committee, which consists of high-ranking judicial officials such as the court president, division heads, and disciplinary inspectors, is the highest decision-making body in Chinese courts. Cases are normally reported to the adjudication committee by the presiding judges, who do not join the discussion of the committee about the case. The minutes of these discussions are, in general, not accessible to the parties of the cases. See Xin He, *Black Hole of Responsibility: The Adjudication Committee’s Role in a Chinese Court*, 46 L. & SOC’Y REV. 681, 681–712 (2012) (“[T]he committee reviews and rules on the most complicated, controversial, and significant cases behind closed doors without hearing cases.”).

55. See ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 189 (2011) (“As regards the ‘abnormal’ relationship between higher and lower courts, this may be explained by the traditional tendency to regard courts as merely part of the administrative hierarchy, so that it is natural for a higher-rank official to give instructions to a lower-rank official, or for the higher-level organ to exercise ‘leadership’ over a lower-level organ.”).

56. Margaret Woo, *Court Reform with Chinese Characteristics*, 27 WASH. INT’L L.J. 241, 259 (2017); see Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国法官法) [Judges’ Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Apr. 23, 2019, effective Oct. 1, 2019), art. 18; see also Huang Tao, *Zhuanyexing Jinrong Shenpan Zuzhi de Lilun Poxi* (专业性金融审判组织的理论剖析) [Theoretical Analysis of Specialized Financial Adjudication Institutions], 1 SHANGHAI JINRONG (上海金融) [Shanghai Fin.] 88, 89 (“A phenomenon that commonly existed was that some local government leaders or governmental departments, for the purpose of self or departmental interests, publicly or privately intervened in the independent adjudication of courts, indulged corporations with escaping unpaid debts, and even supported corporations in illegally filing bankruptcy in order to escape debts.”).

57. US-CHINA BUS. COUNCIL, 2015 USCBC MEMBER SURVEY REPORT: GROWTH CONTINUES AMIDST ECONOMIC SLOWDOWN, RISING COMPETITION, POLICY UNCERTAINTY 5 (2015), [https://www.uschina.org/sites/default/files/USCBC%202015%20China%20Business%20Environment%20Member%20Survey\\_0.pdf](https://www.uschina.org/sites/default/files/USCBC%202015%20China%20Business%20Environment%20Member%20Survey_0.pdf) [<https://perma.cc/LMW5-T7Q5>].

58. THE AM. CHAMBER OF COM. IN THE PEOPLE’S REPUBLIC OF CHINA, 2016 AMERICAN BUSINESS IN CHINA WHITE PAPER (Apr. 2016), [http://www.iberchina.org/files/2016/amcham\\_white\\_paper.pdf](http://www.iberchina.org/files/2016/amcham_white_paper.pdf) [<https://perma.cc/WA3M-JY56>].



Law Index among 128 countries, based on factors such as the constraints on government powers, fundamental rights, and civil justice.<sup>59</sup>

Empowering a fraction of the judiciary, with a focus on privatization, may rebuild the confidence of foreign investors and foster economic developments without significantly threatening state power. These sophisticated and specialized courts can help to precipitate and pilot innovative policies before being implemented nationally. That being said, imposing jurisdictional limits on specialized courts—such as concentrating judicial efforts on the private law areas—would place the courts in a humble spot on the judicial subordinate-supremacy spectrum to review local authorities' behavior for the party-state in a restrictive form.

## II. SPECIALIZED COURTS AS INNOVATIVE LABORATORIES

Scholars often hold skeptical views toward judges as policymakers in areas where they lack sufficient expertise.<sup>60</sup> Such concerns have become even more salient in China. The legal system of contemporary China was heavily influenced by the civil law tradition under which “the main source or basis of the law is legislation” and “the function of the court is [sometimes said] merely to apply the written law.”<sup>61</sup> Moreover, during China's early years, many judges were recruited from the People's Liberation Army and governmental bodies, despite having no knowledge or training in law.<sup>62</sup> Until the late 1990s, judges with an undergraduate degree remained less than 10% in China.<sup>63</sup> Although a civil law judge frequently needs to fill statutory gaps when written laws are silent or ambiguous, a number of generalist judges' lack of sufficient legal knowledge cast doubt on their ability to shape or make policies.

Compared to generalists, having superior expertise in and familiarity with specific subject matters equips specialized judges with a greater capacity to experiment on new policies and “reconceptualize areas when necessary.”<sup>64</sup> A study that compared the tax-case decisions made by the

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59. UNCTAD, *Global FDI Fell by 42% in 2020*, 38 INV. TRENDS MONITOR 1, 3 (2021); THE WORLD JUST. PROJECT, WJP RULE OF LAW INDEX 2020 58 (2020), <https://worldjusticeproject.org/rule-of-law-index/pdfs/2020-China.pdf> [<https://perma.cc/GM9L-AMUX>].

60. R. SHEP MELNICK, *BETWEEN THE LINE: INTERPRETING WELFARE RIGHTS passim* (1983).

61. Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424, 426 (1967).

62. Liu Sida, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75, 82–83 (2006).

63. Ma Junju & Nie Dezhong, *Dangqian Woguo Sifa Zhidu Cunzai de Wenti yu Gaijin Duice* (当前我国司法制度存在的问题与改进对策) [Existing Problems of the Contemporary Chinese Legal System and Strategies for Improvements], 6 FAXUE PINGLUN (法学评论) [L. REV.] 25–39 (1998).

64. Cheng, *supra* note 30, at 559; see Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135,

U.S. Tax Court and the U.S. District Courts between 1996 and 1997 found that the specialized court “use[d] its expertise to allow a much freer hand in decisions for its judges’ policy preferences” than the generalist courts.<sup>65</sup> Challenging the conventional wisdom that specialized courts are policy-neutral, Isaac Unah found that the U.S. Court of Appeals for the Federal Circuit, a specialized appellate court, substantially influenced trade policy to “protect American industries being injured by unfair trade practices.”<sup>66</sup> The ability of specialized courts to shape policy is not foreign to civil law jurisdictions. Recently, an empirical analysis based on a provincial dataset indicated that Spain’s newly established commercial courts have had a significant impact on business bankruptcy rates in the country.<sup>67</sup>

### A. *Infusion of the Common Law Style of Judging*

In common law jurisdictions, judges make policy “by promulgating rules” through judicial decisions and restating those rules in subsequent similar cases under the doctrine of stare decisis (“to stand by decided matters”).<sup>68</sup> By contrast, judicial decisions are not an official source of law in a civil law jurisdiction like China, where courts should adhere to written statutes rather than judicial opinions. Although Chinese judges sometimes consult prior judicial decisions when facing statutory gaps and ambiguities, the decisions they consider are rarely cited or mentioned in their judgments.<sup>69</sup> Absent comprehensive case databases and guidance for de facto reference to prior judicial decisions, Chinese courts’ handling of novel or controversial matters, for a long period of time, varied

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136 (2005) (“Expertise is a significant benefit of a specialized court. Courts are often criticized for influencing or making policy without having any particular knowledge in the particular policy domain. ... Familiarity with the policy allows specialized courts to offer expertise and skill in the subject matter.”).

65. Howard, *supra* note 64, at 143, 146.

66. Isaac Unah, *Specialized Courts of Appeals’ Review of Bureaucratic Actions and the Politics of Protectionism*, 50 POL. RSCH. Q. 851, 863–74 (1997).

67. Claudio Detotto et al., *Did Specialised Courts Affect the Frequency of Business Bankruptcy Petitions in Spain?*, 47 EUR. J. L. & ECON. 125, 132–44 (2019).

68. Edward L. Rubin & Malcom M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 J. CONST. L. 617, 639 (2003); John V. Orth, *The Role of the Judiciary in Making Public Policy*, 4 NC INSIGHT 12, 12–14 (1981).

69. Guo Jinxia et al., Zhichan Anli Zhidao Zhidu: Cong Zunxun Xianli Dao Tongan Tongpan (知产案例指导: 从“遵循先例”到同案同判) [Intellectual Property Case Guidance: From “Stare Decisis” to Deciding Like Cases Alike], Renmin Fayuan Bao (人民法院报) [People’s Ct. Daily] (Jan. 23, 2017), [http://rmfyb.chinacourt.org/paper/images/2017-01/23/06/2017012306\\_pdf.pdf](http://rmfyb.chinacourt.org/paper/images/2017-01/23/06/2017012306_pdf.pdf) [<https://perma.cc/8XUT-JY94>] (“In fact, for a long period of time, it is customary that Chinese judges search for and adhere to prior judgments to make decisions. However, this kind of adherence has been mostly done in an unnoticeable, ‘implicit’ way.”).

between judges and regions.<sup>70</sup> Except for a handful of rules and exemplary cases published by the SPC and regional high courts, there were often no clear wording or lines stressed by previous judgments that could be restarted by subsequent judicial decisions to fill statutory gaps consistently.<sup>71</sup>

However, the situation started to change after the Beijing IP Court was entrusted to build a research base for Chinese-styled IP precedents in 2015.<sup>72</sup> Greater accessibility of IP cases and the extensive adjudication experiences of its judges enabled the Beijing IP Court to grow as a unique lab for pioneering the use of prior judicial decisions and revolutionizing judges' collective involvement in policymaking across the country.<sup>73</sup> By promulgating three sets of normative guidelines,<sup>74</sup> the Beijing IP Court

70. For example, in cases concerning online copyright infringement of film and TV products, courts differed significantly over the years in imposing financial penalties, which could range from several hundred to over ten thousand yuan. This was caused by the disparity between judges and courts in determining the impact of infringement on the product and costs as well as by vague legal reasoning that created obstacles for judges to consult with each other in similar cases. Wang Han, *Leian Butongpan Xianxiang Nengfou Pojie* (“类案不同判”现象能否破解?) [*Can the Phenomenon of “Similar Cases Being Decided Differently” be Overcome?*], MINZHU YU FAZHI (民主与法制) [DEMOCRACY & LEGALITY] (May 14, 2018), <https://m.fx361.com/news/2018/0514/6122436.html> [<https://perma.cc/LUK2-NG6N>].

71. Yang Jing, *Zhishi Chanquan Anli Zhidao Zhidu Shijian Yangben* (知识产权案例指导制度实践样本) [Sample of the Practice of the Intellectual Property Case Guidance System], J. SCI., TECH. & L. 398, 409–11 (2016) (“From ‘the court holds...’ to the main body of the judgment, there is only generic reasoning. Readers are like seeing flowers through the mist and have a hard time to understand.”).

72. Guo Jinxia et al., *supra* note 69.

73. Yang Jing, *Anli zai Zhishi Chanquan Shenpanzhong de Yunyong* (案例在知识产权审判中的运用) [The Application of Cases in IP Adjudication], ZHISHI CHANQUAN SIFA BAOHUWANG (知识产权司法保护网) [Jud. Prot. for Intell. Prop.] (Aug. 6, 2017), <http://www.chinaiprlaw.cn/index.php?id=4843> [<https://perma.cc/7LCS-JY5U>] (“Intellectual property is the legal area which embarked on the publication of judicial decisions at the earliest time in China. [Until 2017.] it has more than ten years of experience of online access to judicial decisions . . . The establishment of IP courts . . . strengthened the specialty, professionalism, and sophistication of IP adjudication and provided talents and systematic foundations for exploring the case [guidance] system.”). See generally Jeremy Daum, *Unprecedented: Beijing IP Court’s Use of ‘Guiding Cases’*, CHINA L. TRANSLATE (Aug. 31, 2016), <https://www.china-lawtranslate.com/en/beijing-ip-court-making-new-precedent-on-guiding-cases/> [<https://perma.cc/5LDZ-3BLW>] (explaining the unique position of the Beijing IP Court in the Chinese judicial system and how the Court is implementing an approach to utilize IP Guiding Cases ubiquitously).

74. The three sets of guidelines issued by the Beijing IP court are the “Adjudication Instructions for the Consistency of Litigation, Adjudication, and Judgments” (诉审判一致性审判规范), “Instructions for Adherence and Reference to Cases with Guidance Effects” (指导案例遵循与参照程序指南), and the “Implementation Methods of the Beijing IP Court concerning Case Guidance (Draft)” (北京知识产权法院案例指导工作实行办法(草案)). Yang Jing, *supra* note 71; see Yang Jing, *Zhishi Chanquan Anli Zhidao Zhidu de Zhangai yu Kefu* (知识产权案例指导制度的障碍与克服) [Obstacles and Solutions of the Intellectual Property Case Guidance System], 10 FALV SHIYONG (法律适用) [J. L. Application] 69, 74–75 (2016); see also Jiang Huiling & Yang Yi, *Yi Xianli Panjue Zhidao Shenpan Gongzuo Zhidu de Chuanxin Shijian* (以

classified nine types of prior judicial decisions based on their precedential values, ranging from Guiding Cases published by the SPC as the most persuasive to foreign courts' decisions as the least persuasive.<sup>75</sup> The Beijing IP Court also formulated a guiding principle for adherence to prior judicial decisions: “up and down, before and after, and left and right (“shangxia qianhou zuoyou”).”<sup>76</sup> This means that a court should adhere to its earlier decisions as well as higher courts' prior judgments and that a court may consult its sister courts' well-reasoned judicial opinions.<sup>77</sup> According to an interview with Judge Yang Jing from the Beijing IP Court,

[The Court] encourages the parties to submit prior judicial decisions in support of their litigation claims and judges to proactively create judgments with exemplary and guiding effects when laws are silent or ambiguous . . . in order to meet new demands of all sectors of society for legal rules in a timely fashion.<sup>78</sup>

To promote more accurate and efficient references to decided cases by later courts, judges are advised to produce a summary that specifies the relevant laws and key points of adjudication for each of their opinions.<sup>79</sup> A consulting committee comprising over 200 legal experts was also formed to study and select model cases nationwide in trademark, copyright, and patent cases.<sup>80</sup> Certainly, the Beijing IP Court is not the

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先例判决指导审判工作制度的创新实践) [Beijing IP Court: Innovative Practices of Adjudication Work Guided by Prior Judicial Decisions], FAZHI RIBAO (法制日报) [Legal Daily] (Apr. 7, 2016), <https://www.chinaipr.com/index.php?id=3896>.

75. Article 7 of “Implementation Methods of the Beijing IP Court Concerning Case Guidance (Draft)” classified different prior judicial decisions into nine levels according to their precedential values. From most to least persuasive, they are: Guiding Cases published by the SPC, Annual Cases published by the SPC, other judgments published by the SPC, typical cases published by high people's courts, reference cases published by high people's courts, other cases published by high people's courts, cases decided by intermediate people's courts, cases decided by basic people's courts, and cases decided by foreign courts. Jiang Huiling & Yang Yi, *supra* note 74.

76. Yang Jing, *Anli Zhidao Zhidu zai Zhishi Chanquan Lingyu de Shijian Tansuo* (案例指导制度在知识产权领域的实践探索) [The Practice and Exploration of the Case Guidance System in the Field of Intellectual Property], RENMIN FAYUAN BAO (人民法院报) [People's Ct. Daily] (July 26, 2017), <https://www.chinacourt.org/article/detail/2017/07/id/2935072.shtml> [<https://perma.cc/N6JD-MWLY>].

