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# Institutional Purposes of Chinese Courts<sup>1</sup>: Examining Judicial Guiding Cases in China through A New Analytic Framework

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## 1. Introduction

In recent years, empirical lights start to shine upon the dormant studies of authoritarian courts. For example, Ginsburg and Moustafa has identified several functions authoritarian courts delivering to the regime and constraints imposed by authoritarian regimes<sup>2</sup>. In addition, there are also a few pilot studies drawing empirical data from People's Republic of China (PRC) courts to test general hypotheses of judicial studies in authoritarian contexts<sup>3</sup>. On the other hand, existing literature of Chinese judicial studies are quite fruitful<sup>4</sup>. However, existing literature on Chinese Legal Studies are largely insufficient to provide a comprehensive theoretical framework for understanding how PRC courts, as institutions, evolve in China's authoritarian context. Likewise, for global judicial studies, although genuinely insightful, they also failed to answer a similar question: apart from being "active servant" of the

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<sup>1</sup> By "context", we follow the contextualism which tended to subordinate political phenomena to contextual phenomena such as economic growth, class structure, and socioeconomic cleavages. Simply put, contextualism means politics and the state largely depend on society its operated. James March & Johan Olsen, "The New Institutionalism: Organizational Factors in Political Life"(1984) 734 at 735

<sup>2</sup> These functions include but not limit to exerting social control, increasing legal legitimacy, strengthening administrative compliance within the bureaucracy, facilitating trade and investment, and implementing controversial policies. Equal importantly, given that authoritarian courts are "double-edged sword", there are also several common strategies for authoritarian regimes containing courts: promoting judicial self-restraint, engineering fragmented judicial systems, constraining the access to justice, and incapacitating judicial support networks. Although not all these functions and constraining strategies equally apply to every authoritarian (including PRC) court, at least some of them are in common. Tom Ginsburg & Tamir Moustafa, "Introduction: The Functions of Courts in Authoritarian Politics" in Tom Ginsburg & Tamir Moustafa, eds, *Rule by Law, The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) 1 at 4, 14-21

<sup>3</sup> These include Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes", in Ginsburg & Moustafa, *ibid*, 59; Pierre Landry, "The Institutional Diffusion of Courts in China: Evidence from Survey Data", in Ginsburg & Moustafa, *ibid*, 207. See also Moustafa's insightful review of the literature on the role of courts in authoritarian regimes, Tamir Moustafa, "Law and Courts in Authoritarian Regimes" (2014), 10 *Annual Review of Law and Social Science* 281; John Gillespie & HY Albert Chen eds, *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (New York: Routledge, 2010)

<sup>4</sup> Indeed, we could describe current China Legal Studies according to their perception regarding relationship between court and PRC authoritarian Party/State. Thus, they could be categorized as Pessimistic scholarship, Optimistic Scholarship and Pragmatic Scholarship. Pessimistic scholars have brilliantly described the cage of authoritarianism in China, they however generally regard such cage as literal and static, and they also fail to establish the centrality of "courts" in their research. Positive scholars often underemphasize the authoritarian impacts on courts and focus too much on what authoritarian context positively support judicial development, though they have provided several meaningful observations. Pragmatic scholarship come most closely to the institutional characters of courts, but there are few, if any, of them built a comprehensive framework that could capture institutional dynamics in both ordinary justices and other more sensitive cases in China. See, for example, Stanley B. Lubman, *Bird in a Cage, Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999); Zhang Qianfan, "The People's Court in Transition: The prospects of the Chinese judicial reform" (2003) 12:34 *Journal of Contemporary China* 69; Randall Peerenboom, "The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?"(2014) 2:2 *The Chinese Journal of Comparative Law* (2014) 188; Benjamin L. Liebman, "China's Courts: Restricted Reform" (2007) 21 *Colum. J. Asian L.* 1; Eric C. Ip, "The Supreme People's Court and The Political Economy of Judicial Empowerment in Contemporary China" (2010) 24 *Colum. J. Asian L.* 367; Zhu Suli, "The Party and the Courts", in Randall Peerenboom in Randall Peerenboom ed., *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge: Cambridge University Press, 2009) 52; Zhang Taisu, "The Pragmatic Court: Reinterpreting The Supreme People's Court of China" (2012) 25 *Columbia Journal of Asian Law* 1

authoritarian rulers, do authoritarian courts have their own agenda? Does similar institutional dynamics of courts manifest in China, even it is seemingly atypical? In other words, whether we should put the institutional characters of PRC courts into the established model as already has been tested courts in elsewhere, or put forward new conceptions for capturing unique institutional characters of Chinese courts?

In 1954, Hoebel's *The Law of Primitive Man* has noted that even in the primitive law, there are some things that we are familiar but in different form<sup>5</sup>. Our thinking pattern might limit our perception of unfamiliar legal forms.<sup>6</sup> Indeed, when we start from the universe of experience of dealing with court based on Continental and Anglo-American law into the world of authoritarian justices, we might be blind for discovering something different in forms but similar in the core. Indeed, PRC court as judicial institution is something different in forms but similar in the core. In particular, one of the crucial question is, empirically speaking, what are Chinese judges' agenda? Do they have their own purposes as institution? This is one of the fundamental question regarding empirical studies of Chinese court that remains to be explored.

Indeed, in the real world, one living in China will be baffled that what drive a judge or court to make decision. For example, the traffic police department determined the liability of traffic accident. In theory, while one party in the traffic accident is unsatisfied with traffic accidents report issued by the police, she has the right to bring up administrative litigation. From one could observe, however, is courts in Shenzhen generally refuse to accept most traffic accident

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<sup>5</sup> E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge: Harvard University Press, 1954) at 19-20

<sup>6</sup> Hoebel refused to wear the hat of common-law style court-centric understanding, which, as summarized by Cardozo, "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be **enforced by the courts** if its authority is challenged." Hoebel believed that, "when we consider legal matters in many primitive societies, if we must rely on courts and their predicted actions as the test of law, we are still left at sea." He instead defines law as the following terms: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." See *Ibid* at 22-23, 28

cases, even though the Supreme People's Court (SPC) has specifically encouraged lower courts to take these cases. This is really interesting because the Shenzhen courts choose to draw back from possible judicialization. Why? In a conference, a senior judge in the Shenzhen Intermediate People's Court provided two reasons. First, currently courts do not have enough resources to deal with these cases, simply because there are hundreds or thousands of these cases happen on everyday basis. Second, the Intermediate Court seems to reach a consensus that "if traffic accidents cases do enter the substantial litigation, it would be a huge waste of police resources, since it is impossible to recreate the accident scene". Instead, the courts choose to "trust" the judgment of the traffic police. "I believe they might only make one mistake among a hundred cases", said by a senior judge of Administrative Litigation Division of Shenzhen Intermediate Court in a closed-door lecture<sup>7</sup>. Thus, if we closely look at the authoritarian judicial system, institutional purposes of courts (and judges) seems to be diverse and even counterintuitive. It goes far beyond some assumptions that authoritarian court such as the Chinese courts are just the prawn of state power, or just simply perform several functions for the regime. They indeed have their own agenda.

This empirical research takes on institutional perspective to capture and conceptualize important institutional purposes of Chinese court through a new framework, which analyzes institutional self-interest, policy preferences in Supreme People's Court (SPC) guiding cases in PRC courts as entry point for testing our theoretical hypothesis of institutional purposes. Importantly, the institutional perspective is embedded with social-legal and interdisciplinary nature. Thus, by extension, we should keep an open mind toward methodological pluralism. Importantly, although divergence exist, both interdisciplinary approach and traditional social-legal approach to examine China court is through conceptualization. Conceptual analysis

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<sup>7</sup> The lecture is a closed-door lecture in a university in November, 2016 in Shenzhen, China. We are instructed by the organizer and speaker that we could not disclose the exact date and place of the lecture.

requires researchers to avoid capturing by the facts, but rather encapsulate the facts with certain concepts<sup>8</sup>. In this article, Conceptualization would be employed.

Apart from this section, Part 1 as introduction, the following parts of this article will be constructed as following sections: Part 2 will establish theoretical framework and elaborate our new analytic framework for examining institutional purposes of PRC Court. Part 3 will be case analysis. In this section, we will first introduce case categorization in China's context, and then introduce the Guiding Case System in China issued by the SPC. We then, critically examine how different types of guiding cases reflect varied institutional purposes of Chinese courts. Part 4 will first compare guiding cases by examining institutional purposes in selected hyper-political cases, and to present our main findings regarding institutional purposes of PRC courts in guiding cases system. Part 5 concludes.

## **2. Theoretical Hypothesis: Institutional Perspective and Institutional Purposes**

### **2.1 Taking PRC Courts as institutions seriously: Institutional Nature, Institutional Purposes and Institutional Maneuvers**

The theoretical framework of this research takes on institutional perspective to capture and conceptualize important institutional characters of court, which has shifted our attention from how courts deliver functions to the authoritarian regime to the institutional nature of judiciary<sup>9</sup>. Institutionalism “focus on how formal and informal rules and procedures of a

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<sup>8</sup> In Potter's research on China's Legal System, for instance, instead of examining different sectors of public law separately, Potter has chosen the Concept “Political Stability” to summarize the changing Constitution, development of criminal law and administrative law in PRC. Likewise, the concept “Economic Prosperity” contains major development of private law in China, including contract law, torts, corporate law and etc. In each section that conceptualized by these concepts, he then has explicitly analyzed how the legal development in China has been “captured” by these concepts. See Pitman B. Potter, *China's Legal System* (Cambridge: Polity Press, 2013) at 5

<sup>9</sup> A stipulative definition of political institutions is: “collections of interrelated rules and routines that define appropriate actions in terms of relations between roles and situations. The process involves determining what the situation is, what role is being fulfilled,

given institution actually did influence, constrain, and sometimes even determine what organizations and actors do<sup>10</sup>”.

On the one hand, we view court as governance institution delivering public goods, where judges have the need and capacity to camouflage political actions in legal discourse and substance of judicial choices<sup>11</sup>. On the other hand, we must not overlook the unique characters of court as judicial institution. Judiciary have their own logic in addition to logic as governance institution. A modern court generally operates on both logics, although the degree of each logic may be manifested differently according to concrete situations.

To takes on institutional perspective, we first come to the realization that, as courts in elsewhere, Chinese court is (at least a huge part of) a quintessential third-party dispute resolver (TDR)<sup>12</sup>. Like courts in elsewhere, Chinese courts also face crisis of triadic legitimacy and it is further aggravated by the fact that court performing other two roles. Indeed, “courts are courts of law<sup>13</sup>”, i.e., the appearance of triadic structure<sup>14</sup> and speaking the law languages are two important weapons for Chinese courts to defend their image of neutrality (institutional integrity) and expand their territory.

The second pillar of institutional character of PRC courts is institutional purpose. Indeed, Chinese courts, like courts in elsewhere, are living organs have their own institutional

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and what obligation of that role in that situation is”. Guy Peters, *Institutional Theory in Political Science: The New Institutionalism*, 3d ed (New York: Continuum Books, 2012) at 29-30

<sup>10</sup> Shapiro & Sweet, “Law, Courts and Social Science”, in Martin Shapiro & Alec Stone Sweet, *On Law, Politics & Judicialization* (New York: Oxford, 2002) 1 at 10

<sup>11</sup> Martin Shapiro, “Political Jurisprudence” in *ibid* 19[Political Jurisprudence]; See also *ibid*, at 8-9

<sup>12</sup>Indeed, almost every contemporary dispute resolution mechanism is constructed as triadic structure, which consist of (at least) two disputants and one dispute resolver. TDR comprises three core elements: the dyad, the third party, and normative structure. Alec Stone Sweet, “Judicialization and the Construction of Governance” (1999) 32 *Comparative Political Studies* 147 at 148-149

<sup>13</sup> Shapiro, “The Success of Judicial Review and Democracy”, in Martin Shapiro & Alec Stone Sweet, *supra* note 10, 149 at 165

<sup>14</sup> Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: The University of Chicago Press, 1981) at Chapter 1

purposes. As the main arguments of this article, we will specifically elaborate it in the latter part.

The third pillar of institutional logic of PRC courts is institutional maneuver. In authoritarian context, the responsiveness of courts<sup>15</sup> is extremely high. Indeed, from the perspective of Principal-Agent(P-A) Model<sup>16</sup>, we could reveal the dilemma of multi-principal's problem for PRC courts<sup>17</sup>. Indeed, the multi-principal problem has generated the embarrassment of Chinese courts for the courts has to survive in the crack of complex multi-principals' environment<sup>18</sup>. We propose the term "judicial diplomacy" to capture institutional maneuvers that PRC courts dealing with such delicate and complex situation caused by multiple P-A dilemma. Judicial Diplomacy indicates the phenomenon that PRC courts, seek to achieve institutional goals by strategically "dancing" with other Party/State institutions. It answers the "how question": how Chinese courts pursue its own interest and policy preference, as a TDR institution, while performing important functions such as social control in authoritarian context<sup>19</sup>.

## 2.2 Institutional Purposes: Self-interests and Preferring Values of PRC Courts

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<sup>15</sup> Indeed, court is a highly responsive institution which often responds to change around them, and this is fundamentally because courts cannot do much without the assistance from other parts of government and/or popular support. Success of Judicial Review, *supra* note 13 at 165; see also David Law, "How to Rig the Federal Courts" (2011) 99 Geo LJ 779 at 791-793

<sup>16</sup> In fact, the Principal-Agent relationship is a common phenomenon. And the P-A theory highlights the fact that the agent has her own interests, which may conflict with those of the principal. Therefore, a vital challenge for the principal is to design an incentive structure to ensure that the agent follows the principal's objectives—a goal become more difficult due to the fact that the principal typically lacks complete information about the agent's efforts and the context in which she acts. See Pauline T. Kim, "Lower Court Discretion" (2007) 82 NYUL REV 383 at 401-402

<sup>17</sup> Instead of a monolithic whole, for courts, PRC Party/State governance structure could be viewed as several major "principals". Under the authoritarian rule, of course, these principals share important common interests, but they have their own interests and preferring goals simultaneously. Indeed, a classic classification of these multi P-A relationship of Chinese courts could be described as follows: (1) Central Party and National Government of PRC; (2) Gong Jian Fa System, including Politico-Legal Committee (PLC), Public Security Bureau, Procuratorate, and maybe the recent established supervisory (jiancha, 監察) organ; (3) Local Party/State; and (4) (For lower courts) Higher Courts.

<sup>18</sup> On the one hand, the interaction between courts and these principals could be roughly understood as different functions that courts deliver to each major principal. On the other hand, obviously, the court will seek varied endorsement and support from different principals. Moreover, conflicts are anticipated between common authoritarian goals and specific institutional purposes of each principals.

<sup>19</sup> For example, there are two common phenomena could be used to concretize the abstract term to examine how judicial diplomacy works. The first one is SPC's terminological game, where the supreme court make political gestures to show political loyalty to the central CCP in exchange for "blessing" from the Party. The second phenomenon is "bureaucratic sympathy and coordination", a long tactic that local courts utilize bureaucratic sympathy to obtain certain level of legitimate and substantial support and coordination(peihe, 配合) from different principals in order to achieve institutional goals.

