

Courts Without Separation of Powers: The Case of Judicial Suggestions in China

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Like courts everywhere else, socialist courts are tasked with settling disputes. Their decisions are backed by the force of law. But unlike courts everywhere else, socialist courts are also required to support official ideology and policies. They are subject to legislative supervision and party leadership in the performance of their duties. The repudiation of the notion of separation of powers and the instrumental conception of law are conventionally taken to be defining—and defective—aspects of socialist legality.

But the political accountability of socialist courts could also be empowering. Because socialist courts answer, in theory, to the party and the people, they have the warrant and duty to contribute to the orderly administration of society. Constitutional scripture does not prohibit socialist courts from venturing beyond the confines of adjudication to address issues not presented for resolution.

We study how courts in the world's largest socialist regime intervene in policy domains ranging from public health to education to crime by making judicial suggestions. These suggestions identify issues that go beyond the legal questions raised by a case and may be directed to private actors like business enterprises and public entities like governmental agencies. Though not binding on their recipients, judicial suggestions are often acknowledged, sometimes adopted, and have occasionally even precipitated legal reform.

Our exploration of judicial suggestions in the People's Republic of China illuminates a function that is available to socialist courts because of their political subordination to the party-state. More broadly, the approach exemplified here steps outside the rule of law and judicial independence paradigms to examine how constitutional doctrine shapes the boundaries of institutions, thereby contributing to a more complete understanding of socialist courts and the roles that courts might usefully take on in a world without separation of powers.

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INTRODUCTION

In the Western liberal tradition, the judiciary is imagined as the guardian of liberty, a bulwark against the arbitrary exercise of power. Sheltered from the ebb and flow of everyday politics, courts resolve disputes impartially according to law and keep the other branches of government in check.¹ In the evocative words of Thomas Fuller, “[b]e you never so high, the Law is above you.”² In contrast to Western liberal democracies, socialist regimes are governed by vanguard parties on a mission to revolutionize society and economic production. In a socialist regime, “the role of the party is to compose and arrange the music”; “[t]he task of the . . . state is to play the music as well as make certain that everyone dances to it.”³ “Law embodies the State’s and the Party’s directives for societal progress,”⁴ and courts transmit these directives. Courts serve the party-state; they do not call it to account. “A socialist figure of justice would not be blindfolded, but seeing, and she would show the way with outstretched arm and pointed fingers.”⁵

Is it conceivable then for socialist legal systems to have the rule of law?⁶ Do they realize it? The answers, it seems, depend on whether we are invoking rule of law in its thin, procedural sense, sometimes also called rule-by-law, or whether we are speaking of substantive limits on governmental power, the preservation of spheres of liberty that even the sovereign cannot transgress, that is, rule of law in its thick sense.⁷ How about judicial independence? Is judicial independence possible in socialist legal systems? Is it practiced? Again, answers seem to turn on how judicial independence is

1. See, e.g., TOM BINGHAM, *THE RULE OF LAW* 60–65, 90–96 (2010); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 52, 92 (2004); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMPAR. L. 605, 611 (1996).

2. THOMAS FULLER, *GNOMOLOGIA: ADAGIES AND PROVERBS; WISE SENTENCES AND WITTY SAYINGS, ANCIENT AND MODERN, FOREIGN AND BRITISH* 35 (1732).

3. MARY A. GLENDON, MICHAEL W. GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 678 (1985).

4. Inga Markovits, *Law or Order—Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513, 571, 574 (1982).

5. Inga Markovits, *Socialist vs. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612, 626 (1978).

6. See John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMPAR. L. 781, 794–96 (1989).

7. John K.M. Ohnesorge, *The Rule of Law*, 3 ANN. REV. L. SOC. SCI. 99, 109 (2007); Eric W. Orts, *The Rule of Law in China*, VAND. J. TRANSNAT’L L. 43, 106 (2001); William E. Butler, *The Rule of Law and the Legal System*, in *DEVELOPMENTS IN SOVIET POLITICS* 104, 105 (Stephen White, Alex Pravda & Zvi Gitelman eds., 1990). Others distinguish between rival conceptions of thick rule of law or articulate taxonomies of the rule of law, for example, the rule of professional law, the rule of political law, and the rule of traditional law. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMPAR. L. 5, 10 (1997).