77. *Id.*

78. Wang Han, *Leian Butongpan Xianxiang Nengfou Pojie* (“类案不同判”现象能否破解) [Can the Phenomenon of “Similar Cases Decided Differently” be Overcome?], 5 MINZHU YU FAZHI (民主与法制) [Democracy & Legal Sys.] 27, 28–29 (2018); *see also* Mark Cohen, *More on Guiding Cases, Precedents and Databases...*, CHINA IPR (Nov. 12, 2017), <https://chinaipr.com/2017/11/12/more-on-guiding-cases-precedents-and-databases/> [<https://perma.cc/TR55-CUD8>].

79. Yang Jing, *supra* note 76.

80. Yang Jing, *supra* note 76.

only specialized court that learns from a variety of decided cases to precipitate innovative rules through adjudication. For example, the Shanghai Financial Court has set up a team of twenty-five bilingual judges and judicial assistants to keep the presiding judges informed of novel cases and relevant judicial opinions overseas.<sup>81</sup> The team is dedicated to “spur development in China’s financial justice system” and “assist in solving domestic problems with a global perspective” by analyzing and conveying foreign judgments.<sup>82</sup>

Besides pioneering a reliable system of formulating and referring to judicial opinions with precedential values, the specialized judiciary also leverages its expertise to initiate judicial dialogues on controversial legal issues and shape future litigation through published dissenting opinions. Despite several early attempts to reveal bench disagreements in Chinese judgments,<sup>83</sup> publishing judicial dissents remains a rare practice in China as courts under the civil law tradition tend to “issue a collective judgment cast in stylized, impersonal language.”<sup>84</sup> The publication of minority opinions challenges the conventional format of Chinese judgments, under which a disagreement raised by one or more judges on the panel should only be recorded in publicly-inaccessible trial transcripts.<sup>85</sup> In addition, such practice is likely to cause concerns about the legitimacy of judgments unsupported by unanimous votes.<sup>86</sup> Stronger academic backgrounds and experiences in the subject matter may, however, furnish specialized judges with a greater capacity to engage in contestations over controversial legal issues compared to generalist courts. Take, for

81. Zhou Wenting, *Court Sets Up Team to Spur Innovation in Financial Justice*, SHANGHAI FIN. CT. (Apr. 22, 2020), [http://www.shjrfy.gov.cn/jrfy/English/news\\_view.jsp?pa=aaWQ9MzIwNQPdcssPdcssz](http://www.shjrfy.gov.cn/jrfy/English/news_view.jsp?pa=aaWQ9MzIwNQPdcssPdcssz) [https://perma.cc/FRS6-HM6R].

82. *Id.*

83. Hao Jun, *Caipan Wenshu Yaobuyao Gongkai Shaoshu Yijian* (裁判文书要不要公开少数意见) [http://opinion.people.com.cn/n1/2016/1108/c1003-2884 3332.html], JINGHUA SHIBAO (京华时报) [Jinhua Times] (Nov. 8, 2016), <http://opinion.people.com.cn/n1/2016/1108/c1003-28843332.html> [https://perma.cc/WUZ7-8HE3]; see Shao Xin & Jiang Yuan, *Sifa Zerenzhi Quanmian Luoshi Beijing Xia Caipan Wenshu Shaoshu Yijian Gong de Zaisikao* (司法责任制全面落实背景下裁判文书少数意见公开的再思考) [Rethinking the Publication of Minority Opinions in Judgments Under the Full Implementation of Judicial Responsibility System], 11 FALV SHIYONG (法律适用) [J. L. Application] 77, 77 (2019).

84. Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2 (2010); see Sun Xiaoxia & Zhu Guojian, *Panjue de Quanwei yu Yiyi Lun Faguan Butong Yijianshu Zhidu* (判决的权威与异议 — 论法官“不同意见书”制度) [Authority and Dissent of Judgments: Analyzing the System of “Dissenting Opinions” of Judges], 5 ZHONGGUO FAXUE (中国法学) [China Legal Sci.] 162, 164–65 (2009).

85. Zhang Xiaoxia et al., *Shaoshu Yijian Zairu Panjueshu* (“少数意见”载入判决书) [Minority Opinions Written into Judgments], JUD. PROT. FOR INTELL. PROP. (Dec. 17, 2015), <https://www.chinaiprlaw.cn/index.php?id=3255> [https://perma.cc/BVG7-6C6N].

86. Zhang Zetao, *Panjueshu Gongbu Shaoshu Yijian zhi Libi Jiqi Guifan* (判决书公布少数建议之利弊及其规范), 2 ZHONGGUO FAXUE (中国法学) [China Legal Sci.] 182, 185 (2006).

instance, the *MLGB* case.<sup>87</sup> In 2016, the Trademark Review and Adjudication Board annulled a popular street brand, MLGB, given that its pinyin abbreviation could imply an offensive expression commonly used by Chinese netizens.<sup>88</sup> The brand owner, Junke Trade Co., challenged the Board's decision in the Beijing IP Court, arguing the trademark stood for "My Life is Getting Better" instead.<sup>89</sup> In this case, the Court not only published in detail the minority opinion raised by judges sitting on the panel, but also the majority opinion that explicitly responded to the dissenting arguments. For example, in determining whether the registration of MLGB violated Article 10 of the Trademark Law, which prohibited trademarks detrimental to socialist morality,<sup>90</sup> the minority opinion suggested that the emergence of MLGB as a network buzzword in China was recent, and its users were mainly from younger generations.<sup>91</sup> The minority opinion stated, "Social moral norms depend on the majority's perceptions."<sup>92</sup> It also intimated that "there are no habits in Mandarin of using the first alphabet of pinyin to comprehend the meanings of English-letter combinations." In response, the majority opinion did not find sufficient evidence to support a finding that MLGB was a common English abbreviation for "My Life is Getting Better."<sup>93</sup> Agreeing with the dissent that MLGB was perceived as an offensive expression mainly by younger generations, the majority argued that the impact of a trademark's vulgar meaning was not limited to the extent of the meaning being recognized.<sup>94</sup> The adverse effect that the trademark in dispute imposed on certain groups of people, including adolescents, would impact the moral norms of the whole society.<sup>95</sup>

The practice of a specialized judiciary revealing dissenting opinions can be traced back to the early 2000s when the Guangzhou Maritime Court promulgated a new guideline to standardize its judgment format.<sup>96</sup>

87. Shanghai Junke Trading Co., Ltd. v. Trademark Rev. & Adjudication Bd. of the State Admin. for Indus. & Com. ADMIN. JUDGMENT NO. 6871 (Beijing IP Ct. 2016); see Zhang Tianwei, *Chinese Court Bans Streetwear Brand MLGB for Tarnishing Socialist Values*, WOMEN'S WEAR DAILY (Mar. 4, 2019), <https://sports.yahoo.com/chinese-court-bans-streetwear-brand-190620664.html> [<https://perma.cc/QD4J-H8HV>].

88. *Shanghai Junke Trading Co.*, ADMIN. JUDGMENT NO. 6871.

89. *Id.*

90. Zhonghua Renmin Gongheguo Shangbiao Fa (2019 Xiuzheng) (中华人民共和国商标法(2019 修正)) [Trademark Law of the People's Republic of China (2019 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Nov. 1, 2019), art. 10.

91. *Shanghai Junke Trading Co.*, ADMIN. JUDGMENT NO. 6871.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Guangzhou Maritime Court, *Guangzhou Haishi Fayuan de Youguan Zuofa he Jiaoguo* (广州海事法院的有关做法和效果) [Relevant Approach and Effects of the Guangzhou Maritime

The guideline required the publication of both majority and minority opinions if the collegiate bench disagreed.<sup>97</sup> In addition, the Guangzhou Maritime Court issued the nation's first judgment publishing dissenting arguments.<sup>98</sup> Generalist courts, such as the Shanghai Intermediate People's Court, later followed this initiative and implemented such practice in a handful of cases.<sup>99</sup> While minority opinions still appear infrequently in Chinese judgments, bench disagreements disclosed by several specialized court decisions in recent years gave rise to assorted discussions and attracted media attention nationwide.<sup>100</sup> Former Chief Justice of the U.S. Supreme Court Charles Hughes quoted dissenting opinions as appeals "to the intelligence of a future day."<sup>101</sup> Similarly, when stressing the importance of disclosing judicial dissents, the person in charge of the Beijing IP Court asserted, "[T]oday's minority opinions may become tomorrow's majority opinions."<sup>102</sup> At a national congress meeting, a committee member also advocated the value of published minority opinions in guiding society to re-examine controversial legal issues.<sup>103</sup> Still, subjecting bench disagreements to the oversight of disputants and the masses imposes heightened requirements on judges' analytical and reasoning capabilities.<sup>104</sup> The expertise of specialized judges would, indeed, meet such demands. Because the amounts in dispute are relatively high, litigants in specialized courts are often represented by experienced lawyers who should be capable of identifying statutory gaps and loopholes, avoiding frivolous appeals, and raising well-grounded arguments. If explicitly adopted by judgments, these

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Court], RENMIN FAYUANBAO (人民法院报) [People's Ct. Daily] (Mar. 24, 2003), <https://www.chinacourt.org/article/detail/2003/03/id/46313.shtml> [<https://perma.cc/HL57-LZPR>].

97. *Id.*

98. *Id.*

99. Yang Yueping, *Lun Heyiting Shaoshu Yijian de Gongkai* (论合议庭少数意见的公开) [The Publication of Minority Opinions from the Collegiate Bench], 57 HENAN DAXUE XUEBAO (河南大学学报) [J. Henan Univ.] 44, 45 (2017).

100. See Liu Man, *Heyiting Shaoshu Jianyi Shouru Panjueshu Guangzhou Zhichan Fayuan Weihe Zheyangzuo* (合议庭“少数意见”首入判决书, 广州知产法院为何这样做?) [Minority Opinions from the Bench Were Written into Judicial Decisions. Why Did the Guangzhou IP Court Do So?], NANFANG DUSHI BAO (南方都市报) [Southern Metropolis Daily] (July 10, 2018), [https://www.sohu.com/a/240398182\\_161795](https://www.sohu.com/a/240398182_161795) [<https://perma.cc/8N8L-DNLC>]; see also Zhang Xiaoxia et al., *supra* note 85.

101. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936).

102. Zhang Xiaoxia et al., *supra* note 85.

103. Sha Xueliang, *Weiyuan Jianyi Gongkai Zhongshen Panjue Shaoshu Yijian* (委员建议公开终审判决少数意见) [Committee Member Suggested Publishing Minority Opinions of Final Judgments], JINGHUA SHIBAO (京华时报) [Jinghua Daily] (Dec. 7, 2016), <https://news.163.com/16/1107/02/C581JRS5000187VI.html> [<https://perma.cc/WQE3-3UNU>].

104. See Zhang Zetao, *supra* note 86, at 186.

arguments may serve as valuable raw materials for future debates and innovations in law.<sup>105</sup>

### B. *Experimentation in Abstract Policymaking and Procedural Justice*

Along with infusing a common-law style of judicial decision-making to advance the value of court opinions, the specialized judiciary leverages its expertise to formulate and experiment with abstract rules and policies. For example, in 2019 after a steady increase of mass disputes against capital market crimes, the Shanghai Financial Court promulgated the nation's first normative provisions, which established a model judgment (“shifan panjue”) mechanism for securities disputes.<sup>106</sup> In February 2019, the number of investors exceeded 147 million in the Chinese securities market, and over 95% were small- and medium-sized investors.<sup>107</sup> Given the high litigation costs and insignificant amount of judicial awards, these investors rarely had the motivation to seek compensation through legal channels.<sup>108</sup> The model judgment mechanism was therefore designed to reduce financial costs and time spent in litigation for retail investors and to conserve judicial resources on repetitive fact-finding.<sup>109</sup> The mechanism allows a model case to be selected from a series of pending securities disputes, either upon the litigating parties' requests or by the Shanghai Financial Court's assignment.<sup>110</sup> The Court will first hear and

105. *Id.* at 189.

106. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Shifan Panjue Jizhi de Guiding (上海金融法院关于证券纠纷示范判决机制的规定) [Provisions of the Shanghai Financial Court on the Model Judgment Mechanism for Securities Disputes] (promulgated by the Shanghai Fin. Ct., Jan. 16, 2019, effective Jan. 16, 2019).

107. Small- and medium-sized investors are those holding stocks with a total value of less than 500 thousand yuan. Ge Shaoshuai, *Shifan Panjue Kaichu Baohu Touzizhe Quanyi Xinlu* (示范判决开出保护投资者权益新路) [Model Judgments Created a New Path to Protect the Rights and Interests of Investors], RENMIN FAYUANBAO (人民法院报) [People's Ct. Daily] (May 19, 2019), [http://www.qstheory.cn/zhuanqu/bkqx/2019-05/19/c\\_1124513854.htm](http://www.qstheory.cn/zhuanqu/bkqx/2019-05/19/c_1124513854.htm) [https://perma.cc/WM2M-EPZM].

108. Lian Jianming, *Zhongguoban Zhengquan Jiti Susong Zhidu Luodi* (中国版证券集体诉讼制度落地) [Chinese Version of the Securities Class Action System Was Launched], XINMIN WANBAO (新民晚报) [Xinmin Evening News] (Aug. 3, 2020), <https://baijiahao.baidu.com/s?id=1673962980283154657&wfr=spider&for=pc> [https://perma.cc/A9PB-GJXW]; Xu Jing, *China Determined to Advance Securities Dispute Mediation Nationally*, PEKING U. SCH. TRANSNAT'L L. REV. BLOG (June 10, 2019), [https://stllawreview.com/index.php/2019/06/10/china-determined-to-advance-securities-dispute-mediation-nationally/#\\_ftn3](https://stllawreview.com/index.php/2019/06/10/china-determined-to-advance-securities-dispute-mediation-nationally/#_ftn3) [https://perma.cc/4WNC-U2SU].

109. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Shifan Panjue Jizhi de Guiding, *supra* note 106, at art. 3; *see also* Lin Xiaonie, Shan Suhua & Huang Peilei, *Shanghai Jinrong Fayuan Zhengquan Jiufen Shifan Panjue Jizhi de Goujian* (上海金融法院证券纠纷示范判决机制的构建) [The Shanghai Financial Court's Establishment of the Mechanism of Model Judgment for Securities Disputes], RENMIN SIFA (人民司法) [People's Judicature] 46, 47 (2019).

110. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Shifan Panjue Jizhi de Guiding, *supra* note 106, at arts. 2, 5.



decide the model case and then resolve other parallel disputes which share common factual and legal issues through mediation or adjudication.<sup>111</sup> After a judgment of a model case comes into effect, the parties of parallel cases will no longer bear any burden of proof for the common facts determined by the model judgment.<sup>112</sup> In March 2019, the Shanghai Financial Court implemented the model judgment mechanism for the first time in handling securities disputes arising from false statements made by the Founder Technology Group Corporation.<sup>113</sup> The Shanghai Financial Court formed a five-judge collegiate panel to hear the model case and invited third-party experts to help determine investors' damages.<sup>114</sup> After the model case's judgment, 637 parallel cases were resolved timely, and more than seventy million yuan in total were awarded to over a thousand investors.<sup>115</sup> The Vice President of the Shanghai Financial Court, Judge Lin Xiaonie, described the establishment of the model judgment mechanism in an interview as "an important measure for the Shanghai Financial Court to reform the financial adjudication system and create a good financial and rule of law environment."<sup>116</sup> The model judgment mechanism pioneered by the Shanghai Financial Court was later adopted by the normative guidance of several provincial high people's courts<sup>117</sup> and implemented by

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111. *Id.*

112. *Id.* at art. 2.