Inspiring by the philosophical principle of consequentiality and principle of appropriateness, we construct a model for examining institutional purposes of PRC courts by differentiating between self/institutional interests and preferring values of courts (and judges). On the one hand, we first make the assumption that institutional and individual self-interests of PRC courts are imbedded in judicial behaviors. On the other hand, we assume preferring policies and values PRC courts find desirable are another major type of institutional goals. We further divide these preferring values of PRC courts into three categories: Traditional Values, Activist Values and Restraining values.

### **2.2.1 Appropriateness or Consequentiality?**

The logic of appropriateness and logic of consequentiality is important philosophical foundation to examine institutional purposes of PRC courts. The logic of appropriateness highlights the moral goods behind a behavior. In existing PRC judicial (and legal) studies, we are no strange to normative arguments, or questions asking about “right” or “wrong”, “should” or “shouldn’t”. Indeed, there are many normative arguments are insightful, but what if the “god” determining right or wrong has died? We thus need to think on a perennial argument haunting social science, the nature of human acts. That is, whether behavior of courts base on logic of appropriateness or logic of consequentiality?

The logic of consequentiality emphasizes the undesirable consequences that one fails to act may incur<sup>20</sup>. In many empirical cases, we found PRC courts are much more affected by the logic of consequence than the logic of appropriateness, as we will demonstrate in self and institutional interests of PRC courts. This is somewhat ironic in a regime that officially values “appropriateness” very much.

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<sup>20</sup> The foundation of logic of consequences, as Madison has pointed out in three hundred years ago, is the evil of human nature, one important philosophy to understand the design of legal system. Argumentation from Posner, is one influential perspective starting from the logic of consequences.



Nevertheless, in general, both individual actions or institutional choices must contain at least a portion of moral choices, considering what “ought to be done”. Indeed, institutional analysis also suggest that generally institutions have their own preferring values, not to mention that the judicial nature of courts, as judicial institution, involves significant moral choice making process. For example, how to be “fair” and “neutral” in resolving disputes? Among institutional theories, some (such as normative institutionalism) treat organizations as more adaptive and normative structures, an institution as expressing “logic of appropriateness”. Simply put, the logic of appropriateness highlights the moral goods behind a behavior. They claim that “participation in integrative institutions is undertaken on the basis of commitment to the goals of the organization, or at least an acceptance of the legitimate claims of the organization (or institution) for individual commitment-again, preference formation is endogenous to the institution”<sup>21</sup>. For example, March and Olsen argues that institutions have “logic of appropriateness” that influences behavior more than the “logic of consequentiality”<sup>22</sup>. Although we might get too far to accept March and Olsen’s judgment, we could still safely assume that the logic of appropriateness must to some degree account for logic of judicial behavior in PRC. Recognizing this, we answer the question “what are Chinese courts looking for” by dividing the institutional purposes of PRC courts into self/institutional interests and preferring values/policies.

### **2.2.2 Self-Interest of Chinese Courts: Institutional and Individual Perspectives**

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<sup>21</sup> “In this context, the logic of appropriateness created by membership in the institution- along with the routines, standard operating procedures, and symbols that help to define the institution: provide the context of behavior of the members.” See *supra* note 7 at 27-29

<sup>22</sup> *Supra* note 9 at 30

Under our theoretical hypothetic framework, both institutional and self-interests are imbedded in judicial behaviors of PRC courts, as major institutional purposes, reflecting largely the “principle of consequentiality”.

On the one hand, judges in China have the general tendency to pursue their own personal interest “as everybody does”. Following Posner, we model the judicial utility functions to view judges as ordinary people responding rationally to ordinary incentives<sup>23</sup>. Indeed, even mere empirical experience when one living in China for years could easily see judges do share many of these ordinary incentives. In particular, Chinese judges lacking financial and career secure make they tend to reflect “judicial maximization” on material interests and career safety. Thus, it is possible to define several common self-interests for Chinese judges. Although these self-interests varies according to different circumstances, we are able to identify at least several common “interests” for Chinese judges: (1) Salary and other material treatment; (2) Workload, which directly relate to caseload and other administrative affairs; (3) Career security and advancement; (4) Personal reputation, popularity and prestige, which are similar to Posner’s analysis of American judges to “seek prestige” among the lawyers and litigants who bring case before the judges<sup>24</sup>. Further, in Chinese culture, “face” or “*mianzi*” could be one important type of personal reputation. In addition, in the extreme form, corruption may also be categorized into another type of “self-interest”.

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<sup>23</sup> In 1974, Richard Posner’s “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)” has presents a positive economic theory of the behavior of appellate judges and judges in the US. His central point is that the judges have significant economic incentives to pursue their own self-interest, and models the judicial utility functions to view judges as ordinary people responding rationally to ordinary incentives. In this research, the central concern is basically designed to show what individual self-interest a judge go through during mental process in order to make that particular judicial behavior. To be more specific, Posner identifies some core elements of the judicial utility functions including: (1) Popularity and prestige, which refers to judges’ incentive to “seek prestige” among “the lawyers and litigants who bring case before the judges”. (2) Avoiding reversal and obviously (3) Personal reputation. Posner view judge as spectator and as gamester, but he rule out the consideration of public interest because it is “inconsistent with an approach that treats judges as ‘ordinary beings.’” In addition, factors such as judges’ social background or life experiences, and their desire to clear their dockets are likely to play a role in the interstices of the law. See Richard A. Posner, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)” (1993) 3 Sup Ct Econ Rev 1 at 1-3

<sup>24</sup> *Ibid* at 10

On the other hand, under rational/utilitarian framework, an institution, court also would have the general tendency to enlarge its own scope and influence of power. Courts, indeed, share intrinsic tendency of institution to self-empower in order to secure its institutional financial interest and enhance social-politico status. And since the foundation of judicial empowerment depends on its nature as professional TDR institution, judicial professionalism is in the center of institutional interests of PRC courts to increase institutional power. Indeed, even taking accounting of disparity between self-interest of individual institutional member and the collective interest of institution, a rational judge or official in the court probably would not oppose measures that increases judicial professionalism for empowering the court in institutional level. In this regard, we would also make connection with pragmatic scholarship in China legal studies suggesting courts have institutional tendency for increasing their professionalism to make more “impacts”<sup>25</sup>. Law, or “normative preference”<sup>26</sup>, as important tool to enhance institutional interest and meta-policy preference for courts as judicial institutions. In other words, law, legal doctrines and legal norms, have independent normative force that cannot be reduced to purely strategic explanations for achieving other public policies<sup>27</sup>. Courts and judges may care more about normative goals, i.e., faithful to law, or choosing appropriate legal values than substantial policies in many cases, as independent preferences separating them from many other governance institutions. Indeed, in many

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<sup>25</sup> As some pragmatic research did. For example, see Zhang Taisu, “The Pragmatic Court: Reinterpreting the Supreme People’s Court of China” (2012) 25 Columbia Journal of Asian Law 1; see also, Eric C. Ip, “The Supreme People’s Court and The Political Economy of Judicial Empowerment in Contemporary China” (2010) 24 Colum. J. Asian L. 367

<sup>26</sup> The conception of “normative preference” is provided by Pauline T. Kim’s “Lower Court Discretion”, which typically model the judicial hierarchy regarding principal-agent relationship. She tries to argue when lower courts implement policies set by US Supreme court, law also shapes the decision-making environment of the lower federal courts. Complying with Supreme Court’s precedent is important factors for lower courts judges making independent judgments. Importantly, Kim argues that, discrete power is the room where judges could pursue their policy preference and normative preference. At last but not the least, in terms of normative preference, the fact that lower courts may not necessary comply with Supreme Courts’ precedents may move against the centralization of Supreme Court’s power. For example, Kim concludes that the fear of reversal is insufficient to explain judicial behavior, and this make the principal-agent model presents a puzzle. Principal-agent models have often overlooked, however, is that legal rules also *restrain* the use of that reversal power by reviewing courts. She then turns out another explanation for lower court compliance is that judges have *legal* preferences independent of their political preferences. More precisely, even if judges care about whether the outcome in a given case advances their preferred policy, they likely care about whether it conforms to legal norms as well. In the US, perhaps the most significant legal restraint is contained in 28 U.S.C. § 1291, which grants courts of appeals jurisdiction only over appeals from final decisions of the district courts. Legal rules prescribing standards of review also require reviewing courts to exercise self-restraint in the use of their reversal power in certain circumstances. However, Kim’s research leave a serious question to be answered: Does normative preference is also valid for authoritarian courts? See *supra* note 16 at 417-18

<sup>27</sup> *Ibid* at 385

occasions, the reason why Chinese courts care more about legal variables than policy variables may be because they remain weaker institutions comparing with many other Party/State institutions in authoritarian context. In short, normative structure thus is an important aspect to strengthen authority and power of Chinese Courts.

### **2.2.3 Policy Preference: Traditional, Activist and Restraining Values**

In addition to self/institutional interest, PRC courts also pursue their policies and values they find desirable as the other major type of institutional goals. It is indeed no secret that modern courts act rationally to bring public policy as close as possible to their own preferred outcome<sup>28</sup>. Essentially, courts' policymaking is a process where courts have both authority and capacity to distribute or re-allocate resources in a community. Policy preference of courts could also be described as a desirable values or choices of values for courts in specified time and space.

In this article, we tend to divide these preferring values<sup>29</sup> into three categories: (1) Traditional values/policies that upheld conventional socialist values or traditional Chinese ethics. (2) Activist values or policies that act more progressive against traditional values held by other state institutions and Chinese society. And (3) restraining values or policies that actively or voluntarily "step back" from social autonomy and realm of other government<sup>30</sup>.

There are at least two merits for categorizing preferring values into traditional, activist and restraining groups. First, Party-State and Chinese society have provided arena that

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<sup>28</sup> Mcnollgast, "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law" (1995) 68 S Cal L Rev 1631 at 1636

<sup>29</sup> Of course, we might also differentiate between "concrete policy" that only affect dyadic relationship and "abstract policy" that may create precedential effect that affect undetermined person in the future. Viewing from relationship between policy made by courts and legislatives, "policy" made by courts could be complementary/affiliated vis-a-vis existing legislation, or be "freestanding" from existing normative framework. We could also divide policies into different categories, such as economic policy and social policy.

<sup>30</sup> which is different than, say, the US model of "judicial activism" and "judicial restraint." See, for example, Orrin G. Hatch, "Judicial Nomination Filibuster Cause and Cure" (2005), Utah L. Rev. 803 at 805-806, 813

institutional purposes of Chinese court could be revealed. To be more specific, traditional values refer to values mainly held by the Party/State or the Chinese society. For activist values, they mean values transcending inherent values held by authoritarian and bureaucratic institution in Party/State as well as traditional Confucian and Legalist (*fajia*) values inherited from ancient Chinese society. For restraining values, they highlight the idea that the court engages in self-restraint in order to preserve the social autonomy that is precious in authoritarian context in China. Thus, restraining values are also closely related to Chinese regime and society as well.

The second significance for distinguishing traditional, activist and restraining values is because of its methodological edges. A well-accepted approach to study China's "Socialist Rule of Law" system and its institution is through "functional approach", which means identifying and delineating the function of the legal rules and institutions<sup>31</sup>. Indeed, a classic social-legal analysis research paradigm for empirically studying Chinese court requires close examination on CCP, government structure and Chinese society<sup>32</sup>. Although our theoretical framework is constructed on the basis of institutionalism, viewing court as an active and living institution with its own agenda, we still have to admit the great merit to examine institutional purposes of courts through interactions between courts, Party/State and society.

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<sup>31</sup> Accordingly, attentions should not only be paid to normative structure, but also to economic actors, politics, social structure, and culture. For example, Lubman's studies showed Maoist legacy and traditional impact has both leaved its mark on the post-Mao legal reform in China. See Stanley B. Lubman, *Bird in a Cage, Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999) at 14-16, 53 and 86

<sup>32</sup> Historically speaking, China's legal studies were long regarded as one branch of sociology in the West for at least three reasons. Firstly, if adopting western criteria, China's court, especially in the early stage after 1978, did not develop a complete jurisprudence that welcome people outside China conduct substantial amount doctrinal analysis, though numerous researches in Chinese language have already done so since the 1990s. Secondly, from Liberal-Democratic Standard, because Chinese courts still fail to portray themselves as separate and independent branch from bureaucracy, or a constitutional institution to check the executive and legislative branches. Obviously, if court is internal part of bureaucracy, the effective way to look at it is through social-political lens. Thus such observation (or bias) inevitably affects methodology until today. The third reason, however, is more fortuitous. Pioneers of China study in the West before the 1980s are usually sociologist and other social scholars who dedicated themselves to study meaningful differences between Chinese society and western society. Later on, when the first generation of China's legal experts started a more "legal" research, the majority material they could only rely on were pervious researches on China's society done by sociologists and other social science scholars. And this is where strong social-legal methodological dominance in international China's legal study coming from. In other word, contemporary China legal study in the West was born with the birthmark of sociology. Undoubtedly, my research also could not escape the sheer amount of influence from social-legal studies.

The categorization of traditional, activist and restraining values thus are good candidate for this.

### 3. Testing Empirical Data: Cases in Chinese Courts and Judicial Guiding Cases

#### 3.1 Ordinary Cases, Sensitive Cases and Hyper-Political Cases in China

Our case categorization for examining institutional characters of PRC courts is based on the relationship between the authoritarian factors and courts' institutional logic. The nature and extents of institutional characters and authoritarian impacts are reflected by courts in different types of cases. We roughly divide cases in PRC context into three categories: ordinary cases, sensitive cases and hyper-political cases.

Ordinary cases are the farthest from central interests of authoritarian rule. Ordinary cases comprise civil, criminal and administrative cases in China. They are generally not perceived as "politically dangerous" by the Party/State, nor they are sensitive in political, economic and social sense. Equally important, these cases are "ordinary" because they are large in number comparing with other two categories. In ordinary cases, court makes rules and exerts social control while engaging in TDR. Importantly, PRC courts generally feel more comfortable to announce their preferring public goods, and free to pursue their own goals in ordinary cases. Chinese courts act like their counterpart in elsewhere, to actively pursue institutional goals in social-economic affair on their own in many of these cases.

The second category is sensitive cases, which are half way between the ordinary case and the more sensitive hyper political cases. They may be "too hot" so that the authoritarian power may interfere, but they might be "relatively safe" because it is unnecessary or too costly for

the authoritarian ruler to take very seriously. However, they may involve with institutional interests or goals of other governance institutions which generate external pressure. Indeed, we could further divide “Sensitive cases” into several sub-categories: non-hyper political cases involving civil rights or PRC constitutional laws, economic-social sensitive cases entailing huge social and economic impacts, such as land-disputes cases, and cases have both political and social/economic sensitivity. Generally, in these sensitive cases, PRC courts may care more about their self/institutional interest and have less room for expressing their preferring values because of the external pressures. Yet, in some cases judges may push forward to positively make public policy for the society<sup>33</sup>.