understood. Do we mean, for example, collective independence, personal independence, internal independence, or decisional independence?⁸

But debates over the rule of law and judicial independence are not semantic quarrels about nomenclature. They are substantively normative because concepts like rule of law and judicial independence represent ideals. “The rule of law is considered by common consent to be a ‘good thing,’”⁹ and judicial independence is “a quality so central to our knowledge of proper court performance that the absence of it is considered a default cause for flaws or injustice in the system, unless another cause can be proved.”¹⁰ The halo surrounding these concepts is why we care so much about them. For the same reason, however, debates about whether a legal system adheres to the rule of law and whether its judiciary is independent are drenched in ideology or even prejudice. These controversies cannot be quieted by selecting one definition and sticking to it.

When it comes to the comparative study of law, concepts that are at once descriptive and evaluative—and whose proper application is contested even at the core—can sometimes generate more heat than light. These concepts emphasize certain facets of a legal system and relegate others to the periphery. They may thus detract from a holistic, contextual account of the legal system under discussion. This Article tries to escape the rhetorical strait-jackets of the rule of law and judicial independence to take a fresh look at socialist courts. Instead of reasoning in binaries, one could take socialist legality on its own terms and explore how its ideological and doctrinal commitments foster or foreclose certain institutional arrangements and functions. To illustrate this approach, we inquire here into the non-adjudicative responsibilities taken on by socialist courts in the absence of a doctrine of separation of powers, and study how these responsibilities have been discharged in practice.

Part I critiques the dominance of the rule of law and judicial independence paradigms in comparative legal analysis. Because the rule of law and judicial independence are assumed to be unqualified goods, their application to any given case is not merely a question of social fact but also a matter of evaluative interpretation and judgment. Recourse to these concepts can exhaust and frustrate interlocutors by miring them in a normative swamp. Part I thus offers and justifies another approach to thinking about socialist legal institutions, one that takes the self-understanding of the legal order seriously and asks how it shapes the functional boundaries and practical operations of state institutions. There are many tenets of socialist legality that

8. Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 69, 71 (Randall Peerenboom ed., 2009); see also Charles G. Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. SOC. SCI. 185, 187 (2014).

9. Laurence Lustgarten, *Socialism and the Rule of Law*, 15 J.L. & SOC'Y 25, 25 (1988).

10. Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 AM. J. COMPAR. L. 37, 40 (2016).

can furnish the basis for such an inquiry. Here, we restrict our attention to the doctrine of democratic centralism. In socialist legal regimes like the People's Republic of China, administration cannot be neatly demarcated from politics, and law cannot escape the shadow of policy. The state is led by a vanguard party, and governmental powers are unified rather than separated.¹¹ This is a foundational and enduring characteristic of socialist orders, one that subjugates the judicial organs to the imperatives of the party-state but can also empower them to perform non-adjudicatory tasks.

Part II introduces some of the non-adjudicatory tasks undertaken by courts in socialist China and elaborates on one of them: judicial suggestions. Judicial suggestions are documents issued by courts raising concerns about individual behavior, social practices, or governmental conduct and proposing corrective action. These documents are not legally binding and may be directed to any private or public entity, whether it is a litigant or not. We trace the conceptual origins of judicial suggestions to “special rulings of the courts” (*chastnye opredeleniia*) in the Soviet Union and document its revival in China since the late 2000s. Part III then draws on several case studies to illustrate how Chinese courts are sometimes able to intervene in social and economic life through judicial suggestions. Because of the dialogical nature of judicial suggestions and their flexibility, courts have occasionally been able to effectuate policy change by initiating intra-governmental discussion. Finally, Part IV examines the limitations of judicial suggestions in China. As judicial suggestions create no legal duties or obligations, many of them are rejected or simply ignored. Adoption of a judicial suggestion ultimately depends on its persuasiveness and the status of the recipient vis-à-vis the issuing court. We conclude by drawing some lessons for thinking about legal regimes, socialist or liberal democratic.