113. Li Shuwei, *Zhongguo Fayuan Shouci Shiyong Shifan Panjue Jizhi Shenli Zhengquan Quntixing Jiufen Shifan Anjian* (中国法院首次适用示范判决机制审理证券群体性纠纷示范案件) [Chinese Courts Applied the Mechanism of Model Judgment to Adjudicate a Model Case of Securities Mass Disputes for the First Time], *ZHONGGUO XINWEN WANG* (中国新闻网) [China News] (Mar. 21, 2019), <https://baijiahao.baidu.com/s?id=1628623567750824761&wfr=spider&for=pc> [<https://perma.cc/T2NU-279A>].

114. *Id.*

115. Yan Jianlian & Zheng Qian, *Shouchuang Buduan Shanghai Jinrong Fayuan de Fazhi Shijian* (首创不断! 上海金融法院的法治实践) [Nonstop First Innovations! The Rule of Law Practice of the Shanghai Financial Court], *RENMIN FAYUANBAO* (人民法院报) [People's Ct. Daily], July 7, 2020.

116. Zhong Shuwei, *Zhongguo Shouge Zhengquan Jiufen Shifan Panjue Jizhi De Guiding Zaihu Fabu* (中国首个证券纠纷示范判决机制的规定在沪发布) [China's First Mechanism of Model Judgments for Securities Disputes was promulgated in Shanghai], *ZHONGGUO XINWEN WANG* (中国新闻网) [China News] (Jan. 19, 2016), <https://baijiahao.baidu.com/s?id=1622803370859033742&wfr=spider&for=pc> [<https://perma.cc/HWV9-DEPC>]; see Li Yuzheng, *China's First Securities Dispute Demonstration Judgment Mechanism Is Issued in Shanghai*, *CHINA-SINGAPORE ONLINE SEA* (Jan. 16, 2019), <https://www.programmersought.com/article/2859555419/> [<https://perma.cc/P2LG-GHFK>].

117. Ge Shaoshuai, *Shifan Panjue Kaichu Baohu Touzizhe Quanyi Xinlu* (示范判决开出保护投资者权益新路) [Model Judgments Created a New Path for Protecting Investors' Rights], *RENMIN FAYUANBAO* (人民法院报) [People's Ct. Daily] (May 19, 2019), <https://www.chinacourt.org/article/detail/2019/05/id/3925105.shtml> [<https://perma.cc/7SBA-9UB6>]; Shanghai Shi Gaoji Renmin Fayuan Guanyu Quntixing Jinrong Jiufen Shifan Panjue Jizhi de Guiding (上海市高级人民法院关于群体性金融纠纷示范判决机制的规定) [The

generalist courts from various Chinese regions to handle securities-related or other civil disputes.<sup>118</sup>

To reinforce investors' access to justice in mass securities disputes, the Shanghai Financial Court filled in the gaps in the representative action ("daibiaoren susong") provisions prescribed by the Civil Procedure Law and the Securities Law by promulgating abstract rules in March 2020.<sup>119</sup> These rules clarified several issues for ordinary and special securities representative litigation schemes.<sup>120</sup> The Shanghai Financial Court has also provided geographically-distant investors with a more convenient dispute resolution channel by establishing an online litigation platform and simplifying the registration mandates for the participation of representative actions.<sup>121</sup> A few months after the promulgation of the rules piloted by the Shanghai Financial Court, the SPC issued an official judicial interpretation on the very subject, aiming to build the securities representative litigation scheme to be "a convenient and low-cost claim

Provisions of the Shanghai High People's Court Concerning the Model Judgment Mechanism for Group Securities Disputes] (promulgated by the Shanghai High People's Ct., Apr. 17, 2021, effective on Apr. 17, 2021).

118. Guanyu Jianli Gongsi Jiufen Shifan Panjue Jizhi de Guiding (关于建立公司纠纷示范判决机制的规定) [Provisions Concerning the Establishment of the Model Judgment Mechanism for Corporation Disputes] (promulgated by the Xiamen Intermediate People's Ct., June 24, 2020, effective on June 24, 2020); Guanyu Jianli Gongsi he Zhengquan Lei Jiufen Anjian Shifan Panjue Jizhi de Yijian (关于建立公司和证券类纠纷案件示范判决机制的意见) [Opinions Concerning the Establishment of the Model Judgment Mechanism for Corporation and Securities-Related Cases] (promulgated by the Jiyuan Intermediate People's Ct., Sept. 1, 2020, effective on Sept. 11, 2020).

119. Shanghai Jinrong Fayuan Guanyu Zhengquan Jiufen Daibiaoren Susong Jizhi de Guiding (上海金融法院关于证券纠纷代表人诉讼机制的规定) [Provisions of the Shanghai Financial Court Concerning the Representative Action Mechanism for Securities Disputes] (promulgated by the Shanghai Fin. Ct., Mar. 24, 2020, effective Mar. 24, 2020) (China); Zhongguo Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective on July 1, 2017), art. 53; Zhonghua Renmin Gongheguo Zhengquan Fa (中华人民共和国证券法) [Securities Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2019, effective on Mar. 1, 2020), art. 95; see Yi Chujun & Wu Xuebin, *Woguo Zhengquan Jiufen Daibiaoren Susong Zhidu de Lanshang yu Wanshan* (我国证券纠纷代表人诉讼制度的滥觞与完善) [The Origins and Improvement of the Representative Action System for Securities Disputes in China], 526 NANFANG JINRONG (南方金融) [S. Fin.] 82, 85–87 (2020).

120. Yan Jianlian, *Shanghai Jinrong Fayuan Fabu Quanguo Shouge Zhengquan Jiufen Daibiaoren Susong Jizhi de Guiding* (上海金融法院发布全国首个证券纠纷代表人诉讼机制的规定) [The Shanghai Financial Court Issued the Nation's First Provisions on the Representative Action Mechanism for Securities Disputes], RENMIN FAYUAN XINWEN CHUANMEI ZONGSHE (人民法院新闻传媒总社) [The People's Cts. News & Comm'n Agency] (Mar. 25, 2020), <https://baijiahao.baidu.com/s?id=1662142235422226649&wfr=spider&for=pc> [https://perma.cc/57NY-K4H7].

121. *Id.*

channel for small and medium volume investors.”<sup>122</sup> In May 2021, the Shanghai Financial Court announced its judgment for the nation’s first ordinary securities representative litigation following the promulgation of the SPC’s interpretation. The Court awarded 315 investors about 123 million yuan in compensation for their investment losses.<sup>123</sup> This securities lawsuit filed against Feilo Acoustics for inflating its profits and revenue in published financial statements was heard by three judges and four expert people’s assessors.<sup>124</sup> The collegiate bench also inquired and consulted two specialists in the field.<sup>125</sup> One of the people’s assessors, Professor Fang Lehua from East China University of Political Science and Law, has spoken highly of the implementation of securities representative litigation. He suggests that it signifies the establishment of “a securities class action system with Chinese characteristics.”<sup>126</sup> Through its innovations in litigation mechanisms such as model judgments and representative actions, the Shanghai Financial Court

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122. *China Introduces a Class Action Regime Aimed at Financial Investors*, DEMINOR (Aug. 20, 2020), <https://drs.deminor.com/en/news/china-introduces-a-class-action-regime-aimed-at-financial-investors> [<https://perma.cc/FU6T-DZRP>]; Zuigaofa Faguan Liwei Jiangdi Weiwan Chengben Bianli Daibiaoren Susong (最高法官李伟：降低维权成本 便利代表人诉讼) [The Supreme Court Judge Li Wei: Reduce the Cost of Rights Protection, Facilitate Representative Actions], XINHUA WANG (新华网) [Xinhua News] (Sept. 4, 2020), [http://www.xinhuanet.com/finance/2020-09/04/c\\_1126452945.htm](http://www.xinhuanet.com/finance/2020-09/04/c_1126452945.htm) [<https://perma.cc/XF7Z-JH2K>]; Zuigao Renmin Fayuan Guanyu Zhengquan Jiufen Daibiaoren Susong Ruogan Wenti de Guiding (最高人民法院关于证券纠纷代表人诉讼若干问题的规定) (promulgated by the Sup. People’s Ct., July 30, 2020, effective on July 31, 2020).

123. Huang Peilei & Zheng Qian, *1.23 Yiyuan Peichang Kuan Shanghai Jinrong Fayuan Xuanpan Zhengquan Jiufen Putong Daibiaoren Susong Shouan* (1.23 亿元赔偿款！上海金融法院宣判证券纠纷普通代表人诉讼首案) [123 Million Yuan Compensation! The Shanghai Financial Court Pronounced Judgment for the First Case of Original Representation Litigation for Securities Disputes], PUJIANG TIANPING (浦江天平) [Huangpu River Scale] (May 11, 2021), <https://mp.weixin.qq.com/s/zsq9MnJVxRJ7-3dWPBKjRA?> [<https://perma.cc/3CPC-M6U9>].

124. Hu Diefei, *Quanguo Shouli Daibiaoren Susong An Kaiting* (全国首例代表人诉讼案开庭) [The Trial of the National First Case of Representative Litigation Started], SHANGHAI FAZHIBAO (上海法治报) [Shanghai Legal Daily] (Apr. 7, 2021), <https://new.qq.com/omn/20210407/20210407A0B8JY00.html> [<https://perma.cc/9HCG-2TLR>].

125. *Id.*

126. *Id.* In 2002, the SPC found class actions as an improper forum for plaintiffs to claim compensation for disputes arising from securities-related false statements. Judicial remedies had to be sought through either individual actions (“*dandu susong*”) or joint actions (“*gongtong susong*”). A joint action refers to “an action where one or both parties consist of two or more persons with an object of action being the same or of the same category.” Sanzhu Zhu, *Civil Litigation Arising from False Statements on China’s Securities Market*, 31 N.C. J. INT’L & COM. REG. 377, 400 (2005); Zuigao Renmin Fayuan Guanyu Shouli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Qinquan Jiufen Anjian Youguan Wenti de Tongzhi (最高人民法院关于受理证券市场因虚假陈述引发的民事侵权纠纷案件有关问题的通知) [The Notice of the Supreme People’s Court on Relevant Issues of Filing of Civil Tort Dispute Arising from False Statements on the Securities Market] (promulgated by the Sup. People’s Ct., Jan. 15, 2002, effective Jan. 15, 2002), art. 4.

“generated many replicable and generalizable experiences in formulating rules and experimenting with case decisions . . . for the reference of other courts across the country.”<sup>127</sup>

Furthermore, technological innovations pioneered in specialized courts also promote procedural justice. As home to some of the world’s most popular e-commerce retailers and social media platforms, China has experienced dramatic growth in its online shopping population and Internet users over the last decade.<sup>128</sup> Meanwhile, various disputes have arisen rapidly from cyber-related activities, such as e-commerce transactions and online copyright infringement.<sup>129</sup> Claimants of these disputes, however, encounter procedural barriers in accessing conventional judicial channels, including long-distance travel to the court where the vendor resides and great difficulty with the collection and preservation of digital evidence.<sup>130</sup> In response to these obstacles, Internet courts built in Hangzhou, Beijing, and Guangzhou have enabled disputants to communicate with judicial personnel through messaging and to obtain, preserve, and deposit tamper-resistant electronic evidence through the “Preservation Network” and judicial blockchains.<sup>131</sup> Ranging from complaint filing to trial hearings to judgment deliveries, Internet courts have moved the entire judicial process online.<sup>132</sup> According to an SPC report published in 2019, Internet courts assisted by digital technology spent an average of thirty-eight days to close a case, which is

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127. Hu Diefei, *supra* note 124.

128. *The 10 Largest E-Commerce Markets in the World by Country*, BUSINESS.COM (Apr. 14, 2020), <https://www.business.com/articles/10-of-the-largest-ecommerce-markets-in-the-world-b/> [<https://perma.cc/BSU6-FP2L>]; *Number of Online Shoppers in China from 2009 to 2020, Key Figures of E-Commerce*, STATISTA.COM (Mar. 14, 2022), <https://www.statista.com/statistics/277391/number-of-online-buyers-in-china/> [<https://perma.cc/H6KS-7BHQ>]; *Number of Internet Users in China from December 2008 to December 2020, Demographics & Use*, STATISTA.COM (Mar. 14, 2022), <https://www.statista.com/statistics/265140/number-of-internet-users-in-china/> [<https://perma.cc/B29Y-QZM4>].

129. Bryan Lynn, *Robot Justice: The Rise of China’s ‘Internet Courts’*, SCI. & TECH. (Dec. 11, 2019), <https://learningenglish.voanews.com/a/robot-justice-the-rise-of-china-s-internet-courts-/5201677.html> [<https://perma.cc/HSU8-MPNP>].

130. Huang-Chih Sung, *Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China*, 39 COMPUT. L. & SEC. REV. 1, 1–3 (2020).

131. *Id.* at 7–8; Lynn, *supra* note 129; Webpage About Judicial Blockchain of the Hangzhou Internet Court, BLOCKCHAIN NETCOURT, <https://blockchain.netcourt.gov.cn/first> [<https://perma.cc/5PPA-F67R>] (last visited Aug. 7, 2022); Webpage About Judicial Blockchain of the Beijing Internet Court, BEIJING INTERNET CT., <https://tpl.bjinternetcourt.gov.cn/tpl/> [<https://perma.cc/5G46-Q49G>] (last visited Aug. 7, 2022); *Judicial Industry Public Cloud Solutions*, ALIBABA CLOUD, <https://cn.aliyun.com/solution/govcloud/judicialpubcloud> [<https://perma.cc/FR5A-HXGG>] (last visited Aug. 7, 2022).

132. Tasha, *supra* note 39; Dani Deahl, *China Launches Cyber-Court to Handle Internet-Related Disputes*, THE VERGE (Aug. 18, 2017), <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes> [<https://perma.cc/ZME3-KQFF>].

about half of the time a traditional adjudication proceeding would take.<sup>133</sup> The Vice President of the Hangzhou Internet Court illustrated that the motivation of these procedural innovations is to deliver a quicker resolution to disputants “[b]ecause justice delayed is justice denied.”<sup>134</sup> Wu Xuhua, a lawyer at Yingke Law Firm, also stressed the role of Internet courts in promoting transparency.<sup>135</sup> He explained to a reporter that “the cases of the Hangzhou Internet Court are recorded throughout the process and can be checked at any time.”<sup>136</sup> “Seen by Chinese policymakers as the breeding ground for experimentation and innovation,” Internet courts have tested and incubated online judicial platforms and evidence preservation technology, which many generalist courts across the country later embraced.<sup>137</sup>

Besides engaging in technological innovations, specialized courts also pioneer unprecedented procedural rulings during adjudication. In May 2016, the Guangzhou IP Court encountered a “hard case” where a well-known French brand, Christian Louboutin, demanded a preliminary injunction to refrain three companies in Guangzhou from manufacturing and selling the products in question.<sup>138</sup> Although the SPC has allowed plaintiffs in IP disputes to *seek* a court order halting defendants’ alleged infringement before the entry of a final judgment since 2001,<sup>139</sup> such preliminary injunctions had not yet been *issued* by courts in China at the time.<sup>140</sup> As stated by Judge Tan Haihua, the presiding judge in the

133. THE SUP. PEOPLE’S CT. OF PEOPLE’S REPUBLIC OF CHINA, ZHONGGUO FAYUAN DE HULIANWANG SIFA (中国法院的互联网司法) [Chinese Courts and Internet Judiciary] 6 (Dec. 5, 2019).