The third category will be hyper-political cases. Comparing with ordinary cases and sensitive cases, hyper-political cases are extremely small in number<sup>34</sup>. In hyper-political cases, the authoritarian regime relentlessly turns them into political trials to punish the dissenter(s), whom the regime regards as direct challenger against “red-line” of the authoritarian rule. The outcomes of these cases usually have been per-determined and their judicial process only constitute one of the chain of crackdown. While some of these cases is open to public, others are still under secret trials. In these hyper-political cases, many have assumed that the courts have no room to do anything. However, empirical evidence shows that in hyper-political cases, Chinese courts may mainly choose to seek to protect their institutional integrity (institutional interest) and pursue possible normative values because courts’ preferring policy may be surpassed by the role as social controller for the authoritarian regime.

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<sup>33</sup> For PRC courts, sensitive cases are “in the middle ground” since courts tend to be very cautious for declaring their policy preferences. In these cases, courts’ decision and reasoning may also become too sensitive that judges’ self-interest and institutional interest of the courts maybe negatively impacted.

<sup>34</sup> Pragmatically, this is caused by at least two reasons. The first reason is because few people directly challenge the authoritarian regime and seek for political change. The second reason is the state machinery could only bring a small number of opponents to courts.

In this article, we mainly choose ordinary cases as our principal empirical data for testing our hypothesis on institutional purposes on PRC courts. Nevertheless, we will also use hyper-political cases as contrast group to examine institutional purposes of Chinese courts.

### **3.2 The Overview of Guiding Cases**

For examining institutional purposes of PRC courts, we mainly choose judicialization in SPC guiding cases system as entry point for understanding institutional purposes in ordinary justices. Starting from 2011, usually every 3 months, the SPC have consistently issued 16 “batches” of guiding cases. These cases are submitted by the lower courts, and then discussed, selected and organized by the SPC Adjudicate Committee before published. On December 20, 2011, the SPC issued the first batch of guiding cases. The most recent batch was published in March 2017. These guiding cases cover criminal, civil and administrative litigations. While some address procedural problems, other dealing with substantial issues; some of them are directly tried or by the SPC, whereas most of them are adjudicated in lower courts. Most of these guiding cases were judgment of first trial and second trial, but there are small number of re-trial (*zaishen*) cases. Among these 87 guiding cases so far (until June 2017), we could not only examine court’s manner of interaction with other parts of Party/State, but also reveals how a court tackle disputes in a transitional society.

Guiding cases manifest important institutional characters of courts, and it is good entry point for examining institutional purposes of PRC courts. First, the SPC guiding cases could largely mitigate the problem of discrepancy of institutional goals between lower courts and SPC. All of these cases, except for those adjudicated by SPC itself, were submitted on their own by the lower courts. They then selected by the SPC after discussion on the Adjudicate



Committee of SPC<sup>35</sup>. Second, guiding cases are arguably high quality because they have been “pre-selected” twice before publishing. A “low quality” case obviously would not become a guiding case<sup>36</sup>. Third, guiding cases cover almost all important matters in ordinary justices. Although this usually means that sensitive cases and political sensitive cases has already been ruled out, the guiding cases system consist of both substantial and procedural problems in civil, criminal and administrative litigations in PRC courts, and many of them have great practical significance. In particular, many guiding cases reflect courts’ incentive and capacity of going further in ordinary justices even facing the administrative bodies or procuratorate.

In the next part, we will apply our analytic framework to examine institutional purposes in guiding cases from 2011 to 2017. We could explore major institutional purposes, self/institutional interest as well as preferring values that PRC courts pursue in guiding cases. To be more specific, we select guiding cases with typical or strong institutional purposes from guiding cases system, then put them into five groups for further analysis: self-interests, institutional interests, traditional values, activist values and restraining values.

### **3.3 Case Analysis: Institutional Purposes in SPC Guiding Cases System**

#### **3.3.1 The Guiding Case No.51: Manifestation of Self-interest of Judges**

Our model provides that judges, just as everybody else, may care about their individual interests such as workload, material treatment, reputation and etc. However, such individual self-interest may be difficult to discover if we merely look at the text of judgment. For guiding cases, because they are selected to be “future reference for similar cases”, it may be reasonable to assume that such “self-interest of judges” would be more difficult to be spotted.

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<sup>35</sup> SPC, *SPC Stipulation on Works of Guiding Cases* [Zuigao renmin fayuan guanyu an’li zhidao gongzuo de guiding] (Nov 26 2010)

<sup>36</sup> *Ibid*

However, the Case No.51, Abdul Waheed v. China Eastern Air Holding Company (CEA, a Mainland China airline Company), a dispute over a contract for the carriage of passengers by air, is indeed an excellent example displaying self-interest among guiding cases.

In this Case, the plaintiff Abdul Waheed, a foreign citizen, purchased an interline ticket issuing by Hong Kong Cathay Pacific Airways Limited (CPA, a Hong Kong airline company). The flight departed from Shanghai, then transferred in Hong Kong to the destination, Karachi. The actual carrier for the flight from Shanghai to the Hong Kong was CEA. The CEA flight from Shanghai was prohibited from taking off by the weather, causing the plaintiff unable to catch the CPA flight from Hong Kong to Karachi. The CEA refused to arrange alternative flight nor any reimbursement for the plaintiff. The plaintiff then sued the CEA in People's Court of Shanghai Pudong New District (Pudong Court). The Pudong Court cited international treaties<sup>37</sup>, and a domestic law, Article 142 of the *General Principles of the Civil Law of the PRC* to establish its jurisdiction.

However, after establishing the jurisdiction, the court find itself face a problem that CPA is an international airline with the headquarter in Hong Kong. Because of an all-known reason that it would be difficult to summon an HK corporation to Mainland Chinese courts. But failure to do so may not only increase the difficulty for the judges to work on the case, but it would also mitigate courts' authority. In particular, it would embarrass the court if defendant is absent from the standing. Second, enforcement would be a problem under such circumstance. Even today, according to current law of PRC and bilateral agreement signed by Mainland China and Hong Kong, seeking to cooperating enforcement from Hong Kong in civil disputes demand a prolonged and complex procedure. It would be extreme costly for

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<sup>37</sup> These international treaties include the *Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw in 1929, amended at The Hague in 1955*, and the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier*.

going through such complex process only for dealing with such a simple case. However, the problem was both parties entering contract of carriage is the plaintiff and CPA but not CEA. Fortunately, the window of opportunity showed up when the plaintiff chose to initiate litigation listing only CEA as defendant. Perhaps conspired by the attorney of the plaintiff, the court pre-rejects the possibility that the CEA may attempt to get CPA involved in the litigation because the CEA has the full legal right and channel to do so. The court thus states that, “although China Eastern Airlines had the right to demand that CPA participate in the litigation, it was not necessary to add CPA as a party to participate in the litigation, given the circumstances of the case and considering the litigation costs.”<sup>38</sup>

The ground that the court base on this decision thus is the necessity but not legality. The “cost” of litigation is a central consideration among other institutional purposes in this case. In fact, saving the litigation costs have not much different than reducing the workload of judges, the time and efforts that a judge may dedicate to a case. Moreover, for the judges hearing this case, it could prevent “losing face” especially in front of a plaintiff coming from foreign land. Indeed, apart from guiding cases system, in many other everyday ordinary cases trying by PRC courts, there have been more occasion that judges decide the cases in some ways primarily for the sake of self-interests. Moreover, in some other occasions, judicial corruption could be viewed as one extreme type of “self-interest”, which plays central roles in numerous ordinary cases in China.

### **3.3.2 Institutional Self-Empowerment in Guiding Cases and Legalism**

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<sup>38</sup> Abdul Waheed v. China Eastern Airlines Corporation Limited, A Dispute over a Contract for the Carriage of Passengers by Air, Guiding Case No.51, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-51/>>

Apart from self-interests, institutional empowerment is the other face of PRC courts' institutional interests. And Legalism is the crucial tool for courts to self-empower and enlarge their power and authority. Indeed, this has been confirmed from numbers of empirical research<sup>39</sup>. In the following guiding cases, we could see that the PRC courts, on its own, strengthening institutional power to enhance its social-political status. On a more frequent basis, this could be reflected by the fact that the court uses normative weapon to expand the scope of jurisdiction and institutional mechanism.

On the one hand, we could observe from in a number of guiding cases Chinese courts have the institutional incentive to expand the scope of judicial power. More frequently, this may be achieved by taking advantage of legislative blank left by the national legislature, the National People's Congress(NPC) and its Standing Committee. But it also be achieved at the expanse of administrative bodies, or directly intrude the garden of society. For example, in guiding Case No. 38, while the legal status is ambiguous, the court increased its territory by including higher education institutions into the scope of proper defending administrative bodies<sup>40</sup>. In Guiding Case 59, another administrative case, likewise, the court incorporated fire department into the coverage of its own jurisdiction by the same logic<sup>41</sup>.

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<sup>39</sup> See, example, Sunstein Trevas, "Mapping the Political Terrain of Justice Reform in China" (2014) 2:1 Griffith Asia Quarterly 18; Randall Peerenboom, *China's Long March toward Rule of Law* (New York: Cambridge University Press, 2002); see also *supra* note 25

<sup>40</sup> The court's opinion in this case is firmly built on normative logic: "the relationship between a higher education institution and a person who receives an education [at the institution] is [one of] educational administration management. [Where] a person who receives an education is dissatisfied with a management act of a higher education institution that involves his basic rights, [that person] has the right to initiate administrative litigation, [and the] higher education institution is a qualified defendant in the administrative litigation." Tian Yong v. The University of Science and Technology Beijing, A Case of a Refusal to Award a Graduation Certificate and a Degree Certificate, Guiding Case No.38, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-38/>>

<sup>41</sup> This is achieved by carefully constructing legal logic: "Fire department register and randomly inspect fire prevention of construction projects...reflect the nature of exercising administrative power, demonstrating the will of nation, the characteristic of law, the nature of public welfare, a monopoly and coercive [power]. [Thus], the notification of the result of registration constitute the action of registration...share characteristics of administrative power, and thus it should be under the scope of judicial review (sifa shencha). See *Dai Shihua su Jinan Shi Gong'an Xiao Fang Zhi Dui Xiao Fang Yan Shou Jiu Fen'an* [*Dai Shihua v. Fire Control Detachment of Public Security Organ of Jinan City*], Chinacourt.org, online:<<http://www.chinacourt.org/article/detail/2016/06/id/1893356.shtml>>

On the other hand, another frequent practice for expanding reviewing scope is at the expense of administrative institutions in guiding cases. In other words, the court expands its jurisdictional power by including more issues into the coverage of judicial review. And such expansion is achieved by “harming” the authority of administrative bodies. For example, Guiding Case No.7 was an ordinary civil dispute. But after the plaintiff got the Supreme People’s Procuratorate (SPP) involved, the adjudicating process had been turned into an arena, where the competition with SPP became fierce and direct<sup>42</sup>. Guiding Case NO.7 shows how an authoritarian court appeal to the normative tool to strengthen institutional authority where the court seeks to expand judicial authority at the expense of procuratorate power<sup>43</sup>. Guiding Case No.22 is another excellent example for expanding judicial power at the expense of administrative authority. In Guiding Case No.22, the Court broke the orthodox doctrine that internal replies made by higher government is nonjudiciable<sup>44</sup>, opining: “where the administrative department directly implements the reply, generating an actual impact on the rights and obligations of the administrative counterpart, and where the administrative counterpart is dissatisfied with the reply and initiates litigation, the people’s court should

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<sup>42</sup> In this case, there was actually confrontation between court and procuratorate. Under the PRC legal system, procuratorate has the power to protest or literally “counter-appeal” (抗诉) a judgment if they consider the judgment is problematic. The No.7 is a re-trial case heard by the SPC. However, the parties had reached a settlement and finished performing such settlement, and they then submitted a Petition for withdrawing the retrial. After examination, the SPC approved the petition by a Civil Ruling. However, while the retrial application was applied to court, the plaintiff also applied to the procuratorate for a protest. The Supreme People’s Procuratorate (SPP) accepted the application and lodge a protest against this case. However, the SPC, on the ground that “the dispute had already been resolved, and the reason for applying for a protest by the procuratorate and that for applying for a retrial were basically identical”. The Adjudication Supervision Tribunal of SPC then communicated with the SPP and suggested that it withdraw its protest. However, the SPP refused to withdraw its protest. The Adjudication Supervision Tribunal again contacted plaintiff, and the plaintiff again submitted a Petition for Withdrawal of the Case to the Supreme People’s Court. On July 6, 2011, the SPC again issued a Civil Ruling to terminate the examination of this case. Indeed, one of the two major justification that the SPC’s rejection of protest on a case from SPP is “national interests or social and public interests”, that “the parties have reached a settlement and finished performing it, or withdrawn the petition and such withdrawal would not adversely affect national interests or social and public interests. Thus, the actual institutional purpose that the SPC pursue in this case is more normative. And indeed, what SPC argue here is a right-based question. “In order to respect and protect the parties’ rights to freely dispose of their lawful rights and interests within the scope of law and to realize the unification of the legal effects and social effects of litigation” the people’s court should rule to terminate the retrial proceeding in accordance with Article 34 of the Interpretation of the SPC on Several Issues Concerning the Application of the Adjudication Supervision Procedures of the “Civil Procedure Law of the People’s Republic of China”. Based on these argumentation, the SPC declare that “the basis upon which the procuratorial organ protested no longer existed.” And thus “there was no need for a ruling to retry the case pursuant to a protest proceeding.” SPC in this case, has rarely won a battle when deal with the procuratorate. Indeed, the case could become guiding case for an important reason that the SPC has rarely achieved such a success. See *Mudanjiang Municipality Hongge Construction and Installation Co., Ltd. V. Mudanjiang Municipality Hualong Real Estate Development Co.,Ltd. And Zhang Jizeng, A Construction Project Contract Dispute*, Guiding Case No.7, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-7/>>

<sup>43</sup> We have to consider that as the near four decades practice since the 1978 has shown, the procuratorate’s power is like sword of Damocles, hanging over the SPC and all lower courts in China. Fu Hualing, “Autonomy, Courts and the Politico-Legal Order in Contemporary China”, in Cao Liqun, Ivan Sun & Bill Heberton eds, *The Routledge Handbook of Chinese Criminology* (New York: Routledge, 2013) 76

<sup>44</sup> Traditionally, replies made by government body to their affiliated department is generally internal administrative act, which traditionally fall into the realm of government, meaning that it is nonjudiciable.

accept [the case] in accordance with law”<sup>45</sup>. In Guiding Case No. 69<sup>46</sup> and Guiding Case No.77 then repeated such practice<sup>47</sup>.

Perhaps one of the boldest moment that Chinese court striving to expand its authority and scope of reviewing power is Guiding Case No.5, where the courts even self-established its quasi-constitutional review power, although such potential power may not be launched immediately. The plaintiff in Guiding Case No5 was a Salt Industry Import and Export Company. The defendant, the Salt Administration Bureau of Suzhou Municipality, Jiangsu Province (“Suzhou Salt Bureau”), imposed administrative penalties on the plaintiff for “purchase and transportation of industrial salt”. The administrative penalties based on a provincial governmental department rule, the *Implementing Measure of Jiangsu Province on the “Salt Industry Administration Regulation”* (the “Measure”).

However, in dealing with such ordinary case, the Basic People’s Court of Jinchang District of Suzhou City (Jinchang Court), a lowest level court, had deployed a “nuclear option”<sup>48</sup>, the *Legislative Law of PRC*. The *Legislative Law of PRC* is a constitutional-nature law stipulating the scopes, tiers of statutes and procedure for making laws in PRC legal system, which in principle shall not be used by People’s Court in adjudication. It was against this

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<sup>45</sup>Wei Yonggao and Chen Shouzhi v. The People’s Government of Lai’an County, A Case About a Reply to Recover Land-Use Rights, Guiding Case No.22, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-22/>>

<sup>46</sup> Likewise, in Guiding Case No.69, the Court hold that if a party deem that procedural administrative act violate property and other legal interest of her, and while the redress from substantial administrative channel is not available, the party may bring the case into court, and the Court should hear the case. *WangMingde su leshanshi Renliziyuan he shehuibaozhangju gongshangrending’an* [Guiding Case No. 69: Wang Mingde v. Human Resources and Social Security Bureau of Leshan City for Dispute over Determination of Work-related Injury], Guiding Case No.69, Chinacourt.org, online:<<http://www.court.gov.cn/zixun-xiangqing-27851.html>>

<sup>47</sup> In the Guiding Case No.77, the court state that if the administrative body only issue a notification (gaozhi) as reply of report when an informant is an interested party, it should be excluded from Article 1, Section 6 of *SPC Interpretation on Several Questions regarding Administrative Procedure Law* (2010). Thus, according to court’s opinion, the issue shall be justiciable, and shall be under the reviewing scope of People’s Court. According to the Decision, this is because using notification as substitution of investigating result fail to oblige the legal duty to protect informant’s right, constituting a form of violation of plaintiff’s right of seeking redress from due procedure. *Luorongrong su ji’anshiwujiaju wujia xingzheng chuli’an* [Luo Rongrong v. Price Bureau of Ji’an City City for Dispute over Price-related Administrative Handling], Guiding Case No.77, Chinacourt.org, online:<<http://www.court.gov.cn/fabu-xiangqing-34342.html>>

<sup>48</sup> Originally, the Nuclear Option in the US refers to filibuster and change of Senate rule. See Dimple Gupta, “The Constitutional optional option to change senate rules and procedures: a majoritarian means to overcome the filibuster”(2004), Harvard journal of law and public policy, 28:1, 205

background that the Jinchang Court use Legislative Law to strengthen judicial authority in such an ordinary administrative case. According to the Court, “since the Article 79 of the *Legislation Law* provides that the effect of laws is greater than that of administrative regulations, local regulations, and rules; and the effect of administrative regulations is greater than that of local regulations and rules.” Because the Article 13 of the *Administrative Penalties Law* prohibit local government rules creating new types and range of administrative penalties exceed the scope of *Administrative Penalties Law*, the court opined that, “the local administrative authority cannot establish new administrative licensing or new administrative penalty when law and regulation do not establish such administrative licensing or penalty.” The local court then took the step further, by stating that:

“The relevant provisions of the *Measure* were inconsistent with the spirit of the aforementioned provisions...[And these violations] were a type of establishment of administrative licensing and penalties in violation of upper-level legislation...Although the Suzhou Salt Bureau applied the *Measure*, it did not abide by the provisions regarding the hierarchy of legal effect stated in Article 79 of the *Legislation Law*, [and] did not follow the relevant provisions in the *Administrative Licensing Law* and the *Administrative Penalties Law*. The application of law was erroneous and [the Bureau’s decision] should be revoked in accordance with law.<sup>49</sup>”

This is a significant guiding case since the Jincheng Court *de facto* engage in quasi-constitutional review. Most importantly, in reviewing the dispute provision, the court has considered “the hierarchy of legal effect” of local government rule, administrative regulation and law, a *de facto* review of validity of statutes:

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<sup>49</sup> Luwei (Fujian) Salt Industry Import and Export Co., Ltd. Suzhou Branch v. The Salt Administration Bureau of Suzhou Municipality, Jiangsu Province, A Salt Industry Administrative Penalty Case, Guiding Case No.5, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-5/>>

“The *Measure*...did not abide by the provisions regarding the hierarchy of legal effect stated in Article 79 of the *Legislation Law*, [and] did not follow the relevant provisions in the *Administrative Licensing Law* and the *Administrative Penalties Law*. The application of law was erroneous and [the Bureau’s decision] should be revoked in accordance with law.”

Thus, although the court did not formally cross the constitutional barrier to declare the provision of *Measure* invalid, the court has in fact declared the government decision “unconstitutional” in the Guiding Case No.5 based on the argumentation that the normative document issued by the government, the *Measure*, is invalid. In other words, this is a common tactic for courts to review validity of government statutes in many mature constitutional-democratic regimes that establishing a judicial reviewing power without directly striking down the normative documents. This may remind us of *Marbury* in early 19th US, and the “Seed Case” in Henan province in early 2000s China. The judge in the Seed Case was as activist as the judge in Guiding Case No.5, who boldly declared a local government rule “contradict with the Seed Law of PRC, a national law promulgated by the NPC”<sup>50</sup>. The difference is judge in Seed Case was forced to resign after the government attacked the court, and the latter become a Guiding Case entrenched by the SPC. Indeed, to our knowledge, after it becomes one guiding cases, started from 2013, there are already 10 cases officially have referenced Guiding Case No.5 in their judgments.

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<sup>50</sup> On May 27, 2003, Judge Li Huijuan of the Luoyang Intermediate People’s Court invalidated the Henan Province Agricultural Seeds Management Act on grounds of inconsistency with the national Seeds Law (2001) in an ordinary civil case. The judgment was based on Article 64 (unity and hierarchy of legal rules) of the Legislation Law, a constitutional law promulgated by NPC in 2000. Local authorities, including local and provincial people’s congresses, condemned Judge Li exceeding her authority. Judge Li took her case to the SPC and triggered public discussion. Eventually, largely because of the public attention, Judge Li resumed her position in the Intermediate court in February 2004. See Stephanie Balme, Stephanie Balme, “The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978-2005)” (2005) 5:1 *Global Jurist Frontiers* 1 at 34-35



On the other hand, apart from expanding scope of reviewing power, normative weapons may also be used to enhance the institutional mechanism of courts. For example, normative values could assist in enhancing the enforcement of judicial decision in Chinese context, a chronic problem<sup>51</sup>. Guiding Case 71 is a case directly related to the problem of “enforcement difficulty” (zhixingnan). In this case, in order to strengthen enforcement power, an important institutional interest of the court, the intermediate People’s Court of Pingyang County of Zhejiang Province pulled out several arrows of legislative intent in its quiver. First, it employs the weapon of legislative intent by citing NPCSC’s Interpretation of Article 313 of *Criminal Law of PRC* to declare that the power of enforcement is generated on the date when the judgement come into force rather than when the case entering into the process of judicial enforcement. Second, to increase persuasiveness of the legal reasoning, the local court further employs the weapon of legislative intent by, on its own, inferring the legislative intent of Article 313 of the Criminal Code of PRC: making the social public genuinely respect judicial adjudication to maintain the authority of law to solve the enforcement problem.

In addition, sometimes the courts would even directly intrude social realm in order to expand its own jurisdiction and authority. For example, in Guiding Case 35, the SPC empower the judicial system by stating that court has the authority to conduct a review of the legality of both the compulsory auction procedures and the auction results<sup>52</sup>.

### 3.3.3 Traditional Values

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<sup>51</sup> See Donald C. Clarke, “Power and Politics in the Chinese Court System: the Enforcement of Civil Judgments” (1996) 10:1 Colum. J. Asian L. 1 at 27-28; see also Fu Hualing & Richard Cullen, “From Mediatorial to Adjudicatory Justice: The Limits of Civil Justice Reform in China” in Margaret Woo & Mary Gallagher eds., *Chinese Justice, Civil Dispute Resolution in Contemporary China* (Cambridge: Cambridge University press, 2011) 25

<sup>52</sup>According to the SPC, this is because “compulsory judicial auction...is different from an auction entrusted by a citizen, legal person, or other organization on his or its own accord to be carried out by an auction agency.” Therefore, “upon discovery of illegal acts [occurring] in an auction that it entrusted [to another], a people’s court may, even after the auction concludes, still rule the auction invalid...[in situations] where there is malicious collusion in the auction process, making fair bidding impossible in the auction and adversely affecting the legal rights and interests of others” Guangdong Longzheng Investment Development Co., Ltd. And Guangdong Jingmao Auction Co., Ltd., An Enforcement Reconsideration Case on an Entrusted Auction, Guiding Case No.35, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-35/?lang=en>>

As our theoretical model has proposed, traditional value is one of three types of preferring values pursued by PRC court. These traditional values and policies are those shared and even enshrined by Party/State and Chinese society, as reflected by a branch of guiding cases. In short, in these cases, courts may feel confidence to declare preferring public policy in cases because they are shared by Party/State and society. Chinese courts in these cases generally do not fill in any legislative blank or achieve institutional purposes at the expense of administrative authority. On the contrary, they may actually help the implementation of traditional values and policies, and enhance the authority of government bodies.

It is very clear that, all guiding cases fundamentally resolve disputes in a triadic structure. And nearly all cases involve process of choice for public policies. However, it should be noted that a large part of these cases only involves rule-making that the court does not try to judicialize new areas, nor courts declare activist ideas that are at the expense of other government organs. In other words, in many cases while there are several values that have already been embraced Party/State or Chinese society, Courts may side with these previous values, even though some of these cases may involve legal interpretation. For example, in Case No.4 “Wang Zhicai Intentional Murder”, the defendant murdered his girlfriend because the victim has rejected his proposal of marriage. The court found he should not be sentence to death because the murder is caused by irritation of unsuccessful proposal. A similar case is No.12, where the mother of the defendant called the police to arrest the defendant when he fled to a relative’s residence after the defendant committed a murder. These cases, of course, do not involve judicialization nor declaring activist values because the courts only chose to side with traditional values. These two cases reflect a very important Chinese legal tradition that focus on the intent of the defender in criminal case, especially when it involves family

ethics. Furthermore, both cases happened during Wang Shengjun's era, when Wang, as the head of the SPC, stressed the need to promote "social harmony", and demanded courts to consider "feeling of the mass"<sup>53</sup>. Both judgments indeed have manifested the combination of traditional Chinese ethics as well as the Socialist values.

Likewise, in Guiding Case No.21, an administrative litigation, the court pursues similar traditional values that are also shared by the Socialist regime. The main dispute of the case was about legal requirement for Air Defense Construction in newly constructed civilian buildings. According to Article 22 of the *Civil Air Defense Law*<sup>54</sup>, "In newly constructed civilian buildings in a city, basements that can be used for air defense during wartime [should be] constructed in accordance with relevant State provisions." Thus, unless the law provides otherwise, such as low-rent housing and affordable housing, newly constructed civilian buildings in a city should bear such legal obligation. The issue in here is that neither law or regulations stipulate whether the *ex situ* construction should also fulfill such obligation. This has left a legislative blank for court to fill in. The court decided to side with traditional values that preventing a situation "where the cost of violating the law is less than the cost of obeying the law." In order to elaborate this, the court's reasoning delivered in a very old-fashion socialist argumentative manner: "this violates the legislative intent [of these provisions], and is not beneficial to safeguarding national defense and security or the fundamental interests of the people."<sup>55</sup> The court thus uphold the government decision even though it may violate the

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<sup>53</sup> Susan Trevaskes, "Political Ideology, the Party, and Politicking: Justice System Reform in China"(2011) 37:3 Modern China 315 at 317 [Political Ideology]; Zhang Taisu, "The Pragmatic Court: Reinterpreting The Supreme People's Court of China" (2012) 25 Columbia Journal of Asian Law 1 at 21

<sup>54</sup> Also, according to Article 48 of the *Regulation on the Administration of the Construction of Civil Air Defense Projects* states: *Where an air defense basement should be built for a civilian building in accordance with provisions, but due to geology, topography, or other factors, such construction is unsuitable, or where the prescribed construction area [of the basement] is smaller than the constructed area of the first floor of the civilian building, [an air defense basement] need not be built if it is so approved by the departments in charge of civil air defense. However, an ex situ construction fee, [the amount of which is] based on the construction cost needed for the area of the air defense basement that should be built, must be paid, and the departments in charge of civil air defense must carry out the ex situ construction [of the air defense basement] nearby.*

<sup>55</sup> "Inner Mongolia Qiushi Real Estate Development Limited Liability Company v. The Civil Air Defense Office of Hohhot Municipality, A Civil Defense Administrative Levy Case", Guiding Case No.21, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-21/>>

principle of limited government by allowing government imposing monetary penalty on issues without clear legal authorization.

Even in civil case where courts may have more autonomous room for discretion, court may also choose to accept traditional value during adjudication. For example, emphasizing on substantial equality over “formal equality” is one important conventional socialist and traditional Chinese values. The judgment of Guiding Case No. 72 has realized such institutional purposes through piercing the mask of freedom of contract, even though the court do evaluate the principle of freedom of contract in its judgment<sup>56</sup>.

### 3.3.4 Activist Values

Indeed, the term “activist” here is somewhat different than judicial activism in, say, the United State. The meaning of judicial activism in the US court highlight the tendency of court to act creatively against the original legislative intent<sup>57</sup>. The “activist” here, however, is a different concept that emphasize the values or policies that is progressively against the traditional values. To be more specific, these values are distance from those traditional values. On the one hand, pursuing these activist values often demand courts to actively work against traditional values or institutional interest of some other institutions. On the other hand, more frequently, PRC courts often take advantage of legislative blank, which means to declare

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<sup>56</sup> The Guiding Case No.72 involves a loan agreement and a commercial residential property contract(商品房). The defendant, a company, fail to pay back the loan from the plaintiff thus they agreed to liquidate the property owned by the defendant. Because under Chinese law, the maximum legitimate amount of interest of loan is significantly lower than liquidated damages generated by breaching the contract, the plaintiff filed a litigation against the defendant for default in order to realize loan interest higher than the legally permissible maximum. The high People’s Court upheld plaintiff’s demand, whereas the SPC overturn such decision with the reason as follows: “...it is not rare that a party change her mind during civil transactions. Such change shall be allowed except for those prohibited by special law. It is within the scope of the principle of freedom of contract that [the Court] should respect parties’ will to unanimously change the nature of legal relationship afterwards.” However, the SPC then cross the fence of freedom of contract to examine the cause of such change. The SPC found the liquated damages in property contract is a veil to legalize high amount of loan interest. And because such high amount of loan interest shall not be upheld according to law, thus the SPC dismiss the application for the liquidated damages from the plaintiff. In short, Guiding Case No.72 is an excellent example demonstrating how Chinese court emphasize more weight on traditional values. *Tanglong, Liu Xinlong, Ma Zhongtai, Wang Honggang su Xinjiang E’erduosi Yanhai Fangdichan Kaifa Youxiangongsi Shangpinfang Maimaihetong Jiufen’an* [Tang Long, Liu Xinlong, Ma Zhongtai and Wang Honggang v. Xinjiang Erdos Yanhai Real Estate Development Co., Ltd. Dispute over the Commercial Housing Sales Contract], Guiding Case No.72, Chinacourt.org, online:<<http://www.court.gov.cn/zixun-xiangqing-27851.html>>

<sup>57</sup> See *supra* note 30

preferring public policy through filling in the legislative gap. In this sense, one may find many “activist values” are more closely related to Liberal-Rule of Law values as they held by courts in the North America and Europe, although differences of “Chinese characteristics” may exist in some occasion. Indeed, a large number of guiding cases actually have reflected these activist values and policies as their important institutional purposes. We could, thus, divide guiding cases reflecting activist values into two categories: The pursuit of activist values against traditional values held by administrative branches, and the activist values that fill in the legislative blank to promote preferring public policy that courts find desirable.