134. Lynn, *supra* note 129.

135. Liu Ruihong, *Hulianwang Fayuan Rang Gongping Zhengyi Chushou Keji* (互联网法院, 让公平正义触手可及) [Internet Courts, Making Fairness and Justice within Reach], RENMIN RIBAO (人民日报) [People’s Daily] (Jan. 31, 2018), <https://www.chinacourt.org/article/detail/2018/01/id/3195430.shtml> [<https://perma.cc/BH88-MH8K>].

136. *Id.*

137. Mimi Zou, “Smart Courts” in China and the Future of Personal Injury Litigation, J. PERS. INJ. L. 1, 5 (June 2020); Tashea, *supra* note 39.

138. Lin Yehan & Xiao Yucheng, *Guangzhou Zhichan Youxuan di shi Zheyang Liancheng de* (广州知产: “优选地”是这样炼成的) [Intellectual Property in Guangzhou: How it Became a Selected Premier Location], RENMIN FAYUANBAO (人民法院报) [People’s Cts. Daily] (Apr. 24, 2019), <https://www.chinacourt.org/article/detail/2019/04/id/3850845.shtml> [<https://perma.cc/8WUK-DNLU>].

139. See Zuigao Renmin Fayuan Guanyu dui Suqian Tingzhi Qinfan Zhuanliquan Xingwei Shiyong Falv Wenti de Ruogan Guiding (最高人民法院关于诉前停止侵犯专利权行为适用法律问题的若干规定) [The Supreme People’s Court’s Provisions Concerning the Application of Law Regarding Stopping the Infringement of Intellectual Property Rights Prior to Litigation] (promulgated by the Sup. People’s Ct., June 7, 2001, effective between July 1, 2001 and Dec. 29, 2020); see also Zhonghua Renmin Gongheguo Zhuanlifa 2020 Xiuzheng (中华人民共和国专利法(2020修正)) [Patent Law of the People’s Republic of China (2020 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 17, 2020, effective on Oct. 17, 2020), art. 72.

140. Lin Yehan & Xiao Yucheng, *supra* note 138.

Louboutin case, “[g]aps in the field are the doors for a breakthrough.”<sup>141</sup> Drawing on the case’s open hearings and research, Judge Tan issued China’s first patent-related preliminary injunction.<sup>142</sup> In his twenty-six-paged opinion, he created a six-part test to review the preliminary injunction request. He suggested that the court may only order a preliminary injunction if the losses it imposed on the respondent were no more than the damages imposed on the applicant.<sup>143</sup> The Louboutin case established an example in response to the longstanding dilemma facing many patent holders in China, commonly known as “winning the case but losing the market.”<sup>144</sup> The reference value of this case for other courts in handling similar cases was further elucidated by the Annual Report of the SPC in 2017.<sup>145</sup>

### III. SPECIALIZED COURTS AS SKILLFUL BUT CONSTRAINED FORA FOR JUDICIAL REVIEW

Judicial review, in a broader sense, refers to judicial practices of reviewing the consistency of acts made by the legislative or executive branches with “higher law, namely the constitution (in the case of primary legislation) and statutory law (in the case of executive acts, including secondary legislation).”<sup>146</sup> Public law scholars have illustrated judicial review through a strong-weak spectrum.<sup>147</sup> One end of the spectrum is the U.S.-style, strong-form judicial review, where “the legislature’s powers are limited by the terms of a written constitution that courts will enforce.”<sup>148</sup> Toward the other end is the “new Commonwealth model,” a weak-form judicial review, in which “ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run.”<sup>149</sup> Judicial review in China, however, barely falls into this scope.

141. *Id.*

142. *Id.*

143. Zhou Qiang, *Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Gongzuo Qingkuang de Baogao* (最高人民法院关于知识产权法院工作情况的报告) [The Supreme People’s Court’s Report Regarding the Work of Intellectual Property Courts], RENMIN FAYUANBAO (人民法院报) [People’s Courts Daily] (Sept. 2, 2017), [http://rmfyb.chinacourt.org/paper/html/2017-09/02/content\\_129691.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2017-09/02/content_129691.htm?div=-1) [<https://perma.cc/K3KK-68PY>].

144. Lin Yehan & Xiao Yucheng, *supra* note 138.

145. Zhou Qiang, *supra* note 143.

146. *Judicial Review*, MAX PLANCK ENCYC. OF COMPAR. CONST. L. (Rainer Grote et al. eds., July 2018); Clifton McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 355 (1966).

147. Stephen Gardbaum, *What’s So Weak About “Weak-form Review”? A Reply to Aileen Kavanagh*, 13 INT’L J. CONST. L. 1040, 1041 (2015).

148. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and-Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 813–14 (2003).

149. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2786 (2003); see Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. LEGAL STUD. 487, 487 (2012) (“Comparative constitutional scholars have noted the

Not only are Chinese courts discouraged from making constitutional interpretations in their judgments,<sup>150</sup> but the party-state has also delegated the authority to perform constitutionality review to the Constitution and Law Committee inside its legislative body instead of the courts.<sup>151</sup> Traditionally, the power of judicial review in China was limited to examining the rationality of executive actions. In 2015, the courts' authority was extended to include judicial review of the consistency of certain regulatory documents with higher laws on which administrative actions were based.<sup>152</sup> That said, courts may not invalidate or strike down any regulatory documents but may declare the illegality of the document and suggest revisions to the issuing authority.<sup>153</sup> Although weaker than the power in liberal democracies, judicial review in China experienced an expansion in its scope and depth over the last decade. This also doubled the number of first instance administrative lawsuits against government agencies, from 101,510 in 2007 to 230,432 in 2017.<sup>154</sup> The empowerment of Chinese courts in auditing executive actions can be explained by well-established studies, which portray the role of courts in authoritarian

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rise in countries such as Canada, New Zealand, the UK and Australia . . . of what they describe as a new, distinctive model of 'Commonwealth constitutionalism' in which courts have broad authority to interpret constitutional rights provisions, but national parliaments retain equally broad power to override courts' interpretations of rights." See generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 719–39 (2001) (discussing the new model of constitutionalism in Canada, New Zealand, and the United Kingdom).

150. Guanyu zai Xingshi Panjue zhong Buyi Yuanyin Xianfa Zuo Lunzui Kexing de Yiju de Fuhuan (关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函) [Reply Regarding the Constitution Shall Not Be Applied as the Basis for Convictions and Sentences in Criminal Judgments] (promulgated by the Supreme People's Court, July 30, 1955, effective on July 30, 1955) ("From the Criminal Aspect, [the Constitution] does not stipulate issues as to how to convict and impose sentences. Based on this, . . . in criminal judgments, the Constitution shall not be applied as the Basis for Convictions and Sentencing."); Zuigao Renmin Fayuan Guanyu Yinfa Renmin Fayuan Minshi Caipan Wenshu Zhizuo Guifan Minshi Susong Wenshu Yangshi de Tongzhi (最高人民法院关于印发《人民法院民事裁判文书制作规范》《民事诉讼文书样式》的通知) [Notice of the Supreme People's Court on Issuing the Specifications for Preparing Civil Judgments by the People's Courts and the Format of Civil Litigation Documents] (promulgated by the Sup. People's Ct. & Sup. People's Procuratorate, June 28, 2016 effective on Aug. 1, 2016), art. 6(4) ("In a judgment, the Constitution...may not be cited as the basis for rendering a judgment").

151. Fan Jinxue, *Quanguo Renda Xianfa he Falv Weiyuanhui de Gongneng yu Shiyong* (全国人大宪法和法律委员会的功能与使命) [The Function and Mission of the Constitution and Law Committee of the National People's Congress], 4 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [ECUPL J.] 13, 13–21 (2018).

152. Zhongguo Renmin Gongheguo Xingzheng Susongfa (effective May 1, 2015), *supra* note 11.

153. *Id.*; see Wei Cui et al., *Judicial Review of Government Actions in China*, 1 CHINA PERSP. 35, 35–44 (2019).

154. CHINA L. SOC'Y, LAW YEARBOOK OF CHINA *passim* (2008); CHINA L. SOC'Y, LAW YEARBOOK OF CHINA *passim* (2018).

regimes as “fire alarms” for legislatures to be informed of ultra vires actions of executive bodies and as instruments for ruling elites to strengthen their grip on power by keeping local authorities in line.<sup>155</sup> As Martin Shapiro argues, in regimes that “have enacted statutes authoritarily” and where “constitutional judicial review is insignificant,” administrative judicial review is still significant because it enlists the courts to monitor “whether administrative agencies have acted according to the statutory law.”<sup>156</sup>

Whilst judicial review in China has started to have some bite, the traditional barriers to administrative litigation continued to frustrate litigants seeking remedies. According to statistics provided by Judge Wang Zhenyu, the then Deputy Head of the Administrative Division of the SPC, less than 10% of administrative judgments ruled for the plaintiffs in 2014, and in some provinces of China, only 2% of such claims were upheld by courts.<sup>157</sup> Judge Wang partially attributed this phenomenon to some judges’ lack of expertise and experience when reviewing regulatory matters.<sup>158</sup> Empirical scholarship in the United States has shown the ability of specialized courts to tackle this dilemma. With greater knowledge of respective fields, the specialized judiciary is “more energetic and confident in overturning [bureaucracies’] decisions”<sup>159</sup> and needs “not . . . to rely on agency interpretation.”<sup>160</sup> By concentrating on “a small set of policy areas, specialized court judges are able to monitor agency practices closely . . . [and] make principled decisions that limit the strategic advantages of bureaucrats.”<sup>161</sup> Relatedly, the new types of specialized courts which have been established in China

155. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984); Ratna Rueban Balasubramaniam, *Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L.J. 405, 405–15 (2009); Jacqueline M. Sievert, *The Case for Courts: Resolving Information Problems in Authoritarian Regimes*, 55 J. PEACE RES. 774, 775–76 (2018); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 283–84 (2014); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARDS RULE OF LAW 394–449 (2009).

156. Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 328 (Tom Ginsburg & Tamir Moustafa eds., 2008).

157. Zhang Yuwen, *Zhongguo Mingaoguan An Yuangao Shengsulv cong 10nianqian 30% Jiangzhi 10% Yixia* (中国民告官案原告胜诉率从 10 年前 30%降至 10%以下) [The Plaintiff Win Rate of Citizen-Suing-the-Government Cases Dropped from 30% Ten Years Ago to Below 10%], RENMINWANG ( 人民 网 ) [People.cn] (Nov. 5, 2014, 8:10 A.M.), <http://politics.people.com.cn/n/2014/1105/c1001-25976290.html> [<https://perma.cc/2CJE-9R7B>].

158. *Id.*

159. Wendy L. Hansen et al., *Specialized Courts, Bureaucratic Agencies, and the Politics of U.S. Trade Policy*, 39 AM. J. POL. SCI. 529, 552 (1995).

160. Howard, *supra* note 64, at 136.

161. Unah, *supra* note 66, at 858.



since 2014 are staffed by well-educated, experienced judges.<sup>162</sup> In addition, IP courts regularly appoint technical investigators for one to three years to participate in trial hearings and provide professional opinions for the determination of technical issues in fields such as machinery, materials, computers, and biology.<sup>163</sup> Financial courts and Internet courts also frequently involve nonjudicial experts in complex or controversial cases during adjudication.<sup>164</sup>

In 2015, the Beijing IP Court decided the nation's first case exercising judicial review of regulatory documents, a power granted by the 2015 Amendment to the Administrative Litigation Law ("2015 Amendment").<sup>165</sup> Plaintiff, Anhui Huayuan Medicine Company, challenged Article 4 of a notice issued by the State Trademark Office (STO), which stipulated that any registration applications for newly-added service trademarks filed between January 1 and January 31, 2013 were deemed "same-day applications."<sup>166</sup> Under Article 4, the STO considered the applications filed by the plaintiff on January 4, 2013, and by two other companies on January 11 and January 28 respectively, as same-day applications.<sup>167</sup> As a result, the plaintiff was notified that the

162. Guo Jinxia & Zhao Yan, *Beijing Hulianwang Fayuan Yuanzhang denghuo Renmin* (北京互联网法院院长等获任命) [The President of the Beijing Internet Court and Others Appointed], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily] (Aug. 17, 2018, 8:30 A.M.), <http://www.court.gov.cn/zixun-xiangqing-112601.html> [<https://perma.cc/FN94-U57T>]; Zhao Yan, *Beijingshi Renda Changweihui Renming Beijing Jinrong Fayuan Yuanzhang Shoupi Peibei 25 Ming Faguan* (北京市人大常委会任命北京金融法院院长 首批配备 25 名法官) [The Standing Committee of the Beijing People's Congress Appointed the President of the Beijing Finance Court 25 Judges Were Recruited], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily], (Mar. 24, 2021) [http://www.legaldaily.com.cn/judicial/content/2021-03/24/content\\_8465864.html](http://www.legaldaily.com.cn/judicial/content/2021-03/24/content_8465864.html) [<https://perma.cc/HW92-X4C3>].

163. Zhishi Chanquan Fayuan Jishu Diaochaguan Xuanren Gongzuo Zhidao Yijian (知识产权法院技术调查官选任工作指导意见) [Guiding Opinions on Selection and Appointment of Technical Investigators by Intellectual Property Courts] (promulgated by the Sup. People's Ct., Aug. 8, 2017, effective on Aug. 14, 2017), arts. 1–5, 10.

164. See, e.g., Yan Jianyi & Zheng Qian, *Shanghai Jinrong Fayuan Chengli Zhuanjia Weiyuanhui* (上海金融法院成立专家委员会) [Shanghai Financial Court Established an Experts Committee], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily] (Nov. 2, 2020), [http://rmfyb.chinacourt.org/paper/html/2020-11/02/content\\_173402.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2020-11/02/content_173402.htm?div=-1) [<https://perma.cc/5MJC-FFGT>]; Meng Huanliang & Yue Feng, *Hangzhou Hulianwang Fayuan Chengli Zhuanjia Zixun Weiyuanhui* (杭州互联网法院成立专家咨询委员会) [Hangzhou Internet Court Established an Expert Consulting Committee], RENMIN FAYUANBAO (人民法院报) [People's Cts. Daily] (Nov. 11, 2017), <https://www.chinacourt.org/article/detail/2017/11/id/3071483.shtml> [<https://perma.cc/S2EM-65AW>].