The first category of activist values are those values that court pursue at the expense of administrative authority. These activist values separate themselves from the traditional Chinese and Socialist values held by government officials, such as bureaucratic convention and disrespect of due procedure. Indeed, there are numbers of administrative cases among Guiding Cases where Chinese courts striving for values at the expense of other government bodies. The Guiding Case No.26 is a proper example. In the case, the plaintiff, a citizen, has submitted an application for the disclosure of government information to defendant Department of Transport of Guangdong Province. The defendant, however, failed to reply or provide the government information [that the plaintiff] applied for within the time limit prescribed by law<sup>58</sup>, and thus [the plaintiff] seeks judicial ruling to confirm that the defendant’s act of failing to reply within the time limit prescribed by law was a violation of law. The defendant, claimed that this was because of the physical isolation of its departmental intranet from the Internet and the provincial extranet in court. The Basic Court of Yuexiu District of Guangzhou Municipality (Yuexiu Court), opined that the government’s claim could not stand. “As for the transfer of the application between the extranet and the

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<sup>58</sup> According to Article 24, Paragraph 2 of the *Regulation on Open Government Information of the People’s Republic of China* (“*Regulation on Open Government Information*”), the defendant should have replied to the plaintiff by 15 working days.

intranet and between the upper and lower level administrative organs, this is a type of internal management matter of administrative organs, and cannot be a ground [for justifying] an administrative organ's deferred processing [of an application]." The court thus held that the defendant's delay in issuing a reply should be recognized as a violation of law.

In more sensitive cases (but still within the scope of ordinary case), Chinese courts was bold enough to declare activist values at the expense of government authority. For example, Guiding Case No.41 involves the issue of demolition. In this case, the Quzhou Municipality Land Bureau planned to demolish plaintiff's property in order to expand the place of a local bank. And it was on the way to be approved by the municipal government. The Land Bureau issued a notification to the plaintiff mentioning the name of Land Administrative Law, yet the notification did not specify which article fit in such situation. When the local court heard the case, the Land Bureau specify that the demolition was based on Article 58, Paragraph 1 of the *Land Administration Law*, [namely that] "the land use is needed for [a] public interest [purpose]" or "the land use needs to be adjusted for carrying out old town renovations to implement urban planning". However, the court implied that expansion of local bank is not "public interest" nor "old town renovations"<sup>59</sup>. The court thus ruled that the justification for the government act is not sufficient and the government decision shall be revoked.

Indeed, in China's context, this is a bold move. Because the bank has been considered as part of the government for the long time since the era of planned economy. Even after the 1980s when China started to open and reform, the bank still enjoys privileged status in many circumstances. It is quite normal that a local bank requests the help from administrative body to accomplish many difficult tasks especially in some underdeveloped areas. And demolition

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<sup>59</sup> "Xuan Yicheng et al. v. Bureau of Land and Resources of Quzhou Municipality, Zhejiang Province, A Case of a Recovery of the Rights to Use State-Owned Land", Guiding Case No.41, China Guiding Cases Project, Stanford Law School, online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-41/?lang=en>>

for expansion of the banking hall in this case is one of the typical issues that a bank may ask for such assistance from government. In such scenario, we even do not have to mention empirical observations that there is wide connection between officials in government branch and personnel in state-owned institutions. But the court chooses to carefully strike down such joint action from local government and state-owned bank. As we may see from the judgement, every step the court made is closely based on law. “According to the *Administrative Litigation Law of the People’s Republic of China* and its related judicial interpretations, the defendant bears the burden of proof during administrative litigation [to justify] the specific administrative act that it carried out. [In situations] where the defendant does not provide evidence [that supported its specific administrative act] or the [legal] basis [upon which the defendant relied] when it carried out its specific administrative act, [a court] should determine that the specific administrative act did not have [the requisite] evidence and [legal] basis [to justify it]<sup>60</sup>.”

On the other hand, some other guiding cases reflect courts’ creativeness while pursuing activist values while there is need to fill in legislative blank. Indeed, in numbers of guiding cases that court seized the opportunities to fill in legislative gap are civil cases, where courts enjoyed greatest autonomy to do so. One salient character in these cases were the courts actively decided on proper public policy for the society.

In a recent guiding case, the Guiding Case No. 75, the Supreme Court has, on its own, established the criterial for standing for environmental case, an important, but one of the limited type of public interest litigation permitted in current China. Because the standard for

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<sup>60</sup> *Ibid*

standing of plaintiff is unclear in legislations<sup>61</sup>, in guiding case 75, the Supreme Court has put forward a criterion for standing (susong zhuti) in environmental public litigation. According to court in the Guiding Case No.75, to affirm the standing of an organization as “social organization that specifically engage in environmental protection activity”, three conditions shall be met: (1) the purpose and scope of work of such organization should include public interest of conserving environment. (2) the organization should actually engage in such activities, and (3) such activities should have causality (guanlianxing) with purpose and scope of organization’s work. The court then, prescribed these three conditions in detail<sup>62</sup>.

Equally impressive, in elaborating the first condition mentioned above, the Court actually cited an international treaty, the UN Convention on Biological Diversity, signed and ratified by Chinese authority<sup>63</sup>. In other words, in order to pursue an activist institutional purpose, Chinese court set up a criterion by including international treaty in its reasoning. In this regard, the court has repeated what many other courts practice in elsewhere.

Besides, there are numerous similar guiding cases pursuing activist values while there is need to fill in legislative blank. In case No.15, the court had applied academic principle of piercing the corporate veil by initializing the Paragraph 3 of Article 20 of the PRC Company Law<sup>64</sup>.

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<sup>61</sup> The Chinese environmental civil public litigation system was established by, though coarsely, the Article 55 of Civil Procedure Law of PRC, Article 58 of the Environmental Protection Law, and Article 4 of Interpretation of the Environmental Protection Law.

<sup>62</sup> *Zhongguo Shengwuduoyangxingbaohuyulvsefazhanjijinhui su ningxia ruitaikejigufenyouxiangongsi huanjingwuran gongyisong'an* [China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.], Guiding Case No.75, Chinacourt.org, online: <<http://www.court.gov.cn/fabu-xiangqing-34322.html>>

<sup>63</sup> To examine whether the plaintiff in the case meets the first condition, in addition to Environmental Protection Law, a domestic law, the Court directly refer to the UN treaty, by stating that the plaintiff’s organizational purpose “has satisfied”(fuhe) both the domestic law and international treaty Case.

<sup>64</sup> Paragraph 3 of Article 20 of the PRC Company Law states that, “Where the shareholder of a company abuses the independent status of the company as a legal person or the limited liability of shareholders, evades debts and thus seriously damages the interests of the creditors of the company, he shall assume joint and several liabilities for the debts of the company.”<sup>64</sup> In this case, the court found although the three companies in this case were registered as separate enterprise legal persons that are independent of each other, they in fact had blurry boundaries and commingled personalities among themselves...(thus) seriously harming the interests of the creditors. The aforementioned conduct violated the purpose of establishing the legal person system and violated the principle of good faith. The nature of such conduct and the harmful results were **comparable to (相当)** the situation stipulated in



Another example will be Guiding Case No. 17, a civil case where the court exploited legislative blank left by NPC and its Standing Committee to actively protect customer rights<sup>65</sup>.

Likewise, in Guiding Case No.45, another civil case, the court established criteria to determine whether the allegedly infringing acts constituted unfair competition<sup>66</sup>. In

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Article 20, Paragraph 3 of the *Company Law*. Thus, **by referring to** (参照) Article 20, Paragraph 3 of the *Company Law*, the court found the three company bear joint and several liability for clearing the debts of the creditors.

Indeed, since 2005 when the Company Law of PRC has been passed, the theory of “piercing the corporate veil” has been put into Article 20. However, if the principle has been legislated, why the court in Case No.15 used the word “comparable to” and “by referring to” but not “according to” or “in accordance with”? In order to answer this question, we should briefly note that, in legal theory of PRC company law, there are three conditions should be met in order to “pierce”: (1) With the purpose of dodging debts, (2) the company abuse the independent status of legal person that (3) cause seriously harm the interest of creditors. While in actual adjudications, (1) or (3) cause fewer disputes, (2) comparably receiving more controversies when comes to actual trial. This is because the legislation, Paragraph 3 of Article 20 of Company Law is vague about how violator “abusing the independent status”. In other words, how a act constitute the violation of “abusing the independent status”? There were no specific standard rendering by the legislation passed by NPC. However, in 2003, Article 51 of the 《SPC Provisions on Several Questions of Corporate Disputes(1) (Draft for Comment)(November 2003), where the SPC has specified the key constitute “abusing the independent status” is “commingling” (混同), or more specific, “commingled business” (营业混同) and “commingled finance” (财产混同). But because of the revision of Company Law in 2005, the SPC 2003 draft has never been passed. Since then, the standard of “commingling” become the actual standard for PRC courts to decide piercing cases. Interesting, there are no other legal documents specified the principle of piercing the corporate veil. As we see in the judgment of No.15 case, the court found that the defending three companies has commingled personnel, commingled finance and commingled business. It is thus very clear that the court does apply such “internal rule that made by the SPC on its own into the case where the legislation left the blank for the judiciary to fill their own will in. This case has further demonstrated that PRC court has very high initiatives and capacities to pursue preferring economic policy that is not directly related to their self-interest or institutional self-empowerment. The detail of the Guiding Case No.15, please see XCMG Construction Machinery Co., Ltd. V. Chengdu Chuanjiao Industry and Trade Co., Ltd. Et al., A Sale and Purchase Contract Dispute, Guiding Case No.15, China Guiding Cases Project, Stanford Law School, online:< <https://cgc.law.stanford.edu/guiding-cases/guiding-case-15/>>

<sup>65</sup> In this case, the plaintiff, a customer, had purchased a car from the defendant, a car-sell company which promised the car has not been used or repaired prior to sell. But after purchase, the plaintiff discovered that the car has been repaired prior to sell, she then brought her case to the court. During the trial, the seller cannot prove that it has performed the duty to disclose this repair and also cannot prove such status has been acknowledged by the consumer. The court then rule that the defendant’s act constitutes sales fraud according to Article 2 and Article 55, Paragraph 1 of the *Law of the People’s Republic of China on Protection of Consumer Rights and Interests* to the case, and orders the defendant to compensate the purchase plus a punitive compensation that doubles the vehicle purchase amount.

However, this is different than the original legislative intent. While looking back the legislative history of PRC Customer Protection Law, it was passed in 1993 where Chinese society was still in a relatively undeveloped status. In the early 1990s, an epidemic of fake commodity and agricultural products has infected most part of the country. With monetary penalty, Customer Protection Law has played its own part in controlling forged and fake commodities in China. However, private cars had been regarded as luxurious items since they were imported or even manufactured in China since the 1980s. But with China’s rapid developing economy, private cars have been popularized within 2 decades. But the NPC and its Standing Committee did not clearly include private cars into the coverage of Customer Protection Law.

Thus, although it is not the first civil disputes regarding car sale that the court has step in, this case contains an obvious incentive that court has filled in the legislative blank by making rule for an area that was ambiguous in legislation. And the SPC select this case into the quiver of Guiding Case 6 year later than its actual deliver date is particularly noteworthy considering previously some local courts had refused to use Customer Protection Law in dealing with Car-purchasing disputes, even though some other courts may acknowledge the application of Customer Protection Law to similar disputes. Until today, there is no single legislation or legislative interpretations was passed specified of car-purchase disputes, yet gradually the car-purchase disputes was incorporated by the Customer protection law in recent year. For example, according to “Analysis on Complaints Accepted by Consumers Associations National Wide in 2016”, a report issued by China Costumers Association, the semi-government organization, now suing car-seller based on Costumer Protection Law become everyday scene in China. For the Guiding Case No.17, please see “Zhang Li v. Beijing Heli Huatong Automobile Service Co., Ltd., A Sale and Purchase Contract Dispute” Guiding Case No.17, China Guiding Cases Project, Stanford Law School, online: <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-17/>>

For the Report from China Costumers Association, please see China Costumers Association, “2016nian quanguo xiaoxie zuzhi shouli qichechanpin tousu qingkuang fenxi”(March 18, 2017), China Costumers Association, online: <<http://www.cca.org.cn/tdsh/detail/27277.html>>

<sup>66</sup> To be more specific, the Articles 5 to 15 of Chapter Two of the *Anti-Unfair Competition Law of the People’s Republic of China* (hereinafter referred to as the “*Anti-Unfair Competition Law*”) only provide a list of acts of unfair competition, for those acts not listed in the specific provisions, the court, based on “generally recognized business ethics and common understanding, to be in violation of the principles set forth in Article 2 of the [*Anti-Unfair Competition*] Law”, has put forward a triadic standard to determine whether an act of a business operator constitutes unfair competition: (1) [whether] the person who implements the act is a business operator as defined by the *Anti-Unfair Competition Law*; (2) [whether] the business operator, not following the principles

interpreting Patent Law in Guiding Case NO.20, again, the Court explored the blank of legislative intent when the Patent Law promulgated by the NPC is ambiguous regarding application of prior user rights<sup>67</sup>. In Guiding Case 53, on the issue of whether the right to proceeds associated with the concession right to operate a project such as a sewage treatment project could be pledged, the Legislation and other statutes did not provide any detail. The Court in this case, however, used judicial interpretation rather than legislative interpretation to establish the pledging of the right to proceeds from sewage treatment project<sup>68</sup>. Chinese court declares its preferring public policy purpose by taking advantage of legislative blank, again, in the foreign-related civil case in Guiding Case 37 in order to grant the plaintiff, a PRC company a type of unusual right of enforcement application<sup>69</sup>. Furthermore, if an issue under dispute is only remotely related to the administrative power, court may choose to act

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of voluntariness, equality, fairness, and good faith when engaging in business activities, violates the provisions of the *Anti-Unfair Competition Law* and generally recognized business ethics; and (3) [whether] the business operator's act of unfair competition adversely affects the legal rights and interests of a proper business operator. Again, in trying this anti-competition issue, the court actively declares social-economic policy that to protect business ethics the court finds desirable in such situation. Beijing Baidu Netcom Science and Technology Co., Ltd. v. Qingdao Aoshang Network Technology Co., Ltd. Et al., An Unfair Competition Dispute, Guiding Case No.17, China Guiding Cases Project, Stanford Law School, online: <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-45/>>

<sup>67</sup> The Court opined that "...Otherwise, it would violate the original legislative intent of the *Patent Law* by providing protection to technical solutions that are not yet made public or patented." When the Law provided by NPC is unclear, the court, without any hesitation, filled in the blank of Patent Law: "the *Patent Law* provides for prior user rights...But the aforementioned subsequent acts of exploitation cannot be determined to constitute infringements merely because the *Patent Law* does not have clear provisions. Otherwise, the prior user rights stipulated by the *Patent Law* would be meaningless. Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Water Supply Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd. An Invention Patent Infringement Dispute, Guiding Case No.17, China Guiding Cases Project, Stanford Law School, Online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-20/>>