165. *Huayuan Medicine Co., Ltd. v. Trademark Off. of the State Admin. of Indus. & Com.*, ADMIN. FIRST INSTANCE NO. 177, ZHONGGUO XIANZHENGWANG (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), <http://www.calaw.cn/article/default.asp?id=11976> [<https://perma.cc/2KUS-V6BV>]; *Zhonghua Renmin Gongheguo Xingzheng Susongfa* (effective May 1, 2015), *supra* note 11.

166. *Huayuan Medicine Co., Ltd.*, ADMIN. FIRST INSTANCE NO. 177.

167. *Id.*

trademark would be granted upon the outcome of negotiations or drawing lots. The plaintiff, therefore, asked the Beijing IP Court to invalidate the decision and requested a concurrent review of Article 4 of the notice.<sup>168</sup> Given that the 2015 Amendment provided no specific guidance for judicial review of normative documents, the Beijing IP Court created a four-factor test. Under the test, courts examined whether the STO was a legally authorized body to issue the notice, whether the STO acted beyond its authority, whether the content of Article 4 was lawful, and whether the issuance of Article 4 complied with statutory procedures.<sup>169</sup> Finding that the STO's prescribed "same day" definition contradicted higher laws and that there was not sufficient evidence establishing Article 4 was a legitimate solution narrowly tailored to the purpose of protecting the interests of trademark users in rural areas, the Court declared the illegality of Article 4 and invalidated the defendant's decision.<sup>170</sup> This judgment excited the legal community in China because the decision showed the capability of the judiciary to boldly audit actions undertaken by bureaucracies at the state level. Furthermore, the Anhui Huayuan case's judgment set a national precedent for other courts to apply the 2015 Amendment in reviewing regulatory documents.<sup>171</sup> The guidance for judicial review issued by the SPC in 2018 mirrored the four-factor test established by the case.<sup>172</sup>

The other cause to which Judge Wang attributes the low win rates of plaintiffs suing bureaucracies is the local political interference facing grassroots courts.<sup>173</sup> In China, many first instance administrative lawsuits end up in basic-level trial courts where judges are appointed or removed by the Standing Committee of the People's Congress at the grassroots level.<sup>174</sup> Like other civil servants in China, judges are ranked in an administrative hierarchy, a determining factor for their salaries and

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168. *Id.*

169. *Id.*

170. *Id.*

171. Wang Chunye, *Cong Quanguo Shouan Kan Xingzheng Guifanxing Wenjian Fudai Shencha Zhidu Wanshan* (从全国首案看行政规范性文件附带审查制度完善) [From the National First Case to Study the System of Concurrent Review of Administrative Normative Documents], 2 *XINGZHENG FAXUE YANJIU* (行政法学研究) [ADMIN. L. REV.] 41, 41 (Aug. 2018); Zhu Mang, *Guifanxing Wenjian de Hefaxing Yaojian Shouli Fudaixing Sifa Shencha Panjueshu Pingxi* (规范性文件的合法性要件 — 首例附带性司法审查判决书评析) [The Criteria of the Legality of Normative Documents: Analyze the First Judgment of Concurrent Judicial Review], 11 *FAXUE* (法学) [LEGAL STUD.] 151, 151 (2016).

172. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Nov. 13, 2017, effective in Feb. 2018), art. 148.

173. Zhang Yuwen, *supra* note 157.

174. Zhonghua Renmin Gongheguo Faguan Fa, *supra* note 56.

compensations.<sup>175</sup> For instance, the president of the basic-level people's court in a city district would have an administrative rank equivalent to the deputy magistrate of the district.<sup>176</sup> Therefore, it is fairly common to see judges handling lawsuits challenging the decision-making of bureaucrats at a higher administrative level. In 2003, a local judgment invalidated provisions of a provincial regulation that conflicted with a national statute.<sup>177</sup> Provisional officials in Henan later criticized the judgment for invading their administrative authority and seriously violating the law.<sup>178</sup> For this reason, the presiding judge, Li Huijun, was removed from office.<sup>179</sup> Yet the aftermath of this case experienced a sharp turn in March 2004, when the SPC issued a reply which stressed the superior authority of national statutes over local regulations and confirmed that national normative documents would prevail when a conflict arises.<sup>180</sup> It was not counter-intuitive that the central government intended to implement national laws and policies uniformly and effectively across the country. For a while, the weak judicial control left local bureaucracies' discretion in rulemaking and regional protectionism unchecked. While China's economy continued to grow, the inconsistent local application of national codes and excessive mandatory regulatory approvals "resulted in low market efficiency and more corruption."<sup>181</sup> To unify the implementation of national rules and prolong its grip on power, the central government's

175. Wang Yijun, *supra* note 13.

176. *Jiedu Woguo Zuigao Renmin Fayuan Yuanzhang Shi Shenme Jibie* (解读: 我国“最高人民法院院长”是什么级别?) [Analysis and Interpretation: What Level Is the President of the Supreme People's Court in China?], LANDUN JUNSHI (蓝盾军事) [LANDUN MINISTRY] (Sept. 8, 2018), <https://www.163.com/dy/article/DR63OKG90515H3DQ.html> [<https://perma.cc/AZ8W-AAUA>].

177. Chen Si, *Lvshi Jianyi Quanguo Renda dui Luoyang Zhongzian Jinxing Lifa Shencha* (律师建议全国人大对“洛阳种子案”进行立法审查) [Lawyers Suggested the National People's Congress Performs Legislative Review on “Luoyang Seeds Case”], HENAN DIANSHIWANG (河南电视网) [HENAN TELEVISION] (Nov. 30, 2003), <https://www.chinacourt.org/article/detail/2003/11/id/93800.shtml> [<https://perma.cc/LV7V-JF65>].

178. *Id.*

179. *Id.*

180. Guanyu Henansheng Ruyangxian Zhongzi Gongsu yu Henansheng Yichuanxian Zhongzi Gongsu Yumi Zhongzi Daifan Hetong Jiufen Yian Qingshi de Dafu (关于河南省汝阳县种子公司与河南省伊川县种子玉米种子代繁合同纠纷一案请示的答复) [Reply to the Enquiry Concerning the Case of a Contract Dispute over Corn Seed Propagation Between Henan Ruyang Seed Company and Henan Yichuan Seed Company] (promulgated by the Sup. People's Ct., Mar. 30, 2004, effective Mar. 30, 2004).

181. *A Potential New Boost for Foreign Investment in China – China Eliminates or Simplifies Certain Governmental Approvals*, WINSTON & STRAWN LLP (Nov. 2012), <https://www.winston.com/images/content/1/3/v2/1305.pdf> [<https://perma.cc/T3HH-9JQZ>]; see David L. Weller, *The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action*, 98 COLUM. L. REV. 1238, 1239 (June 1998) (“[There are] difficulties of doing business in China. One of the most significant of these difficulties has been the extensive and ad hoc intervention by the State . . . including inconsistent and unpredictable regulation.”).

“tacit acquiescence in judicial empowerment has over time transformed into express approval.”<sup>182</sup> Still, in authoritarian regimes like China, where the ruling party has no incentives to preserve an independent judiciary as an “insurance”<sup>183</sup> for future political turnovers, the fate of empowered courts is ultimately dependent “upon their ability to refrain from challenging the regime.”<sup>184</sup> This can be well illustrated by the “bounded activism” exercised by the Supreme Constitutional Court (SCC) of Egypt.<sup>185</sup> Before the late 1990s, the SCC issued several liberal rulings involving economic and property rights, which the Egyptian government endorsed.<sup>186</sup> In the meantime, the SCC gradually gained support from domestic and international activist groups to monitor constitutional and human rights violations.<sup>187</sup> Essentially, “[a]s the regime grew increasingly nervous about opposition advances through the SCC and the Court’s growing base of political support, the regime moved to undermine their efforts.”<sup>188</sup>

Judicial review of the newly-established specialized courts in China, either at the central or local level, is constrained by their jurisdictional limitations. Not only do these specialized courts have an economic-related focus, but they are also located in China’s most popular destinations for foreign investment.<sup>189</sup> Furthermore, none of their judicial appointments and budgets are controlled by political authorities at a

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182. Eric C. Ip & Kelvin Hiu Fai Kwok, *Judicial Control of Local Protectionism in China: Antitrust Enforcement Against Administrative Monopoly on the Supreme People’s Court*, 13 J. COMPETITION L. & ECON. 549, 549 abstract (2017).

183. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 21, 25 (2003) (“By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain.”).

184. Ratna Rueban Balasubramaniam, *Review: Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L. J. 405, 411 (2009); see Shapiro, *supra* note 156, at 334 (“If the courts challenge the authoritarian regime in which they are embedded to the extent that the regime openly ignores or controls them, they lose that legitimacy, which is about their only resources and defense against the authoritarians.”).

185. TMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 3–11 (2007).

186. *Id.* at 3–9.

187. *Id.* at 6–8.

188. *Id.* at 9.

189. See *The Top 6 Best Cities in China for Setting Up a Business in 2021*, FDI CHINA (Apr. 29, 2021), <https://www.fdicchina.com/blog/the-top-6-best-cities-in-china-to-set-up-a-business/> [<https://perma.cc/5ZLT-TSTU>] (listing the most popular cities in China for businesses to establish offices); see also *Official: Hainan FTP Sees Explosive Growth in Foreign Investment*, PR NEWswire (Apr. 13, 2021), <https://www.prnewswire.com/news-releases/official-hainan-ftp-sees-explosive-growth-in-foreign-investment-301267326.html> [<https://perma.cc/ZT23-MBWL>] (describing the growth in foreign investment in the Hainan province).

grassroots—county or district—level.<sup>190</sup> Even for the three Internet courts, which have jurisdiction as basic-level courts, their judges are appointed by the standing committee of the people’s congress of either a provincial capital city or a centrally administered municipality.<sup>191</sup> The Hainan IP Court, set up in 2021 following the construction of the Hainan Free Trade Port,<sup>192</sup> is also under the direct supervision of the provincial government and high people’s court.<sup>193</sup> Being more competent in deciding technical and complex matters and less beholden to the pressure exerted by grassroots officials to favor home litigants,<sup>194</sup> specialized courts can show less deference to local bureaucracies than generalist courts. Among the limited published data, the Beijing IP Court, for

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190. Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding, *supra* note 34, at art. 5; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding, *supra* note 34; Quanguo Renda Changweihui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding, *supra* note 37; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Beijing Jinrong Fayuan de Jueding, *supra* note 37; Zuigao Renmin Fayuan Guanyu Sheli Hangzhou Hulianwang Fayuan de Fangan (最高人民法院印发《关于设立杭州互联网法院的方案》的通知) [Notice of the Supreme People’s Court on Issuing the Plan for Establishing the Hangzhou Internet Court] (promulgated by the Sup. People’s Ct., June 26, 2017, effective June 26, 2017); Quanguo Zuigao Renmin Fayuan Yinfa Guanyu Zengshe Beijing Hulianwang Fayuan Guangzhou Hulianwang Fayuan de Fangan de Tongzhi (最高人民法院印发《关于增设北京互联网法院、广州互联网法院的方案》的通知) [Notice of the Supreme People’s Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court] (promulgated by the Sup. People’s Ct., Aug. 9, 2018, effective Aug. 9, 2018), art. 3 (6), (7).

191. Zuigao Renmin Fayuan Guanyu Sheli Hangzhou Hulianwang Fayuan de Fangan, *supra* note 193; Quanguo Zuigao Renmin Fayuan Yinfa Guanyu Zengshe Beijing Hulianwang Fayuan Guangzhou Hulianwang Fayuan de Fangan de Tongzhi, *supra* note 193.

192. See Nicole Zhang et al., *China’s Hainan Free Trade Port: Introducing an Innovative Tax Regime to Attract Investment*, INT’L TAX REV. (Sept. 7, 2020), <https://www.internationaltaxreview.com/article/b1n8bgfxnnnydw/chinas-hainan-free-trade-port-introducing-an-innovative-tax-regime-to-attract-investment> [<https://perma.cc/QGJ9-JBD7>] (“China’s central government released a master plan on June 1, 2020, setting out policies to support the construction of the Hainan Free Trade Port . . . This has the aim of building Hainan Island, on the southern coast of China, into a globally-significant free trade port by 2050 . . . [T]he master plan consist[s] of “zero-tariffs, low tax rates, a simplified tax system, and an enhanced legal system.”).

193. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding, *supra* note 34, at arts. 3, 4.

194. Woo, *supra* note 56, at 250; see Zhou Bin & Jiang Hao, *Duli Xingshi Shenpanquan Xuqu Difanghua Xinzhenghua* (独立行使审判权须去地方化行政化) [Independently Exercising Adjudicative Power Needs to Remove Localism and Bureaucratization], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Nov. 18, 2013), <https://www.chinacourt.org/article/detail/2013/11/id/1145826.shtml> [<https://perma.cc/HW23-P8RN>] (“Judicial practices proved, the smaller the administrative region is, the greater possibility of the interference with judicial justice will be.”); see also Zhang Weiwei, *Dapo Mingaoguan de Xingzheng Ganyu* (打破“民告官”的行政干预) [Overcome the Administrative Interference with “Citizens Suing Bureaucracies”], 22 ZHONGGUO RENDA ZAZHI (中国人大杂志) [Chinese Nat’l People’s Congress Mag.] *passim* (2014).

instance, ruled for 49% of foreign litigants in administrative lawsuits between November 2014 and June 2019.<sup>195</sup>

China's specialized courts, with a particular emphasis on privatization, have less potential than constitutional or administrative courts to grow as powerful institutions that political activists can use to challenge the regime on the grounds of human and civil rights. Rather, judicial specialization may help Beijing rein in local bureaucracies' decision-making on issues of special complexity and lend the central government legitimacy for its economic policies. More importantly, equipping these specialized courts with capable judicial personnel and relieving them from local political interference would restore the confidence of international investors and further the regime's core interests in expanding its impact on the global market.

#### IV. STRATEGIC JUDICIAL EMPOWERMENT IN AUTHORITARIAN STATES

The empowerment of courts has been observed in many authoritarian states. Some states have empowered the whole judiciary, while others have empowered only a fragment of it.<sup>196</sup> Rational strategic theories illustrate that the ruling elites in authoritarian regimes support a more autonomous judiciary in hopes of preserving their policy preferences in future electoral competitions, legitimizing political hegemony, reining in local bureaucracies, and facilitating economic growth.<sup>197</sup> The judicial reform in Mexico under the governance of *Partido Revolucionario Institucional* (PRI), for example, has been elucidated by scholars as an insurance policy “designed to protect a weakening ruling party operating in an increasingly insecure political arena”<sup>198</sup> and a strategic move driven by the PRI's “legitimacy building” interests.<sup>199</sup> The establishment of the SCC in Egypt, with a high level of autonomy from executive control, was expected to demonstrate “an unambiguous commitment to investors that

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195. Liu Wenxu & Xie Hao, *Beijing Zhishi Chanquan Fayuan Shewai Minshi Anjian Guowai Dangshiren Shengsolv Jin 7cheng* (北京知识产权法院: 涉外民事案件国外当事人胜诉率近七成) [Beijing IP Court: The Litigation Success Rate of Foreign Parties in Civil Cases Involving Foreigners Is Nearly 70 Percent], XINHUASHE (新华社) [XINHUA NEWS] (Oct. 18, 2019), [http://www.gov.cn/xinwen/2019-10/18/content\\_5441766.htm](http://www.gov.cn/xinwen/2019-10/18/content_5441766.htm) [<https://perma.cc/YJM4-HCNT>].

196. See, e.g., José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 L. & SOC'Y REV. 475, 482 (1975) (“The Spanish judges at present seem fairly independent . . . Selection of new judges is entrusted to the judiciary itself.”).

197. See Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. OF POL. SCI. 345, 355–58 (2009) (discussing such theories in countries like Chile and Mexico).

198. Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 46 LATIN AM. POL. & SOC'Y 87, 88 (2005).

199. Silvia Inclán Oseguera, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?*, 62 POL. RSCH. Q. 753, 759 (2009).

property rights would be protected through an independent process of judicial review.”<sup>200</sup> To raise its courts’ international reputation and attract foreign businesses, Spain allocated jurisdiction over politically-important matters to special tribunals under the close watch of the government. It then empowered generalist judges with lifetime tenure and an appointment system subject to minimum political interference.<sup>201</sup> Portraying Singaporean courts staffed by highly-qualified and well-paid judges as a model for authoritarian regimes and emerging democracies, Silverstein explains how Singapore’s judiciary, despite its limitations in ruling on politically-sensitive subjects, became an effective avenue to “build and secure a stable economy” and “shape international perceptions.”<sup>202</sup> Silverstein insights about the Singaporean experience are the following:

By maintaining Fuller’s eight formal criteria for the rule of law, Singapore made clear to investors that what they valued was safe and protected, and that their investments were secure. The swift constitutional revisions including the termination of appeals to the Privy Council sparked no capital flight . . .

Singapore therefore presents countries like China with the possibility of an alternative model: while economic reform and prosperity demand the rule of law, the rule of law does not necessarily mean that judicialization—and the expansion of individual rights—necessarily will follow. It is possible to de-link economic and political/social reform.<sup>203</sup>

#### A. *The Causes and Consequences of Judicial Specialization: The Chinese Experience*

Longing for foreign investments and domestic economic developments after the ten-year cultural revolution, China began its reform and opening-up and a march toward the rule of law in the late 1970s.<sup>204</sup> Since then, the country has launched a series of judicial reforms of independence, professionalization, and transparency. For instance, China heightened the education and qualification requirements for newly

200. Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 885 (2003).

201. Toharia, *supra* note 196.

202. Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 76–86 (Tom Ginsburg & Tamir Moustafa eds., 2008).

203. *Id.* at 82–83.

204. Yingyi Qian, *The Process of China’s Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives*, 156 J. INST. & THEORETICAL ECON. 151, 153 (2000).

appointed judges in the early 2000s.<sup>205</sup> Since 2013, the control of court budgets has been elevated from grassroots governments to the provincial level in many regions of China.<sup>206</sup> Driven by the Sunshine Judiciary Campaign, trial hearings and millions of judicial decisions have been made publicly available through online platforms.<sup>207</sup>

There are various narratives about the Chinese judiciary. Taisu Zhang and Tom Ginsburg argue that Chinese courts “have become more *institutionally* independent” from political entities and “are now more professional, independent, and politically powerful than at any point in PRC history.”<sup>208</sup> While acknowledging the reforms that were made in China, Donald Clarke challenges the conventional use of terminology to describe dispute resolution in China—“the Chinese legal system,” “court,” and “judge”—and suggests that “[w]hat China has been building for the last forty years are order maintenance institutions.”<sup>209</sup> More recently, Xin He relies on empirical evidence to show that, despite a decline in illegitimate influences on Chinese judges, such as *guanxi* and improper interference by local courts or political leaders, influences that the Party perceives to be legitimate continue to exist.<sup>210</sup> He also asserts, “Chinese courts have become more professional and transparent, but not independent.”<sup>211</sup>

This Article does *not* intend to join the debate. Instead, it suggests that if the Chinese judiciary is to be empowered or further empowered by the party-state, specialized courts focusing on the areas of privatization are a safe arena with which to start. This is not the least because of the specialized judiciary’s capability to experiment with pilot rules and

205. *Compare* Zhonghua Renmin Gongheguo Faguanfa (中华人民共和国法官法) [Judges Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., June 30, 2001, effective Jan. 1, 2002), arts. 9, 12, *with* Zhonghua Renmin Gongheguo Faguanfa (中华人民共和国法官法) [Judges Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 1995, effective July 1, 1995), art. 9.

206. Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding, *supra* note 12.

207. Zhongguo Panjue Wenshu Wang (中国判决文书网) [China Judgments Online], <https://wenshu.court.gov.cn/> [<https://perma.cc/R777-PVZL>] (last visited Aug. 12, 2022); Zhongguo Shenpan Liucheng Xinxi Gongkaiwang (中国审判流程信息公开网) [China Judicial Process Information Online], <https://splcgk.court.gov.cn/gzfwwww/> [<https://perma.cc/8WVQ-ALU5>] (last visited Aug. 12, 2022); Zhongguo Tingshen Gongkai Wang (中国庭审公开网) [China Ct. Trial Online], <http://tingshen.court.gov.cn/> [<https://perma.cc/6ZLW-4NM5>] (last visited Aug. 12, 2022).

208. Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 306, 332, 342 (2019).

209. Donald C. Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 541, 543-45, 595 (2022).

210. Xin He, *Pressures on Chinese Judges under Xi*, 85 THE CHINA J. 49, 61-62, 65-66 (2021).

211. *Id.* at 73.



adjudication techniques and to audit bureaucratic acts on complex, novel issues. During the first four decades of the People's Republic, the majority of the judicial corpus comprised of veterans and officials recruited from the army or governmental organs, many of whom lacked sufficient legal education or training.<sup>212</sup> Until 2019, the Judges Law still allowed incumbent judges to be exempted from education requirements by undertaking part-time training.<sup>213</sup> While the implementation of the national judicial examination for aspiring judges<sup>214</sup> and the quota judge system (“*faguan yuane zhi*”)<sup>215</sup> professionalized the Chinese judiciary to some extent, the number of judges has been reduced significantly amid a constant increase of disputes funneled into courts.<sup>216</sup> In China, generalist courts' heavy dockets, which cover assorted types of disputes, do not afford judges ample time or energy to research novel or technical issues encountered during adjudication.<sup>217</sup> Entrusting generalist judges, who are already overwhelmed by their caseloads and other court duties, to experiment with controversial policies and examine the rationality of administrative rulemaking on complex subjects could draw backlash over judicial legitimacy. However, assigning these tasks to informed and experienced judicial experts serving in specialized courts would

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212. Sida Liu, *Beyond the Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75, 82 (2006).

213. *Compare* Zhonghua Renmin Gongheguo Faguanfa (中华人民共和国法官法) [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018), art. 9, *with* Zhonghua Renmin Gongheguo Faguanfa, *supra* note 56, at art. 12.

214. Zhonghua Renmin Gongheguo Faguanfa (effective July 1, 1995), *supra* note 205; Björn Ahl, *Advancing the Rule of Law through Education? An Analysis of the Chinese National Judicial Examination*, 42 ISSUES & STUD. 171–204 (2006).

215. The quota judge system was one of the major judicial reforms carried out by the Fourth Plenary Session of the 18th Party Central Committee of the Communist Party of China in 2014. To promote judicial elitism, the proportion of court personnel authorized to hear cases was capped at 39% for each province. Judges who did not pass internal appraisals were transferred to assistance or administrative roles. Gao Jinghong, *Faguan Yuanezhi de Zhidu Jiazhi he Shixian Lujing* (法官员额制的制度价值和实现路径) [The Value and Fulfillment of the Quota Judge System], TIANJIN FAYUAN WANG (天津法院网) [Tianjin Courts] (July 20, 2015), <http://tjfy.chinacourt.gov.cn/article/detail/2015/07/id/1936313.shtml> [<https://perma.cc/6GZR-EXZ8>]; *see* Susan Finder, *Why Are Chinese Judges So Stressed?*, SUPREME PEOPLE'S COURT MONITOR (Feb. 27, 2018), <https://supremepeoplecourtmonitor.com/2018/02/27/why-are-chinese-judges-so-stressed/> [<https://perma.cc/5JD5-J56Y>] (“[A]uthorities decided to reduce the headcount of Chinese judges by comparing the percentage of judges in China with those in major jurisdictions.”).

216. *See* Tang Qi, *Zuigaofa: Faguan Pingjun Banan Shuliang Tishengzhi 2008nian de Jinsanbei* (最高法院: 法官平均办案数量提升至 2008 年的近 3 倍) [Supreme People's Court: The Average Amount of Cases Handled by Judges Raised Nearly Three Times of the Year of 2008], ZHONGGUO XINWENWANG (中国新闻网) [CHINA NEWS] (Aug. 1, 2017), [http://www.china.com.cn/news/2017-08/01/content\\_41323068.htm](http://www.china.com.cn/news/2017-08/01/content_41323068.htm) [<https://perma.cc/6CKC-PHDE>].

217. *Id.*

minimize such risks. Furthermore, under the principal-agent model,<sup>218</sup> the party-state could delegate the specialized judiciary as a competent but constrained agent to collect information about and remedy bureaucracies' self-interest-seeking violations, especially those that would curb national economic growth. More importantly, because of jurisdictional limitations, the emerging specialized courts in China have little room to challenge the decisions of political and governmental entities outside domains related to IP, finance, and the Internet. Finally, the existence of these specialized benches could maintain and restore the confidence of foreign investors in the Chinese market. As shown in previous research, regions in China with higher gross domestic product (GDP) per capita and foreign capital tend to enjoy a more positive public perception of judicial integrity.<sup>219</sup> If a dispute occurs, investors can be assured that they will receive a fair judgment from a capable and neutral institution set up in one of China's most developed regions with considerable international capital flows.<sup>220</sup>

Given the activities carried out by the IP, financial, and Internet courts over the last decade, China appears to be granting more power to its specialized judiciary. Not only did these specialized courts craft and pilot new policies in the relevant fields, but some also obtained cross-regional jurisdiction and the authority to audit state-level bureaucrats.<sup>221</sup> Moreover, perceived as a "judicial window" connecting China with the world, the specialized judiciary has pledged to deliver equal protection for foreign parties in its official media outlets and reports.<sup>222</sup> The push for

218. See, e.g., Sean Gailmard, *Accountability and Principal-Agent Models*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 11–12 (Mark Bovens et al. eds., 2014) ("One should understand Congress as a principal and various bureaucrats as its agents. Therefore one should interpret bureaucratic institutions and legislative-bureaucratic interaction . . . as promoting the interests of the principal to the greatest extent possible. This is the central premise of thought on bureaucratic institutions based on principal-agent theory.")

219. Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 THE CHINA J. 43, 55–57 (2013).

220. See Sievert, *supra* note 155, at 776.

221. See Zuigao Renmin Fayuan Guanyu Shanghai Jinrong Fayuan Anjian Guanxia de Guiding (最高人民法院关于上海金融法院案件管辖的规定) [Provisions of the Supreme People's Court on the Jurisdiction of the Shanghai Financial Court] (promulgated by the Supreme People's Court, Apr. 21, 2021, effective Apr. 22, 2021), art. 3; Zuigao Renmin Fayuan Guanyu Beijing Shanghai Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (2020 Xiuzheng), *supra* note 36, arts. 2, 5.

222. See, e.g., Liu Wenxu & Xie Hao, *supra* note 195; Wu Haiping, *Fuwu Baozhang Lingang Jinrong Kaifang Shanghai Jinrong Fayuan Tui 15tiao Jucuo* (服务保障临港金融开放 上海金融法院推 15 条举措) [Serve and Safeguard the Openness of Lingang Finance the Shanghai Financial Court Put Forward 15 Measures], KANKAN XINWEN (看看新闻) [KNEWS] (July 30, 2020), <https://baijiahao.baidu.com/s?id=1673621358102707741&wfr=spider&for=pc> [https://perma.cc/K7BQ-BRH8]; Zhishi Chanquan Sifa Baohu Zhuangkuang (知识产权司法保护状况) [Judicial Protection Conditions for Intellectual Property] 15–16 (2015–2019), <http://www.hshfy.sh.cn/css/2020/04/15/20200415151254151.pdf> [https://perma.cc/A8JQ-AA2X].

a global judicial presence is indicated by the comments given by the President of the Shanghai Financial Court, Zhao Hong. In an interview, Judge Zhao explained that one of the main reasons for establishing the first financial court in Shanghai was to “set a Chinese adjudication standard for international financial dispute resolution and to advance the international credibility and impact of [China]’s financial judiciary.”<sup>223</sup> In 2020, the Shanghai Financial Court formed an expert panel consisting of eight international financial law academics and practitioners to consult on the adjudication of important and influential cases and the formulation of financial rules and policies.<sup>224</sup> The panel is described as “one of PRC’s most convincing efforts so far to create a very strong legal environment and robust judicial practice for the protection of foreign investors in China.”<sup>225</sup> Similarly, Jay Kesan, a law professor at the University of Illinois at Urbana-Champaign, considers the establishment of IP courts to be the most important development for IP protection in China to date.<sup>226</sup> According to Kesan, “it’s in China’s best interest to have good IP protection,” since it “will help Chinese companies within China, help Chinese companies go abroad . . . [and] also make China a more attractive place for foreign companies.”<sup>227</sup>

To better understand the causes and consequences of China’s emerging judicial specialization, I interviewed eleven lawyers who handled cases either in IP, financial, or Internet courts in China.<sup>228</sup> The interviews were semi-structured and conducted through voice calls from August 5 to October 17, 2021. Due to the disparity in the amount and type of cases handled by interviewees, the depth of discussions and opinions varied between respondents and across questions. The length of each interview ranged from forty to a hundred minutes. Several main themes arose from our conversations.

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223. Yu Dongming & Huang Haodong, *Shanghai Jinrong Fayuan: Dakai Zhongguo Tongwang Shijie de Jinrong Sifa Zhichuang* (上海金融法院：打开中国通往世界的“金融司法之窗”) [Shanghai Financial Court: Open China’s “Financial Judicial Window” to the World], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Aug. 20, 2019), <http://legal.people.com.cn/n1/2019/0820/c42510-31305343.html> [https://perma.cc/Z5ZV-FRKR].

224. Yan Jianyi & Zheng Qian, *supra* note 164.

225. Professor Emiliios Avgouleas to Advise Shanghai Financial Court on International Investment Treaties, UNIV. EDINBURGH L. SCH. (June 21, 2021), <https://www.law.ed.ac.uk/news-events/news/professor-emiliios-avgouleas-advise-shanghai-financial-court-international> [https://perma.cc/389R-BSN8].

226. Yamei, *Spotlight: How China’s Judicial Protection of IP Rights Will Benefit Its Economy*, XINHUA NEWS (June 4, 2019), [http://www.xinhuanet.com/english/2019-06/04/c\\_138116303.htm](http://www.xinhuanet.com/english/2019-06/04/c_138116303.htm) [https://perma.cc/X36B-S3PH].

227. *Id.*

228. Pursuant to requirements for human participants research by the Research Ethics Committee in United Kingdom, identifiable information has been redacted from the interview transcripts, and the respondents were referred to by their last names only during the interviews.