<sup>68</sup>These judicial interpretations include: Article 97 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Guarantee Law of the People's Republic of China"*, in order to transplant SPC's institutional purposes to this case. In this case, the *Guarantee Agreement for the Pledge of the Concession Right to Operate of the sewage treatment project* in dispute was signed in 2005. The laws, administrative regulations, and related judicial interpretations at that time did not provide for the pledging of the right to proceeds from a sewage treatment project. In other word, the legislation has been silent in such matter. Under such circumstances, the court took the liberty to pursue desirable social-economic policy again. After comparing the right to proceeds from a sewage treatment project and the right to proceeds from a highway, the court finds they are "similar in nature". Thus, the court allow a right to proceeds from a sewage treatment [plant], which is similar to [a right to proceeds from a highway], be pledged. The Fuzhou Wuyi Sub-Branch of Fujian Haixia Bank Co., Ltd. v. Changle Yaxin Sewage Treatment Co., Ltd. and Fuzhou Municipal Administration and Engineering Co., Ltd., A Dispute over a Financial Borrowing Contract, Guiding Case No.53, China Guiding Cases Project, Stanford Law School, Online:<<https://cgc.law.stanford.edu/guiding-cases/guiding-case-53/>>

<sup>69</sup>According to the Civil Procedure Law of PRC and some other relevant statutes, in general, calculation of the enforcement application period started where the party subject to enforcement or his property is [located] within the territory of China when an effective legal document is rendered. The court thus be creative *on the issue [concerning the time] from which the enforcement application period in this case [should be] calculated when the party subject to enforcement or its property is not [located] within the territory of the People's Republic of China where PRC courts did not have enforcement jurisdiction over that case*. Therefore, the court opined that "an enforcement applicant's time limit [within which he must] apply for enforcement should be calculated from the date on which [such] enforcement jurisdiction is confirmed, that is, the date on which the property available for enforcement [belonging to] the party subject to enforcement is discovered" Shanghai Jwell Machinery Co., Ltd. and Retech Aktiengesellschaft, Switzerland, AN Enforcement Reconsideration Case on an Arbitral Award, Guiding Case No.37, China Guiding Cases Project, Stanford Law School, online: <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-37/?lang=en>>

more boldly. In Guiding Case No. 30, a civil case<sup>70</sup>, the court had enshrined the philosophy of legal right to turn down the defendant's claim which is indeed one of the very classic Chinese traditional philosophy that mingled morality and rights, that a person morally liable shall not deserve of legal protection.

On the other hand, in some guiding cases, Chinese courts have taken advantage of legislative blank to declare preferring values when strike down administrative decision. In Guiding Case No. 76, for instance, the Court had found its own legal reason to decide an administrative contract before the legislation came out. In the old form of Administrative Litigation Law of PRC(ALL, the original version was promulgated in 2000), whether “administrative contract” ( xingzheng xieyi ) is justiciable remained as a question. Under such circumstance, the Basic People's Court of Anyuan District of Pingxiang Municipality in Jiangxi Province (Anyuan Court) not only accepted the case, but also stated that “the interpretation made by administrative bodies within its authority should bind both parties on the administrative contract. According to concrete circumstance, [the court] may use it as the basis for reviewing administrative contract<sup>71</sup>”. In the case, the plaintiff, a property developer had entered a contract with Land and Resources Bureau of Ping Zhou Municipality. The purpose of the contract was to transfer a land to the plaintiff. According to the contract, the nature of the land is “commercial-residential”, but while the land certificate was issued by the defendant, the nature had been changed into “industrial”. The plaintiff then sought to resume the original nature of land into “Commercial-residential”. With the refusal from the defendant, the plaintiff turned to Planning Bureau of the Municipality. After the Planning Bureau's

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<sup>70</sup>Lan Jianjun and Hangzhou Suremoov Automotive Tecnology Company Limited v. Tianjin Xiaomuzhi Automobile Maintenance and Repair Services Co., Ltd. et al., A Trademark Infringement and Unfair Competition Dispute, Guiding Case No.30, China Guiding Cases Project, Stanford Law School, online: <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-30/?lang=en>>

<sup>71</sup> *Pingxiangshi yapeng fangdichan kaifa youxiangongsi su pingxiangshi guotuziyuanju bulvxing xingzhengxieyi'an* [Pingxiang Yapeng Real Estate Development Co.,Ltd. V. Land and Resources Bureau of Pingxiang City], Guiding Case No.76, Chinacourt.org, Online: <<http://www.court.gov.cn/fabu-xiangqing-34322.html>>

involvement by issuing an interpretation that the land should be “commercial-residential” *ab initio*, the Land and Resources Bureau agreed to change the nature of land, yet it requested the plaintiff to repay “land-transferring fees”. The case was thus brought by the plaintiff into the Anyuan Court in order to (1) seek change the nature of the land, and (2) revoke the administrative decision for the repayment of “land-transferring fees” contingent on the change of the land nature. The Anyuan Court upheld the plaintiff on the following grounds: (1) Administrative Contract should underlie the principle of good faith, equality and voluntariness...administrative body shall not increase obligation for the other party, or unitarily modify or terminate the contract. (2) The Interpretation issued by Planning Bureau fell within its scope of authority, and is conducive to the image of integrity of the government...and it legally bind the decision regarding the nature of the land. Thus, the Basic Court decide to discharge the administrative decisions of the defendant on the ground of legality and the principle of good faith. The Intermediate Court had sustained the decision of Anyuan Court after the government appealed<sup>72</sup>.

Even in criminal cases, where the traditional values usually prevail, PRC courts may still declare public policy by taking advantage of legislative blank. For example, in Guiding Case 61, in determining what constitute “the circumstances are serious” and “the circumstances are especially serious” of the crime of using undisclosed information for transaction”, a gap left by NPC, the SPC sought to interpret legislative intent of Criminal Law. In particular, the SPC even took the place of NPC or its Standing Committee while explaining why the Article 180 quote penalty provisions from other articles. According to the SPC “the purpose for quoting penalty provisions from other articles is because [the legislators] avoid repeatedly express, and it is in no case because the provisions are unclear.” In short, the SPC opined,

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<sup>72</sup> *Ibid*

“although the Section 4 of Article 180 do not explicitly contain ‘the circumstances are especially serious’, it should be included” because of “legislative intent, the meaning of the provisions and legislative technique.<sup>73</sup>” In other words, the SPC has on its own, form a quasi-provision to fill a legislative blank while the NPC or its Standing Committee’s original scheme may not actually contain such “legislative intent”.

### 2.1.6 Restraining Values

According to our model, the third type of preferring values is restraining value. The term “restraining” in here refers to the idea that Chinese courts voluntarily “step back” from judicializing new area to declare public policies for the society, even if they do have the chance. In such scenario, the reason for being “restraining” is for the sake of social and institutional autonomy, a special preferring value. Certainly, comparing with other guiding cases, cases reflecting such “restraining values” in guiding cases system are smaller in number.

Indeed, the Guiding Case No.10 may be seen as a typical example, where the courts chose to move back from the issues that it could have been judicialized. The plaintiff in this case, a general manager claimed that, a resolution that the defendant, Jiapower Company used to dismiss the plaintiff from his post as general manager was based on facts and reasons that could not stand, and the board of directors’ procedure for convening, its method of voting, as well as the contents of its resolution all violated the provisions of the *Company Law of PRC*. He requested that the court revoke the board of directors’ resolution in accordance with law<sup>74</sup>. Thus, the key in this case is whether the court should review a resolution made by broad of

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<sup>73</sup> Male liyong Weigongkaixinxi jiaoyi’an [Case concerning Ma Le's Trading by Using Undisclosed Information], Guiding Case No.61, Chinacourt.org, Online: <<http://www.court.gov.cn/fabu-xiangqing-27541.html>>

<sup>74</sup> Li Jianjun v. Shanghai Jiapower Environment Protection Science and Technology Co., Ltd., A Corporate Resolution Revocation Dispute, Guiding Case No.10, China Guiding Cases Project, Stanford Law School, online: <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-10/>>

directors in a Shanghai Company when the plaintiff seeks judicial intervention from the court to overturn the defendant's resolution that discharge his duty in the company. While the Basic Court upheld the plaintiff, the Intermediate Court in the Second Instance revoked the Basic Court's decision, dismissing the plaintiff with the ground that the courts should respect the corporate autonomy with the following ground: "in principle, judiciary do not intervene in internal corporate affairs."<sup>75</sup>

In another administrative case, the Guiding Case 39, the court, once again, voluntarily stepped back from academic autonomy when it has the chance to judicialize the issue to promote preferring public policy. The plaintiff was a graduate of the undergraduate program in the defendant, a university in China. However, the defendant refused to confer the bachelor degree on the plaintiff based on the Detailed Implementing Rules of Undergraduate program that issued by the defendant itself. The plaintiff thus filed an administrative litigation against the defendant. Both courts in the First and Second Instances had rejected the litigation request of the plaintiff.

The court opined that each higher education institution enjoys academic autonomy. Academic autonomy allows the higher education institution to "determine its own measuring standards for the requisite academic levels for bachelor's degree conferral, in accordance with its teaching level and actual circumstances and within the scope of basic statutory principles". Thus, on such premise, the higher education institution has autonomy to set their own standards to confer bachelor degree based on its own philosophy of how to run its school, actual teaching situations, and [its] pursuit of the ideal of [achieving high] academic levels.<sup>76</sup>"

The court concludes that legality review is the principle for conducting judicial review of an

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<sup>75</sup> *Ibid*

<sup>76</sup> He Xiaoqiang v. Huazhong University of Science and Technology, A Case of a Refusal to Confer a Degree, Guiding Case No.39, China Guiding Cases Project, Stanford Law School, online: <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-10/>>

education institution's act of conferring a degree. "Judicial review of the conferral of bachelor's degrees must not interfere with or influence the principle of higher education institutions' academic autonomy. Legality review should be the basic principle for [determining] the scope of judicial review in administrative litigation cases [involving] degree conferral.<sup>77</sup>" Thus, again, when the court has both the potential power and opportunity to declare desirable public policy for judicialize such matters, the court, voluntarily, chose to back down. Indeed, restraining value is a particular but salient type of institutional purpose, which had been shared by numbers of mature judiciaries in the world. However, in China's context, such value had not begun its development until recent years. In this regard, restraining values reflected by guiding cases the current Chinese courts are pursuing. This is indeed a noteworthy development. Even more noteworthy is that Guiding Case No. 39 was delivered long before it was collected by the guiding cases system. And this has somewhat demonstrated the vision of the institutional purposes of SPC itself, a supreme court in the probably most complex authoritarian environment in the world.

#### **4. Main Empirical Observations: A Brief Comparison with Hyper-Political Cases**

In this part, we will explore institutional purposes in hyper-political cases which are vastly different than them in the ordinary cases, although they do share some similarity regarding their institutional purposes. We then compare institutional purposes between guiding cases and these selected hyper-political cases to present our empirical findings from guiding cases that could validate our theoretical model.

##### **4.1 Exploration of Courts' institutional purposes in three Hyper-Political Cases**

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<sup>77</sup> *Ibid*

For the purpose to compare guiding cases, we have chosen another important type of cases in China, the hyper-political cases, as “control group” for contrast of ordinary justices. To be more specific, among hyper-political cases, “Xu Zhiyong” case in 2014, “Pu Zhiqiang” case in 2015 and “Zhang Rongping” case in 2016 are particularly important. First, they represent different social identities of people subject to hyper-political trials.<sup>78</sup> Second, they represent different “social classes” within those unwelcomed and suppressed by the authoritarian regime<sup>79</sup>. Along with some other hyper-political cases, from the perspective of institutional purposes, some preliminary observations could be found in judgments of hyper-political cases. In general, in hyper-political cases Chinese courts have strong tendency to protect self-interest and institutional integrity.

First, from our observation, the text of these judgments tends to be very detailed, which probably would be the first impression for anyone reading these judgments. In general, these political trials come with judgments that are very long in text with over 10000 characters in Chinese. Comparing with guiding cases collected and issued by the SPC, this length is quite rare and unusual. Indeed, the most important reason accounting for such extraordinary length are because the evidence collected by prosecutors and recognized by courts are quite detailed.

For example, in Pu Zhiqiang case, originally the prosecutor prepared over 30 pieces of Weibo

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<sup>78</sup> Pu Zhiqiang is an critical lawyer mainly defending political sensitive cases such as cases involving torture and excessive detention. Xu Zhiyong is an social campaign chief organizer and in Charge of a civil right NGO, named “Citizen Movement” or “Gongmeng” in Chinese. He holds a law doctoral degree from Peking University. Zhang Rongping, on the other hand, is an individual activist who, on his own, seeks to overturn the Party/State by inciting people via Internet and public protest in person. Thus, they each represent critical lawyer, civil right NGO organiser/ social movement leader, and individual activists. When PRC they have been sent to courts by the Party/State, as we will demonstrate, their cases have manifested important basic social logic, institutional dynamics and “judicial diplomacy of PRC courts under the authoritarian rule.

<sup>79</sup> Pu himself is a successful lawyer who has awarded many high-class rewards and honors for fighting both political cases and other normal cases, and he is economically successful as well. Both Xu and Pu are famous internationally and domestically. Xu was famous for he has submitted a petition to call for abolish the system of reforming through labor with other two scholars when he was a doctoral candidate in Peking University. He then became a lecturer in a University in Beijing and earned reputation mainly among legal academic circle. His career as social campaign organizer has somewhat successful in the 2000s until his NGO Gongmeng has been banned in 2009. But this has not seriously impaired his reputation as civil right NGO leader. However, unlike these two figures, Zhang Rongping is like “nobody”. He always protested in public and expressed his political online totally on his own. He has no staff, and no funding for promoting his political opinions. According to his judgment, the most “influential” platform he got was his QQ Space which only hundreds of followers and three thousand viewing. He could be ascribed as “lower class” in list of “unwelcomed people” of the PRC regimes, comparing with other two enjoying higher “social status” and popular attention. Thus, we deliberate select these cases for examining if there are difference exist for how PRC courts deal with these cases.



published by Pu as evidences, although they had shortened to 7 pieces during the trial<sup>80</sup>. In Xu Zhiyong case, likewise, the police and prosecutors had collected over 200 pieces of testimony, although a large part of them are hearsays<sup>81</sup>. From the perspective of our theory, our speculation would be twofold. First, the courts, as TDR institution, have their own institutional logic even though they are under authoritarian context. As many have written, adjudicating political case provide some degree of legitimacy for the authoritarian regimes<sup>82</sup>. To a large extent, adjudicating political cases according to normative structure is an important feature that separate current Chinese courts from the camp of very definition of totalitarianism.