First, respondents generally spoke positively about the experience and subject matter expertise of specialized courts. They attributed such phenomenon either to the heightened selection standards of individual judges or the “elite group” effects.<sup>229</sup> Judges serving on IP courts “were selected and transferred from the whole region of Shanghai, [and were] regarded as experienced elites.”<sup>230</sup> Sharing common expertise in specific subject matters, specialized judges learn from each other not only from conversations on the benches but also through national judicial conferences and training in relevant legal areas.<sup>231</sup> As lawyer Li explained,

Like doctors, these judges have tried many cases [and] handled different issues, so they have the confidence . . . to try something controversial and develop their own reasoning and philosophy . . . They are experts in the field, who are already better trained than [their peers from] IP tribunals or generalist courts. When you have a group of quite prominent judges, [there is] a group effect, which will only make them better.<sup>232</sup>

In addition, several respondents illustrated that even in specialized tribunals of generalist courts, judges could not always handle cases in specific areas due to internal job rotations, which took place every one to two years.<sup>233</sup> Some judges serving in the tribunals were also recent law graduates who did not have much adjudication experience.<sup>234</sup>

In part because of their expertise and experience, specialized courts are perceived by the respondents as being more receptive to lawyers’ arguments during trial hearings than specialized tribunals or generalist courts in their respective fields. Drawing on their legal practice, lawyers Tan and Hu explained that superior knowledge in particular subject matters equips specialized judges with the capacity to evaluate the importance of arguments raised by both parties and with an open mind to consider precedents, “policy-oriented” reasoning, and “rules from foreign jurisdictions.”<sup>235</sup>

Compared to generalist courts, specialized courts are more likely to encounter novel or complicated cases, which allows ample room for

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229. Telephone Interview with Zheng, Lawyer (Aug. 10, 2021); Telephone Interview with Li, Lawyer (Aug. 14, 2021); Telephone Interview with Zhu, Lawyer (Aug. 18, 2021); Telephone Interview with Hu, Lawyer (Sept. 4, 2021); Telephone Interview with Yu, Lawyer (Sept. 16, 2021); Telephone Interview with Chi, Lawyer (Oct. 16, 2021).

230. Hu, *supra* note 229.

231. Yu, *supra* note 229.

232. Li, *supra* note 229.

233. Telephone Interview with Tan, Lawyer (Aug. 12, 2021); Hu, *supra* note 229.

234. Hu, *supra* note 229.

235. *Id.*; Tan, *supra* note 233.

arguments.<sup>236</sup> During trial hearings held by specialized courts, several respondents were comfortable citing academic findings, internationally recognized rules, and foreign precedents.<sup>237</sup> For example, the firm that lawyer Hu worked for often invited university professors to roundtable workshops, which helped to prepare expert opinions on “important, novel, and controversial cases” to be submitted to courts for consideration.<sup>238</sup>

Efficiency was another main aspect brought up by most respondents. With a good understanding of and familiarity with technical terms and applicable rules, specialized benches appear to grasp key evidence and legal issues in a timely fashion. For example, lawyer Zheng stated, “In these specialized cases, both judges and lawyers have relevant expertise, which eliminates a lot of obstacles in their communications . . . In most situations, they understand each other and it is easier [for judges] to identify and summarize the focus of contention.”<sup>239</sup> Internet courts, in particular, make all evidence and other materials available to the parties through virtual platforms.<sup>240</sup> “[T]he adjudication process is more concentrated and smoother,” Zheng added.<sup>241</sup> Furthermore, some respondents pointed out that specialized judges show a strong capability to make prompt and firm decisions, especially in novel and controversial cases.<sup>242</sup> “You can imagine that a [complex] case might take a very long time for a generalist court to decide,” lawyer Fu said, “because the presiding judge would need to understand [the issue] first, and then discuss it with other bench members.”<sup>243</sup> If the case is influential or involves a large amount of money in dispute, it needs to go through the adjudication committee or be reported to the court at a higher level.<sup>244</sup> Fu stated, “[I am] not saying that the same type of cases would definitely be handled better in specialized courts, [the difference is that] judges in specialized courts can decide these cases more efficiently, which would send a positive signal to the market.”<sup>245</sup> Lawyer Fu further elaborated:

Financial activities prioritize efficiency . . . if important and typical financial disputes take a long time, or even several

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236. Zheng, *supra* note 229.

237. *Id.*; Telephone Interview with Zhong, Lawyer (Oct. 17, 2021); Tan, *supra* note 233; Li, *supra* note 229; Hu, *supra* note 229.

238. Hu, *supra* note 229.

239. Zheng, *supra* note 229.

240. *Id.*

241. *Id.*

242. Telephone Interview with Fu, Lawyer (Aug. 5, 2021); Telephone Interview with Wang, Lawyer (Aug. 24, 2021); Hu, *supra* note 229; Li, *supra* note 229; Chi, *supra* note 229; Zheng, *supra* note 229; Tan, *supra* note 233.

243. Fu, *supra* note 242.

244. *Id.*

245. *Id.*

years, to decide, this type of financial activities could be paused as both transactional parties would want to learn the rules... [Specialized courts] can deal with cases that may significantly affect financial affairs more promptly so that all parties will have rules to apply and judgments to refer to . . . This will guarantee the stability of finances and investments.<sup>246</sup>

Respondents also shared their experiences where specialized courts managed to make innovations when laws were silent.<sup>247</sup> Lawyer Wang handled several securities disputes arising from false statements in the Shanghai Financial Court.<sup>248</sup> She explained that to subject accounting firms and stock brokerages to any damages in civil or commercial cases in the past, courts had to await the decisions of violations and penalties made by administrative agencies.<sup>249</sup> This common practice, however, delayed many investors in getting their money back.<sup>250</sup> When the publicly listed companies bearing substantial liabilities had no assets to compensate, investors could hardly receive any remedies.<sup>251</sup> After the Shanghai Financial Court issued a judgment that imposed monetary penalties on accounting firms and stock brokerages before administrative decisions for the first time, “the Securities Regulatory Commission of China held a press conference and stated that they would revise relevant regulatory measures according to the judgment.”<sup>252</sup> In Wang’s view, the case showed how the Shanghai Financial Court “exerted influence on legal enforcement entities and the regulatory environment through its judgment.”<sup>253</sup>

In 2014, lawyer Zhong and his team represented a defendant company who hyperlinked a source publishing other people’s work without authorization in a public account on Weibo.<sup>254</sup> The case was first decided by a generalist court, and the defendant challenged the first-instance judgment in an IP court.<sup>255</sup> At the time, there were no applicable rules to determine whether hyperlinking should be deemed to be copyright infringement if the hyperlink provider did not know and should not have known about the infringement committed by the anchored source.<sup>256</sup>

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246. *Id.*

247. *Id.*; Telephone Interview with Zhong, Lawyer (Oct. 17, 2021); Zheng, *supra* note 229; Tan, *supra* note 233; Li, *supra* note 229; Wang, *supra* note 242; Chi, *supra* note 229.

248. Wang, *supra* note 242.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Wang, *supra* note 242.

254. Zhong, *supra* note 247.

255. *Id.*

256. *Id.*

Zhong argued that the court should distinguish infringement committed by the original wrongdoer from the hyperlinking provider and consider the intent of hyperlinking providers.<sup>257</sup> His argument was rejected by the generalist court.<sup>258</sup> Zhong said, “It was a novel case in 2014. There were no specific rules... You explained [the hyperlinking issue] to the [generalist] court. They did not understand at all. What can you do?”<sup>259</sup> However, in the second instance, the specialized court considered Zhong’s legal opinions and found the hyperlinking provider did not have the intent of infringement and thus bore no liability for damages.<sup>260</sup> This has become the common approach for determining the liability of hyperlinking providers in the following years.<sup>261</sup>

In another example raised by respondents, a financial court filled a statutory gap by clarifying the scope of banks’ obligations in risk disclosure when selling private equity products to clients.<sup>262</sup> Lawyer Chi commented, “That the court so decided in the absence of clear provisions in law was an innovation . . . [F]rom the perspective of the society, [the court] protected consumers’ interests and identified an inadequacy of the financial organization, . . . which helped banks to make relevant amends.”<sup>263</sup> He thought the case would have an exemplary effect on future adjudication in terms of regulating powerful financial institutions like banks.<sup>264</sup> “The first-instance court contemplated from a traditional contract law aspect, while the [specialized] court’s way of thinking on adjudication and [its] formulation of rules was more advanced,” he added.<sup>265</sup>

When I asked about the driving forces behind the innovations of the specialized judiciary, lawyer Zheng’s comments were insightful.<sup>266</sup> He said,

[As] the function bore by specialized courts is to push the boundary of innovations and to engage in judicial innovations, judges have greater motivations and wider politically correct grounds to innovate. [G]eneralist judges, however, do not have such systematic protection. [Furthermore,] specialized courts are more likely to produce typical judicial cases. That is why judges have the motivation to engrave their names in provincial or national

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257. *Id.*

258. *Id.*

259. Zhong, *supra* note 247.

260. *Id.*

261. *Id.*

262. Chi, *supra* note 229.

263. *Id.*

264. *Id.*

265. *Id.*

266. Zheng, *supra* note 229.

top ten cases on certain subjects. Therefore, when specialized courts handle novel cases, judges favor detailed reasoning. [Lawyers] arguing something theoretically innovative can be acceptable because [these cases] are novel, and relevant statutory and adjudicatory rules are not clear . . . [The specialized judiciary] is to show the whole world China's judicial strengthens, so it has the motivation to [innovate].<sup>267</sup>

Lawyer Chi contended that the specialized courts also explore different ways of adjudicating cases in specific fields that, if successful, could be implemented nationwide.<sup>268</sup> Indeed, with China's recent trend toward judicial transparency and the national implementation of the "similar-case-search" mandates,<sup>269</sup> the judgments of specialized courts could have an impact on generalist courts across Chinese regions. Eight out of eleven respondents told me they would search for and consult similar cases decided by specialized courts even when handling cases in courts sitting elsewhere.<sup>270</sup> Lawyer Hu considered this approach to be "very necessary."<sup>271</sup> She elaborated, "As the purpose of establishing specialized courts is to gather a group of judges with adjudication experience and expertise to [decide certain types of cases], the judgments given by [these judges] have very strong guiding effects, and we will definitely look for [their] judgments of similar cases."<sup>272</sup> She said she would consult prior judicial decisions handed down by specialized courts, including those not from the region where she was litigating.<sup>273</sup> When lawyer Wang handled a novel, controversial securities case in an intermediate court in Fujian province, she submitted to the court over ten judgments given by specialized courts.<sup>274</sup> She said, "Although the court has yet to decide, during trial hearings, I could tell judges considered [the judicial decisions I submitted]."<sup>275</sup>

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267. *Id.*

268. Chi, *supra* note 229.

269. Zuigao Renmin Fayuan Yinfa Guanyu Tongyi Falv Shiyong Jiaqiang Leian Jiansuo de Zhidao Yijian Shixing de Tongzhi (最高人民法院印发《关于统一法律适用加强类案检索的指导意见(试行)》的通知) [Notice by the Supreme People's Court on the Guiding Opinions concerning Unifying the Application of Law and Strengthening the Retrieval of Similar Cases (for Trial Implementation)] (promulgated by the Sup. People's Ct., July 15, 2020, effective July 31, 2020).

270. Zheng, *supra* note 229; Li, *supra* note 229; Hu, *supra* note 229; Chi, *supra* note 229; Zhu, *supra* note 229; Yu, *supra* note 229; Wang, *supra* note 242; Fu, *supra* note 242.

271. Hu, *supra* note 229.

272. *Id.*

273. *Id.*

274. Wang, *supra* note 242.

275. *Id.*



In addition, a favorable ruling from specialized courts could help some lawyers get their cases accepted by generalist courts. Lawyer Zheng shared his tactics with me.<sup>276</sup> One of his clients was a company in Hangzhou, which lent private loans to car buyers and ended up with over 200-million-yuan of non-performing assets.<sup>277</sup> “Many courts would not want to accept cases filed by these kinds of companies. Because once a case is accepted, thousands of [parallel] cases will be funneled in,” he explained.<sup>278</sup> Given the Hangzhou Internet Court’s greater ability in batch-processing cases through its automated adjudication system, the Court would be more likely to accept such cases.<sup>279</sup> Therefore, lawyer Zheng first brought a series of disputes arising from the company’s non-performing loans to the Hangzhou Internet Court.<sup>280</sup> Once he received a favorable judgment, he used it as proof and filed similar cases in generalist courts from other regions.<sup>281</sup> Although “[i]t doesn’t mean [the generalist courts] have to decide in the same way, [the disputes] all have very similar facts and applicable laws,” so a favorable judgment in a specialized court gives them solid ground for arguments.<sup>282</sup>

Interestingly, foreign clients represented by the respondents showed a particular interest in bringing their lawsuits to specialized courts.<sup>283</sup> Take IP cases, for instance. Lawyer Zhu told me that if a case had any connections with Beijing or Shanghai and could be filed in the IP court, her foreign clients would prefer to sue in the IP court.<sup>284</sup> A general concern her clients had was that “if the defendants were from a region with massive forgeries, [they] would not be able to overcome local protectionism.”<sup>285</sup> “Because jurisdiction [over IP cases] has different determinants, such as the place where the alleged infringement occurred and the defendant’s domicile,” some of Zhu’s foreign clients secured jurisdiction by collecting and notarizing infringement evidence at industrial expositions hosted in Shanghai.<sup>286</sup> In so doing, Shanghai became the location where the alleged infringement took place.<sup>287</sup> “Especially [with] foreigners,” Zhu explained, “their trust over the judicial environment in Beijing and Shanghai is higher . . . The more

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276. Zheng, *supra* note 229.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. Zheng, *supra* note 229.

282. *Id.*

283. Tan, *supra* note 233; Li, *supra* note 229; Zhu, *supra* note 229.

284. Zhu, *supra* note 229.

285. *Id.*

286. *Id.*

287. *Id.*

developed a region is, the more open and transparent it gets.”<sup>288</sup> Lawyer Li attributed his foreign clients’ preference of litigating in specialized courts to transparency, experience, and predictability:

[A]ll three IP courts have their WeChat channels and all kinds of social media platforms. They are active in writing articles that express their opinions about certain judgments, including the ones they handed down. That is something making them more visible to the community, compared to IP tribunals and generalist courts... My clients often read the articles published by these [specialized] courts.<sup>289</sup>

In addition, when asked whether specialized courts were less subject to external influences from local authorities and large businesses than generalist courts when handling cases of the same kind, eight out of eleven respondents either felt indifferent or indicated that it was hard to determine.<sup>290</sup> However, among the three respondents with a positive answer, all of them mentioned that the cross-regional jurisdiction of specialized courts helped avoid local protectionism.<sup>291</sup> Specialized courts follow their own rules for personnel, finances, and facilities. Their budgets and appointments are overseen by provincial-level governments.<sup>292</sup> As such, lawyer Zheng thought specialized courts “are more independent and likely to detach themselves from local authorities.”<sup>293</sup> While the centralization of court management was a part of judicial reform for generalist courts, “the difficulties facing [generalist courts in] . . . achiev[ing] this goal [are] far greater than specialized courts . . . Because specialized courts are [set up] for pilots and experimentation, they have the condition to realize such an objective,” he explained.<sup>294</sup>

To illustrate the potential impact of local companies on judicial outcomes, lawyer Zheng used the example of Tencent, infamously known as “who must triumph in Nanshan (‘Nanshan bishengke’),” a tech giant that has won a large majority of cases in the basic-level generalist court of Nanshan district where the headquarter of the company is.<sup>295</sup> He

288. *Id.*

289. Li, *supra* note 229.

290. Telephone Interview with Lv, Lawyer (Oct. 17, 2021); Fu, *supra* note 242; Tan, *supra* note 233; Wang, *supra* note 242; Hu, *supra* note 229; Zhong, *supra* note 242; Zhu, *supra* note 229; Yu, *supra* note 229.

291. Zheng, *supra* note 229; Li, *supra* note 229; Chi, *supra* note 229.

292. *See* Zheng, *supra* note 229.

293. *Id.*

294. *Id.*

295. *Id.*; *see* “Longgang Wudishou”, “Nanshan Bishengke”, “Haidian Budaowen”, Ningde Shidai: “Cangshan Bulaosong” (“龙岗无敌手” · “南山必胜客” · “海淀不倒翁” · 宁德时代: “仓山不老松”) [“Longgang Unbeatable,” “Nanshan Who Must Triumph,” “Haidian Tumbler”,

added, “Alibaba has lost several cases in the Hangzhou Internet Court, and some interpreted this as the Internet court making known its position.”<sup>296</sup> Lawyer Li commented on the elevation of appellate courts for highly technical IP judgments to the SPC as a bold move to ensure the quality of IP courts’ decisions and their autonomy from local interference.<sup>297</sup> He stated,

This is different from before when [IP] cases would not go beyond the province-level. [In the past,] although these judgments could be reviewed by courts at a higher level, first-instance courts would not “lose face” in the Supreme People’s Court. Now the second instance of certain cases is tried by the SPC. Everyone involved will have some concerns . . . [L]ocal protectionism will be less and less.<sup>298</sup>

Overall, the interviews revealed legal practitioners’ feedback based on their own interactions and experiences with the three new types of specialized courts established in China over the last decade.<sup>299</sup> The findings generally hint at the causes of China’s recent revival of judicial specialization and the impact of judicial elites on legal and economic developments. Most of the respondents noted the greater willingness and capabilities of specialized courts to innovate in the course of adjudication and decision-making, especially when handling novel and controversial cases. This phenomenon might be due to their institutional status as a national hub for policy experimentation and their judges’ superior knowledge of specific subject matters. Because of the accessibility of decided cases and the implementation of the similar-case mandates, the reasoning crafted by specialized judges could impact and inspire their peers sitting in general courts across the country. Furthermore, specialized courts, with a focus on private rights and their detachment from grassroots authorities, seem to be a more efficient and transparent

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Contemporary Amperex Technology: “Cangshan Forever-young Pine”, Zhichan Qianyan (知产前沿) [IP ForeFront], <https://zhuanlan.zhihu.com/p/392966579> [<https://perma.cc/265Z-FEHH>] (last visited Aug. 12, 2022).

296. Zheng, *supra* note 229.

297. Li, *supra* note 229; see Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhuanli deng Zhishi Chanquan Anjian Susong Chengxu Ruogan Wenti de Jueding (全国人民代表大会常务委员会关于专利等知识产权案件诉讼程序若干问题的决定) [Decision of the Standing Committee of the National People’s Congress on Several Issues concerning Judicial Procedures for Patent and Other Intellectual Property Cases] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018, effective Jan. 1, 2019), arts. 1, 2.

298. Li, *supra* note 229.

299. It is worthwhile to note that lawyer Lv did not observe any differences between specialized and generalist courts. He thought that the disparities in judicial capabilities were greater between urban and rural regions than the specialized-generalist division. However, he said this “ignorance” might be because he had not dealt with any controversial or complex cases in specialized courts. See Lv, *supra* note 290.

forum for dispute resolution. Deliberately or organically, such courts were set up in regions that attract some of the country's most international capital flows. Foreign clients of our respondents showed their growing interest in bringing lawsuits to specialized courts.

B. *The Creation and Allocation of Specialized Jurisdiction:  
A Model for Institutional Design*

As Martin Shapiro explains,

[A]nxious to attract foreign investment, authoritarian regimes can be persuaded to institutionalize relatively independent and effective courts to assure investors of legal protections . . . Because they provide an authoritarian regime benefits in terms of assuring international investors, such a regime will begin to tolerate, indeed encourage, judicial decisions protecting property rights.<sup>300</sup>

By establishing a sophisticated and autonomous judiciary to resolve “disputes between property or business owners, or between owners and the state itself,” regimes, regardless of their chosen political apparatus, “signal[] to potential investors that [they are] willing to play by the rules and be subject to the laws of the state.”<sup>301</sup> One might ask whether every authoritarian government with economic incentives should establish a specialized judiciary for commerce. Singapore, for instance, was able to emerge and maintain itself as a global business hub without much help from specialized courts. Even among states that put extra effort into setting up specialized benches, the types of cases transferred out of the dockets of generalist courts varied. Specialized judicial empowerment therefore might respond to deeper inquiries about the institutional design of authoritarian courts.

Assuming that elites in authoritarian states have the power to assign any type of case to either generalist or specialized courts, the delimitation of jurisdiction would depend on the history, reputation, and pedigree of the original courts of the regime as well as the political character of subject matters. To be more specific, in a regime where an independent and reputable judiciary has long existed (an “inherited legal system,” see Table II), dismantling the original court system would either be infeasible to accomplish or would impose a considerable burden on the operation of private spheres if the general law could no longer provide sufficient protection for civil or economic activities. Instead, the ruling class could withdraw politically relevant matters from the jurisdiction of ordinary courts and turn them over to specialized courts. The English Court of Star Chamber was initially created in the reign of King Henry VII to offer

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300. Shapiro, *supra* note 156, at 330.

301. Sievert, *supra* note 155, at 776.

“relatively fast, flexible solutions to problems that other courts could not address.”<sup>302</sup> However, before its abolishment by parliament in 1641, the Star Chamber had become a court that held proceedings in secrecy and exercised discretion to punish the accused without due process.<sup>303</sup> Whilst the traditional law governing private affairs remained intact, King James I and King Charles I used the Star Chamber to suppress political and religious dissents as well as nobles resisting royal commands.<sup>304</sup> In Nazi Germany, where the “Prerogative State” exercised jurisdiction over political matters, the “Normative State” was nonetheless well kept to maintain the orderly administration of economic domains.<sup>305</sup> Meanwhile, the autocratic leaders created special benches, such as the courts-martial, to try prisoners of war and rebels of German or foreign descents in the Prerogative State.<sup>306</sup> As Fraenkel explains, “The Dual State refer[red] political crimes to a special court, despite the fact that they [we]re political questions.”<sup>307</sup> Because the jurisdiction of the Prerogative State was not legally defined in the Dual State, any types of disputes could be removed from or allocated to the Normative State.

For regimes where the courts are traditionally perceived as less independent and competent (“rebuilt legal systems,” see Table II), creating a specialized jurisdiction for commerce is beneficial provided that property rights and commercial activities are protected by relatively professional, autonomous judicial institutions. In 2004, to combat the detrimental effect of corruption on economic growth, Indonesia removed the jurisdiction over anti-corruption cases from the generalist courts and assigned it exclusively to the newly-established Tipikor courts.<sup>308</sup> These specialized courts set up at the central and provincial levels, with the involvement of *ad hoc* legal experts, were created to “circumvent entirely a judicial system known to be complicit in protecting corruptors” and free judges from “undue influence by politicians or other powerful actors.”<sup>309</sup> Another notable example is the establishment of the SCC in Egypt. Given

302. INST. OF HIST. RSCH., *STAR CHAMBER MATTERS: AN EARLY MODERN COURT AND ITS RECORDS I* (K. J. Kesselring & Natalie Mears eds., 2021).

303. See Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 738 (1913).

304. See *id.* at 737, 742, 746–47.

305. ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* 96–97, 99–102 (2017).

306. Peter Lutz Kalmbach, *The German Courts-Martial and Their Cooperation with the Police Organizations During the World War II*, 8 J. ON EUR. HIST. OF L. 2, 2–3 (2017).

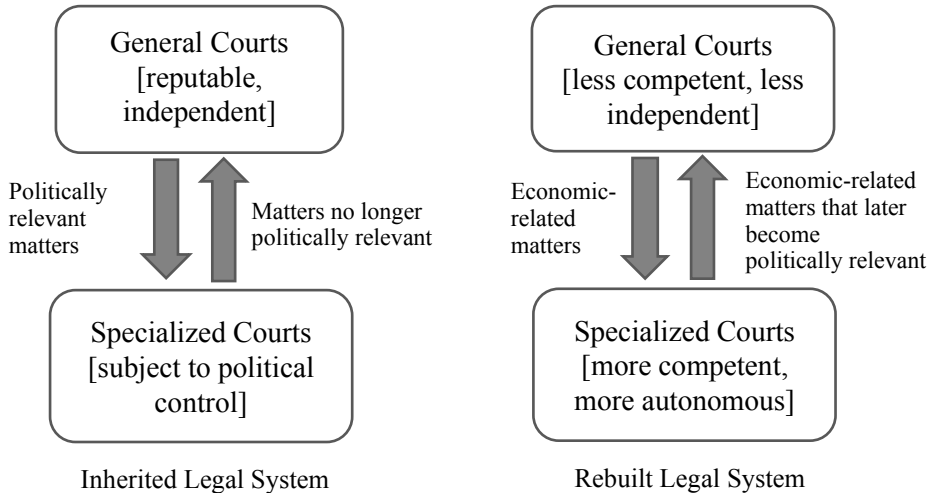
307. FRAENKEL, *supra* note 305, at 50.

308. Lígia Mori Madeira & Leonardo Geliski, *An Analytical Model of the Institutional Design of Specialized Anti-corruption Courts in the Global South: Brazil and Indonesia in Comparative Perspective*, 64 DADOS – REVISTA DE CIÊNCIAS SOCIAIS 1, 10 (2021).

309. *Id.* at 10; MATTHEW C. STEPHENSON & SOFIA A. SCHÜTTE, U4, *SPECIALIZED ANTI-CORRUPTION COURTS: A COMPARATIVE MAPPING* 12 (Dec. 2016), <https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping.pdf> [<https://perma.cc/KZ3R-HBVC>].

that the original legal system was not held in high repute by investors, the government created autonomous, specialized benches to support economic liberalization.<sup>310</sup>

**Table II: The Allocation of General and Specialized Jurisdiction**



Furthermore, whether and to what extent a subject matter is politically important can vary with time, circumstances, and the party in power. Take a rebuilt legal system, for instance. If a case becomes vital to the state's core interests at a later time, the ruling elites should still be able to, at any point, channel the case from the specialized courts back into the generalist courts. Accordingly, the specialized courts mainly play one of two functions: (1) handling certain cases by professional judicial elites or (2) increasing the costs of political intervention to withdraw any cases from the specialized benches. When Indonesia first established Tipikor courts, the government did not seem enthusiastic to handle anti-corruption cases exclusively in the courts subject to its control. However, Tipikor courts and the Corruption Eradication Commission, with growing capacity and integrity, went on to target powerful corruptors, including senior parliamentarians and a close family member of the President.<sup>311</sup> Once the jurisdiction over corruption became more politically sensitive, the power of the specialized judiciary started to face increasing political

310. Moustafa, *supra* note 200, at 885.

311. Simon Butt, *Asian Law in Translation: Translator's Note on the Indonesian Corruption Court Law. The Unravelling of Indonesia's Anti-Corruption Framework Through Law and Legal Process*, 11 AUSTRALIAN J. ASIAN L. 302, 303–04 (2009).

suppression.<sup>312</sup> Due to the specialized courts' heightened transparency, external interference with their affairs drew significant public backlash which might, to some extent, restrain the leviathan.<sup>313</sup> Similarly, the political interest of the People's Republic in IP, financial, and cyberspace cases might be lukewarm at present while relatively autonomous specialized courts were created in respective areas to attract foreign capital. Still, the government retains the power to withdraw this jurisdiction from the specialized judiciary, whenever it turns out to be more politically relevant. Thus, what the establishment of the specialized courts may assure global investors is that government intervention in any IP, financial, or cyberspace cases handled by these courts will be more visible and costly than before.

### CONCLUSION

The transformation of the Chinese economy is one of the greatest events in the last half-century. Since its reform and opening-up in 1978, China's economic liberalization and advancement has made it a top destination for international businesses. Yet foreign investors' reservations about the country's legal environment and judicial capability continue to grow. These concerns often involve whether investors' private rights are adequately protected in the Chinese market, whether local protectionism will prevent companies from receiving a fair judgment against bureaucracies and home enterprises, and whether courts are able to respect international rules and resolve disputes timely and effectively. To maintain and boost global investors' confidence in the legal environment, Beijing could draw on the Singaporean experience by furnishing courts across the country with a higher level of autonomy and a more selective and independent judicial appointment system. This goal would, however, take considerable time and resources to realize. More importantly, its fulfillment could allow judges to obtain more leverage for policy reform and social movements than political elites would prefer. Alternatively, China could mirror the practices of Egypt and Spain by empowering a fragment of its judiciary. But unlike their approaches, China has not created a powerful forum for grievances against violations of fundamental rights, and no efforts have been made to grant generalist judges life tenure and place economic-related cases in the hands of special tribunals under the state's close watch. Instead, China has embarked on the empowerment of courts with expertise in areas that align with the nation's core economic interests but their abilities to generate political contestation are constrained by their jurisdictional limitations.

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312. Madeira & Geliski, *supra* note 308, at 12; Christian von Luebke, *The Politics of Reform: Political Scandals, Elite Resistance, and Presidential Leadership in Indonesia*, 29 J. CURRENT SE. ASIAN AFFS. 79, 85–89 (2010).

313. von Luebke, *supra* note 312, at 87–88.

As more skillful, less powerful agents, specialized courts can be entrusted by the party-state—the principal—to deliver prompt, refined judgments, formulate innovative rules in the fields of IP, finance, and the Internet, and rectify local power abuses detrimental to national economic growth.

From a comparative perspective, the Chinese experience represents one of many possible designs of courts in authoritarian regimes. Depending on the history and reputation of the country's original courts, different authoritarian regimes might require different distributions of general and special jurisdiction. In addition, the types of disputes that are politically relevant could change over time. Consequently, the regime would need to re-allocate certain subject matters between generalist and specialized jurisdiction. Thus, a thorough assessment of specialized judicial empowerment can shed light into the strategic use of courts by authoritarian regimes in subverting the rule of law while fostering commerce and keeping private affairs in order.

As an early effort to investigate specialized judicial empowerment, this Article invites scholars to further explore the functions of specialized courts in policymaking and state governance. Important questions to investigate may include, but are not limited to, whether judgments of specialized courts have a statistically significant impact on future judicial outcomes of generalist courts, whether there are any substantial differences between opinions by generalist and specialized courts in fields subject to both courts' jurisdiction, and whether the type of regime—either authoritarian or democratic and either developing or developed—plays a role in the growth and impact of an emerging specialized judiciary.

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