However, if we further shift our point of view from traditional “functional perspective” to institutional view, we found that authoritarian courts such as Chinese courts still have their institutional purposes in political sensitive cases. In our selected hyper-political cases, courts’ prolonged procedure for examining evidence during trials is indeed one important way for courts to expand their authority. For one thing, court going through such procedure might be able to show the Party/State that normative structure is the key to legalize political suppression. On the other hand, the authority of court, as we have noted, lies in the image of neutral triadic dispute resolvers that adjudicate matters “according to law”. Without this, there would be no legitimacy for foundation of judicial power. Thus, to include extraordinary detail of evidence and analysis thereof is also a way to exert authority of court toward the plaintiff and defendant in the political trials and, by extension, the society as well. Admittedly, in trying hyper-political cases, authoritarian courts are unable to perform the genuine TDR

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<sup>80</sup> Zheping Huang, “The Seven Tweets that could cost a Chinese human rights lawyer eight years in Jail”(Dec.9, 2015) Online: <<https://qz.com/569370/the-seven-tweets-that-could-cost-a-chinese-human-rights-lawyer-eight-years-in-jail/>>

<sup>81</sup> See Xu Zhiyong’s Judgment: Criminal Judgment (2013) *yizhongxingchuzi* No. 5268, The First Intermediate People’s Court of Beijing Municipality

<sup>82</sup> See for example, Zhang Qianfan, “The People’s Court in Transition: The prospects of the Chinese judicial reform” (2003) 12:34 *Journal of Contemporary China* 69 at 71, 77 [Court in Transition]; Carl Minzner, “Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives on” (2009) 39 *N. M. L. Rev.* 63 at 83-84

function and prevent from pursuing their preferring policy as they did in the ordinary cases. In China, the powerful Party/State has demanded courts to perform social controlling function in these trials. In such circumstance, the Chinese courts actually do not jeopardize the laws. Indeed, it adjudicate ACCORDING TO LAW, at least it tries to establish the image that it does follow the law, even though the legislative intent behind the legislation is questionable from the liberal-democratic standard. Intentionally or unintentionally, it actually passes the buck to the authoritarian regime, the government or even the Party. Because when the courts' acts are in pure legal realm, it actually avoids taking any ethic risk about the political crack down engaging by authoritarian regime. To some degree, the logic of Chinese courts in these circumstances is still in line with its counterpart which judge according to legislation. But courts obviously have calculated their institutional interests that are different than the Party/State. They may care much about their reputation and legitimacy than the rest of the authoritarian governing machine because their fundamental institutional logic depends on it. In short, the PRC courts actually act strategically in order to protect their institutional authority and integrity as much as possible in the case of hyper-political trials.

On the other hand, it is not difficult to see from these three cases that the Party/State has left the discretion of penalty to the courts. While in most cases the courts would still behave within the expectation of authoritarian rulers, occasionally the courts use it as the invaluable windows of opportunity to pursue their own interest and values. Maybe the most important example would be Pu Zhiqiang's trial. In the case, the court had considered the defending attorney of Pu, that sentence three-year imprisonment of Pu with probation. Because of Pu's domestic impression and international reputation, the Party/State is compromised and fine with the penalty.

Furthermore, in some occasions, the court may take the opportunity to express civil rights and constitutional rights when the defending lawyer fed them with these constitutional articles and principles in these hyper-political cases. For example, since these cases all involves freedom of speech, the courts did make constitutional statement before the window of opportunity shut down. In Pu Zhiqiang, Zhang Rongping and Xu Zhiyong case, the court stresses repeatedly that citizens in China has the right of speech and freedom of expression, but these should be exercised within the framework of state laws. In this regard, we have to particularly consider that there is no constitutional review in China, and the PRC Constitution remains unjudiciable and be forbidden to be cited in actual cases.

In short, in these hyper-political cases, three important observations could be made regarding institutional purposes PRC courts have in hyper-political cases: (1) Obviously, under high political pressure, and considering there are no life tenure or similar institutional shield to guarantee incumbency for Chinese judges, they are undoubtedly care much about self-interest in trying hyper-political cases. This could be reflected by the facts the courts in hyper-political cases usually side with Party/State in substantial judgment. Because even rational and empirical assumption may be able to infer a judge may be subject to career disadvantage or even worse penalty once adjudicate hyper-political cases against the authoritarian order. Thus, this almost never happen. (2) The courts trying hyper-political cases, however, reflect a strong tendency to preserve institutional integrity, which centers on the image of a qualified triadic dispute resolving institution, the image of remain neutral TDR mechanism. (3) Occasionally the courts in hyper-political cases may pursue limited normative values or even political-constitutional values, through making constitutional arguments, to a very limited degree.

## **4.2. Main Empirical Findings and analysis on Institutional Purposes of SPC Guiding Cases**

With hyper-political cases as contrast group, let us revisit these guiding cases. In summary, we have found that empirical data drawing from the Guiding Cases has basically confirmed our theoretical assumptions.

### **4.2.1 Self-Interest and Institutional-Interest**

In these Guiding Cases, we could see that both the self-interest and Institutional Interest has played their intrinsic part in shaping institutional purposes of judicial behaviors. On the one hand, Chinese courts, just as courts in elsewhere, are institutions consist of judges. A judge is just ordinary individual in essence, a collection of varied kind of self-interests such as career advancement, workload, material treatment and reputation. These self-interests may even determine the results of cases, and has been semi-officially recognized by the SPC, just like the Guiding Case No.51 has revealed.

On the other hand, judicial behaviors in a number of guiding cases also have demonstrated the trace of institutional interest. In these guiding cases, we have found that expanding the judicial power, social-political status is in the center of institutional purposes. The most common ones may include expanding judicial power of review and strengthening “devices” of courts such as enforcement mechanism. As manifested by guiding cases, they may be achieved by exploiting legislative blank, self-empowering at the expense of administrative authority, or sometimes just by directly intruding the social realm.

Indeed, one potential but important problem for examining institutional purpose is institutional purposes may be very hard to identify. This is first because court system in China, a country with vast regional diversity, comprises of over three thousand courts. In particular, there are four tiers of court in PRC judicial system, which include SPC, provincial level High People's Court, municipal level Intermediate People's Court and the Basic People's Court in county and district of city. Although courts may share some similar purposes as judicial institution, each one is very likely to have their own agenda. For example, the SPC probably have different consideration than, say, an intermediate court. On the other hand, the fact that courts are judges' courts make the situation more complicated. Every judge, even in the same court, generally have their own interests and preference for different matters. Indeed, these differences have not only brought obstacles for researchers like us to examine, but in practice this problem baffled the PRC courts themselves. Institutional/self-interests and preferring values have great possibility to be overlapped and difficult to separate in the real world. Moreover, for judges, not only their public policy preferences, but also their preferences of public policy and normative policy may conflict from time to time. In such circumstances, courts may have to carefully select their goals and act strategically to achieve them. In short, these interests may overlap, and the divergence of self-interest of judges and institutional-interest of courts often blurs in actual cases.

How to reconcile or mitigate such obstacle in our research? In theory, Institutionalism suggest that individuals are not atomistic but rather are embedded in a complex series of relationships with other individuals and with collectivities<sup>83</sup>. Their personal preferences are

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<sup>83</sup> For example, one important school of institutionalism is rational-choice institutionalism. Rational choice theory depends for its analytical power upon the utility-maximizing decisions of individuals, but they differentiate themselves from the school of behaviorism from understanding clearly that most political life to expand self-interest does occur within institutions. See *supra* note 9 at 47

both exerted and constrained by the institution<sup>84</sup>. Further, membership in an institution tends to be a valuable commodity for those who do belong. Membership is also capacity of an institution to enforce their standards<sup>85</sup>. Thus, institutional theory highlights the fact that institutional characters of courts, such as institutional structure, cohesion and variation, or even a small variation in the institutional configuration<sup>86</sup>, would impact the member's behavior (and by extension, institutional behavior) to a varying degree. Nevertheless, in practice, it is impossible to capture all these different interests and preferences. This is because, for example, a simple result may come from numerous institutional features or environmental changes.

Thus, methodological individualism would be an important complementary for institutional perspective. Originally, it argues that only actors in political settings are individuals, and therefore the only appropriate foci for political inquiry are individuals and their behaviors<sup>87</sup>. In here, we take a more moderate ground to use behavioral and individual approach to focus on attitudes of individual judges, which could provide background and information for understanding the court as institution<sup>88</sup>. In addition, the behavioral/individual can be clearly linked with rational/utilitarian term to assume that individual act to maximize their personal self-interest. Thus, interviewing numbers of judges and other officials will be necessary<sup>89</sup>. Nevertheless, all models necessarily simplify the complex reality. That simplification,

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<sup>84</sup> From the viewpoint of rational-choice institutionalism, "utility maximization" could only be "achieved most effectively through institutional action", and member's behavior in the institution is shaped by the institutions. Thus, "individuals rationally choose to be, to some extent, constrained by their membership in institutions, whether that membership is voluntary or not." *Ibid* at 49

<sup>85</sup> The viewpoint of "Normative Institutionalism" suggest that Normative Compliance, therefore, is central to the functioning of institutions from this theoretical perspective. The source of compliance then is derived from a normative commitment to the institution and its purposes. It may also, however, become habitualized and routinized so that conscious commitment and conscious decision-making are minimized. *Ibid* at 39, 41

<sup>86</sup> *Supra* Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) at 251

<sup>87</sup> *Supra* note 9 at 14

<sup>88</sup> This is because, the weakness of attitudinal approach is obvious. As Shapiro has noted, "weaknesses for the attitudinal research is that the behavior under another name becomes its own explanation. At best this method is tautological." Even obtaining attitudes from group behavior such as group voting we may encounter similar difficulties. This is because even all judges vote unanimous together on the same issues, their attitudes toward a policy or issue may still not the same. See *supra* note 11 at 40-41

<sup>89</sup> But this might generate extra difficulties. For example, it is a general knowledge that in China, both courts and judges probably, in official occasions, will deny they have "made law". They might assert that they merely observe and follow legislative will. This is understandable considering the PRC is a civil law country officially enshrining the orthodoxy principle of parliamentary supremacy.

however, creates the risk that some essential aspect of the process or phenomenon under study will be lost<sup>90</sup>. In applying attitudinal approach to our study, we must note that there may always be gap between judges' actual motivations and motivations that we could observe. This is one observational bias that we may encounter and not that easily to get rid of.

In our research, we tend to make a compromise by seeking for the best common place between higher courts and lower courts, between judges and the courts. Just like “screen shot”, we seek to capture at least many common preferences shared by most rational courts in one specified time and space. The best effort we could do is to strike the balance between behavioralism or institutionalism to discover common interests and purpose of them<sup>91</sup>. Behavioralism suggest that we should pay attention to individual behaviors within institution, while institutionalism corrected behavioralism by focusing on how formal and informal rules and procedures influence, constrain, and sometimes even determine what individual actors' behaviors within the institution<sup>92</sup>. Nevertheless, the SPC still deserve our special attention because SPC's extremely special position in judicial system and important status in China's polity.

#### **4.2.2 Traditional, Activist and Restraining Values**

As hypothesized by our model, as for the preferring values, we divide them into three categories: traditional, activist and restraining.

First, empirical observation on guiding cases could reveal that it is quite often that Chinese courts side with traditional values. Although the selection of cases tends to make them

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<sup>90</sup> *Supra* note 16 at 442

<sup>91</sup> In this regard, the “rational choice institutionalism” might be good for reference. This version of the rational choice approach conceptualizes institutions as aggregations of rules with members of the organizations-or institutions-agreeing to follow those rules in exchange for such benefits as they are able to derive from their membership within the structure. *Supra* note 9 at 52

<sup>92</sup> See *supra* note 10 at 10; To explore more, see *supra* note 1

“meaningful” for courts’ reference, we still could find in numbers of cases the courts support traditional Chinese philosophy and Socialist values. For example, the two murder cases as noted above have been mingled application of modern law with traditional Confucian ethics. In another administrative case, the court chose to side with the socialist values.

Second, and perhaps more often than traditional values, activist values manifest themselves in a large part of guiding cases. Activist values are distance from or even against traditional values. Pursuit of these activist values often demand courts to actively work against traditional values or institutional interest of some other institutions. Such activist values share more resemblance with Liberal-Rule of Law values as enshrined in the Western world. As we have demonstrated, from demolition case to company issues, from administrative reply to environmental public litigation, from foreign-related civil enforcement to patent law, Chinese court indeed act very much as its counterpart in the world to declare preferring public policy, at least for the guiding cases.

Finally, we also have found a special type of values, the “restraining values” exists in guiding cases. The term “restraining” means that the court voluntarily pulls back from judicializing social-economic issues for the sake of protecting social autonomy, even though society is the realm that the courts feel most comfortable to deal with. In commercial dispute as the Guiding Case No. 10, the courts sacrificed the chance to judicialize social-economic issue for expanding judicial power because “corporate autonomy” is a value that the court jealously respect and protect. In another case, Guiding Case No. 17, the courts, again, voluntarily kept distance from the autonomy of university to protect “academic freedom”.

#### **4.2.3 Judicialization and Binding Effects of Guiding Cases**



Indeed, in numbers of Guiding Cases the judicial power has pushed forward to concur new territory. This means, judicialized process occurred. In these cases, Chinese courts push forward to conquer new areas where have not been touched and through guiding cases system they have been formally recognized by the SPC, which is both the Supreme Court and the highest administrative organ in Chinese courts system.

Indeed, many of the guiding cases involve judicialization. Indeed, judicialization is an excellent entry point to examine institutional purposes of PRC courts. However, the prototypic conception of judicialization is somewhat problematic because it has tangled with normative meanings. First, the prototypic definition of “judicialization” implies that only political development would invite judicialization<sup>93</sup>, which closely link with judicialization of politics. However, it neglects the fact that social-economic development also would provide enough materials and needs for judicialized process, as these guiding cases have demonstrated<sup>94</sup>. Second, there is a general assumption that judicialization is possible only the prerequisite of Liberal-democratic version of judicial independence is achieved. However, modern courts may not be truly independent if considering their roles as rule maker and social controller<sup>95</sup>. Nevertheless, we may step back and take a more moderate position to redefine the conception of judicialization. That is, judicialization simply means to institutionally bring dyadic disputes under the remit of the courts. Simply put, after largely neutralizing the normative ideological meaning of the conception, judicialization is a means

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<sup>93</sup> Under such “prototypic definition”, the judicialization of politics is the process by which triadic lawmaking progressively shapes the strategic behavior of political actors engaged in interactions with one another. *supra* note 12 at 164

<sup>94</sup> However, obviously, the scope, objective, and power for such judicialized process in social-economic affairs may be different than the “typical” judicialization of politics.

<sup>95</sup> In the US, for example, the bureaucratic nature of Federal Judiciary make it could potentially be rigged by electoral politics. Common way for rigging Federal Justices is to change the structure of courts. This may include entrenching ideological bias in the newly created court or introducing “Rule of More than Four”. Moreover, constitutional protections for judicial independence not only fail to preclude such manipulation, but can themselves be exploited for even greater effect. See *supra* note 15

rather than the ends. The courts indeed manifest important institutional characters in judicialized process<sup>96</sup>.

Importantly, the purpose of guiding cases, according to the SPC, is to provide reference for all Chinese courts when they encounter similar cases in future, and to better solve the problem of disunited judgements in the diverse China<sup>97</sup>. However, this has somewhat led to the ambiguous status of the binding effects of guiding cases. Although the SPC claim that the practice of guiding case is not intended to duplicate the *stare decisis* system in Common Law world<sup>98</sup>. They do, to a varied degree, has provided *de facto* precedent-effect for courts to observe. Indeed, even viewing from limited information we have, there are indeed some cases have already cited the guiding cases. For example, after the Guiding Case No.10 was issued by the SPC in 2012, there have been five judgments officially refer to Guiding Case No.10<sup>99</sup>. Nevertheless, we may not be optimistic too soon because the Chinese judicial system still formally remains in its constitutional and political cage<sup>100</sup>. Among constraints, the legislative supremacy and the niche of court in a civil-law legal system are two largest obstacles for genuine and official realization of binding effect of guiding cases.

#### 4.2.4 Law as the Strongest Weapon for Pursuing Institutional Purposes

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<sup>96</sup> In addition, we need to clarify relationship between judicial rulemaking and judicialization. These two concepts are different terms having several aspects overlapped. The key is, rule-making generally contain varied degree of judicialization, because judicial rule-making is the courts make abstract rules that conquer a new realm and bind the similar dyadic exchange and normative structure in future.

<sup>97</sup> This has been officially acknowledged by the SPC. See, for example, “Zuigaorenminfayuan fabu jiaqiang anli zhidaogongzuo qingkuang” (June 12, 2015), SPC, online: <<http://www.court.gov.cn/zixun-xiangqing-14623.html>>

<sup>98</sup> At best, “the system of *stare decisis* is only used for reference.” Said by Shen Deyong, Standing Vice-President of SPC. See “Shen Deyong: Strengthening Guiding Case and Unify the standard for judgment” (Sept. 16, 2015), SPC, online:<<http://www.court.gov.cn/zixun-xiangqing-15475.html>>

<sup>99</sup> There are five results for searching “Guiding Case Referenced: Guiding Case No.10”, See the Search on Chian Guiding Cases Project, Stanford Law School, online: <[https://cgc.law.stanford.edu/judgments/?guiding\\_case\\_references=1446](https://cgc.law.stanford.edu/judgments/?guiding_case_references=1446)>

<sup>100</sup> See Court in Transition, *supra* note 82 at 71, 77, 99-100; Anthony R. Dicks, “Compartmentalized Law and Judicial Restraint” (1995) The China Quarterly, No. 141, Special Issue: China’s Legal Reforms 82 at 86-87; see also *supra* note 31 at 256

Indeed, both our theoretical framework and empirical examination of guiding cases demonstrated that, law, or normative structure, is the most powerful weapon in courts' arsenal for pursuing both institutional/self-interest and preferring values. From our exploration of guiding cases, we could also testify such assumption. "Court are law's courts". In numbers of guiding cases, law has been turned into reasoning and persuasion. In taking advantage of legislative blank, the PRC courts mainly go through legal reasoning and legal logic to provide necessity to themselves, as many guiding cases above have shown.

On the other hand, while court pursue public policy and institutional interest at the expense of other administrative branches, it may also do so by covering with legal shield. As we could see from nearly all administrative litigations, they all first tend to review legality (*hefaxing*). In performing legalism review, courts in general review whether the disputed act has violated laws or legal order. Courts in these cases cast as neutral dispute resolvers and law-interpreters in order to invisibly pursue institutional interests and preferring policies. Perhaps one of the most important example would be Guiding Case No.5, where the court, in an administrative case, took the opportunity to create a system of quasi-constitutional review, a taboo in current China constitutional and political system. And to make things more interesting, the case was selected by the SPC as a guiding case. Thus, in short, the fact that normative structure become the most powerful weapon for courts to serve self-institutional interests and preferring values have empirically confirmed our institutional analytic model of courts in China's context.

#### **4.2.5 Institutional Purposes in Criminal, Civil and Administrative Cases**

In general, we have found that the degree that institutional purposes reflect in civil, criminal and administrative cases are different among all guiding cases. Obviously in different types of cases, the room for Chinese court to pursue their institutional purposes are varied.

In civil cases, frequently the disputes only involve private parties such as individuals and companies. In this sense, courts thus usually only have to deal with society in many civil cases. This is indeed put Chinese courts in a more comfort zone since the court is not only a TDR institution, but a government institutions. As government institutions, courts share coercive power backed up by the state. Thus, we have found that Chinese Courts in these cases have much autonomy to demonstrate their preferring policies and pursue self/institutional interests without concerning political safety related to more sensitive cases, or possible retaliation caused by stepping on other institutions' realm. Furthermore, in many circumstances, they may care more about their preferring values rather than, say, judge's self-interests in many of these cases.

Secondly and astonishingly, while basic facts or disputes of most administrative cases are quite straightforward, a large part of administrative cases among all guiding cases reflect strong institutional purposes. This is first because most administrative cases collected as guiding cases involve salient judicialized process where the courts started to handle disputes previously were not under its remits in order to expand its reviewing scope. Secondly, as we could see from these cases, many preferring values are achieved through striking down administrative acts or taking advantage of legislative gap in administrative cases. For example, the Guiding Cases No.5 where the court established a potentially quasi-constitutional review power is an typical administrative case. Thus, in short, apart from civil cases, administrative cases provided another arena where the courts expanding judicial power

and display their preferring values.

Third, in criminal cases, the courts indeed have the least room for stretch their self/institutional interests and preferring values. As we could see from guiding cases, traditional values often prevail in criminal cases, although the court may still pursue some values or extend institutional power in these cases just as the Guiding Case No. 61 has revealed. This may cause by at least three reasons: first, courts in most criminal cases directly perform social control function for the state power. The State and legislation may only leave a very limited room for courts to stretch themselves in criminal cases. Second, as criminal procedure in elsewhere, the principle of Chinese criminal law also stresses modest and restrained application of criminal code, which has further limit the room of the courts. Third, in China legal system, the criminal law generally involves three state organs: The Public Security Bureau (Police), procuratorate and the courts. Traditionally the police and procuratorate enjoy higher status in Chinese context, plus the Political-Legal Committee's strong influence. Under such circumstance, in most cases the courts seldom challenge the procuratorate and polices in criminal justice, which may further limit its capacity to display and pursue its own agenda.

#### **4.2.6 The “Uprising” Character in Local PRC Courts**

From these guiding cases, we could particularly notice that many bold judgments that rule fiercely against government department and fill in legislative gap are delivered by lower courts, especially court in basic level and intermediate level. For example, the Guiding Case No. 26 was the case where a basic court struck down an administrative act of provincial government department. In Guiding Case No.5, the potential power for quasi-constitutional

review was established by a basic court, where the reasoning of this judgment *de facto* challenge the validity and legality of the *Measure* that issued by a department of provincial government.

Therefore, the scenario is interesting because it is actually counter-intuitive, challenging our perception regarding authoritarian judicial system like the PRC courts that work under great pressure from both the authoritarian environment which hostile to judicial independence, judicial activism, and bureaucratic tradition. Why basic courts in China willing to risk themselves to challenge the state power? Indeed, Blame's article in basic rural tribunals in Western China may inspire us for answering this question. She found that, comparing with courtroom, free from rigidity and formality in tribunal makes it easier to develop popular constitutionalism in current China<sup>101</sup>. Nevertheless, obviously degree of rigidity and formality seems to be an inadequate explanation for phenomenon we found in here. Thus, such scenario is worth to be further explored and more answers may be needed.

#### **4.2.7 Guiding Cases and Hyper-political Cases**

As indicated by our case categorization, we divide all cases in China into ordinary cases, sensitive cases and hyper-political cases. We have theorized that institutional characters in all three categories of cases in PRC authoritarian context are different. For the characteristics and extent of institutional in each category, we also assume that they are varied, although they share important institutional logics in common. In the second and third part of this article, from empirical data we have drawn from guiding case system and selected hyper-political case, we found that, in general, in ordinary Cases Chinese courts mainly pursue

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<sup>101</sup> Stephanie Balme, "Ordinary Justice and Popular Constitutionalism in China", in Stephanie Balme & Michael Dowdle, eds, *Building Constitutionalism in China* (New York: Pagger Macmillan, 2009) 179 at 195-196

preferring values, while in hyper-political cases institutional integrity and normative values, as well as self-interest of judge dominate institutional purposes of PRC courts.

If we view only these judgments alone, we might make a reckless conclusion that Chinese courts act not much different than courts in Europe, North America or even Japan or South Korea. Chinese courts act like a very well-established court that chose preferring public policy with total discretionary power, as long as the courts stay within the line of the law. The courts even forfeit the chance to expand its own power toward the society even though it totally has the opportunity to do so.

However, this scenario become quite different once we take hyper-political cases into account. When adjudicating cases involving hyper-political matter, Chinese courts' fundamental "crisis of TDR legitimacy" has been exacerbated. When this occur, the channel for pursuing most preferring values would be generally closed. And the only option left for PRC courts is to use varies tactics to statically defend its institutional nature and integrity. Thus, protecting the image of neutral dispute resolver remain as central task for PRC courts as institution, although in occasion they may be able to declare limited normative policy or even engage in somewhat constitutional arguments.

#### **4.2.8 The Limitations of Guiding Cases**

As we have demonstrated institutional purposes manifested in China's Guiding Case system, there are at least two major limitations of these guiding cases.

First, as they have been ascribed into the category of "ordinary justice", most, if not all

guiding cases selected by both lower courts and SPC stay in politically safe realm, which means they never touch the core of Party/State or authoritarian rule. Obviously, for example, none of these guiding cases involve high-ranking official, let alone more sensitive issue such as Communist Party, election and other more central political power. Even though a few of these cases seems to touch the constitutional rights such as due procedure and academic freedom, they are still far from “sensitiveness” if using our theoretical model aforementioned. For one reason, the Party, along with many political matters, are currently nonjudiciable in Chinese courts. However, a more fundamental reason is that the court system in China seems to have an intrinsic tendency to keep distance from authoritarian ruler. Of course, they have further confirmed our observation regarding institutional and self-interests of Chinese courts. This means PRC courts have incentives to preserve self-interest of judges and protect the institutional health of the courts by staying away from political disputes. Importantly, remaining as a low-key neutral TDR institution, an “apolitical” dispute resolver in adjudicating activities is beneficial to development of judicial power in current China context.

Another major limitation of guiding case system is selection bias problem. As we discussed above, all guiding cases are handpicked by courts, thus they might limit our perception of the whole picture of courts and justices in China. Even within the realm of ordinary justice, the guiding cases are questionable regarding their representativeness of whole cases. Indeed, in a country bearing vast regional difference, guiding cases by no means represent every single judgement in every courtroom in over three thousand Chinese courts<sup>102</sup>. The nature of twice-selection of guiding cases may blind us to see how similar cases are decided even in a basic court in an adjacent town. Moreover, a more frustrated fact is that, in current China, false

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<sup>102</sup> For instance, in 2016, official statistics show there are over 23 million cases handling by PRC courts, 18% more than total cases in 2015. “Works Report of SPC” (March 19, 2017) Xinhuanet, online:<[http://news.xinhuanet.com/politics/2017-03/19/c\\_1120653949.htm](http://news.xinhuanet.com/politics/2017-03/19/c_1120653949.htm)>



case and judicial corruption remains as very serious but common problem<sup>103</sup>, and this has further impaired the trustworthiness that guiding cases could represent the real scenario in China. Nevertheless, guiding cases do show many excellent judgments genuinely and bravely delivered by Chinese judges. Also, because they have been collected and organized by the SPC functioning as reference cases, it might show a path regarding where Chinese courts might go in the near future.

## **5. Conclusion**

After briefly introducing institutional perspective, this article has proposed a new analytic framework to interpret institutional purposes of courts in PRC authoritarian context. This theory implies that the foundation of judicial development growth in China lies in courts' basic nature as TDR institution but not rest on external factors. As one major pillar of the comprehensive institutional analytic framework, this article has first provided a theoretical model indicating that PRC courts do pursue a variety of institutional purpose just as courts in elsewhere.

We have adopted the rational/utilitarian perspective and divide institutional purposes according to principle of appropriateness and principle of consequentiality. On the one hand, we have identified common vital self-interests of judges, and courts' institutional interest to increase professionalism to attain more power and enhance socio-politico status. On the other hand, this article also suggests that court as institution have the tendency to pursue preferring values and public policies.

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<sup>103</sup> See, for example, Fu Hualing, "Building Judicial Integrity in China" (2016) 39:1 *Hastings International and Comparative Law Review* 167

We use the guiding cases system collected and issued by the SPC to test our theoretical framework. With hyper-political cases as contrast, we have found these guiding cases seems to be able to validate our institutional analytic model. First, while the cases are farthest from the core interest of authoritarian rule, the court enjoy largest autonomy to pursue its own preferring values and policies that the court(s) found desirable. Chinese courts, on its own, could choose to implement substantial public policy, or uphold the normative values to promote institutional interests. It could choose to expand its own territory by judicializing social-economic affairs, or develop its authority at the expense of administrative branches in administrative litigations. It may follow a common and even institutionalized approach to fill in the legislative blank left by the NPC. At its extreme, the courts may establish a quasi-constitutional review power in ordinary cases. The courts, in other words, deploy a potential powerful weapon without immediately activating it. On the one hand, guiding cases reflect, though rarely, the self-interest of courts. Also, many cases reflect strong tendency of self-empower of PRC courts, and many of these cases demonstrate high degree of normative preference that PRC courts use law to increase their own power and authority. On the other hand, in numbers of guiding cases, the courts may choose to cooperate in preserving traditional values, promoting policies that reflected strong traditional and Socialist values. However, in many other cases, PRC courts are enthusiastic to pursue activist values that at the expense of administrative authority, or take advantage of legislative blank, or directly control the public policy of Chinese society. Furthermore, in some rare occasions, PRC courts even scarify their opportunities to self-empower in exchange of preserving social autonomy, a special preferring value. Furthermore, guiding cases also manifest some interesting scenario. For example, it has shown that local courts' uprising character against high level governments, and the extent of manifestation of institutional purposes are varied in criminal, civil and administrative cases.

Indeed, comparing with courts in elsewhere, institutional purposes of SPC and lower Chinese courts demonstrate in guiding cases are not much different from many counterparties in the world. Courts perform important TDR, social control and legislative function, and they all have different level of self/institutional interests and preferring values and public policy.

Perhaps most importantly is that guiding cases had been selected by both lower courts and the SPC, as an official “reference” for similar cases will be tried by Chinese courts in the future. In a sense, they are “endorsed” by the SPC. And the list of guiding cases is growing every three months continuingly. No one could predict or accurately examine how much impact these guiding cases could make to the current China judicial system which come with huge regional diversity across the country, but high-quality judgments made by the Chinese courts are by no means limited to these SPC guiding cases. Every year millions of judgments of ordinary cases had been delivered by over three thousand PRC courts, and there are always treasures to be discovered.

Nevertheless, as we have also noted, there are significant limitation for examining institutional purposes of Chinese courts through guiding cases system. Not only guiding cases has ruled out the sensitive cases and hyper-political cases in China, but they even are also insufficient to reveal the whole picture of ordinary justices in China. Moreover, selection bias inherited from the selection process of guiding cases has further limited the empirical validity of guiding cases system.