I. APPROACHES AND ASSUMPTIONS

A. *Stepping Out of The Rule of Law Paradigm*

Does China have the rule of law? Are its courts independent? Will ongoing reforms enhance the rule of law and judicial independence in the People's Republic of China? These controversies have dominated academic and popular discussions of the Chinese legal system.¹² Imbricated in them are profound questions about how the concepts of rule of law and judicial independence are to be understood. Does the rule of law mean adherence to a set of formal requirements, such as generality, publicity, and prospectiveness, to

11. See, e.g., Astrid Hedin, *Communist State Administrative Structures*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (William R. Thompson ed., 2021).

12. See generally Peerenboom, *supra* note 8; Kwai Hang Ng, *Is China a “Rule-by-Law” Regime?*, 67 BUFF. L. REV. 793, 793–94 (2019) (“Certainly scholars differ in prognosticating whether China is moving towards the rule of law or drifting further away from it. But they generally agree on the usefulness of the rule of law as a yardstick to evaluate the Chinese legal system.”).

name a few?¹³ Does it require law to be “capable of guiding the behavior of its subjects”?¹⁴ Under these articulations of the rule of law, China does not fare too poorly.¹⁵ Or does it demand still more, for example, that political power be tamed by law, or, to be specific, that independent courts have the final say in constitutional matters?¹⁶ The Chinese legal order categorically rejects this thicker notion of the rule of law. The Chinese Communist Party is not subject to legal restraint, and the regulations made by state-level bureaus cannot be invalidated by the judiciary. Similarly, one could ask, when it comes to judicial independence, from what and to what end? Should courts be accountable for their decisions and if so, to whom? Judges who answer to no one may turn out to be as arbitrary or venal as those who are under the thumb of the political elite.¹⁷ Are courts to be insulated from all extraneous influences and considerations so they can do justice though the heavens fall?¹⁸ Or does it suffice for judges not to be beholden to the litigants appearing before them? Simple queries about whether there is rule of law or judicial independence in China raise vexed issues whose resolution is often assumed and always fragile.¹⁹

It is perhaps time that we turned away from these conceptual scaffolds when describing, analyzing, and interpreting legal phenomena in China. The concepts of rule of law and judicial independence can sometimes be unhelpful and even distracting. Their boundaries are fluid, their cores indeterminate, and their essence subject to continual reinterpretation. “It would not be very difficult to show that the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general over-use,” muses Judith Shklar. “It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American

13. LON FULLER, *THE MORALITY OF LAW* 41–44 (1969).

14. JOSEPH RAZ, *THE AUTHORITY OF LAW* 214 (2d ed. 2009).

15. *But see* Hualing Fu, *The Varieties of Law in China*, HUM. RTS. CHINA (July 18, 2011), <https://www.hrichina.org/en/crf/article/5422> [<https://perma.cc/L7BR-DNUA>] (distinguishing between “law,” “extra-law,” and “extra-extra law” in China).

16. *See* Mark R. Beissinger, *The Party and the Rule of Law*, 28 COLUM. J. TRANSNAT’L L. 41, 43–47 (1990) (distinguishing between “formalist,” “rationalist,” and “substantive” approaches to conceiving of the rule of law); Orts, *supra* note 7, at 98.

17. *See generally* Stephen B. Burbank, Barry Friedman & Deborah Goldberg, *Introduction*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 3, 4 (Stephen B. Burbank & Barry Friedman eds., 2002).

18. *Cf.* Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must be Reversed*, 45 CORNELL INT’L L.J. 77, 108 n. 225 (2013) (“If every influence by an outside agent endangered judicial independence, the concept would become a myth.”).

19. *See* Peerenboom, *supra* note 8, at 69; Lin Feng, *The Future of Judicial Independence in China*, in *ASIA PACIFIC JUDICIARIES: INDEPENDENCE, IMPARTIALITY AND INTEGRITY* 81 (H.P. Lee & Marilyn Pittard eds., 2017); Yanrong Zhao, *The Way to Understand the Nature and Extent of Judicial Independence in China*, 6 ASIAN J.L. & SOC’Y 131 (2019); Jiangyu Wang, *The Party in the Legislature and the Judiciary*, in *THE CHINESE COMMUNITY PARTY IN ACTION: CONSOLIDATING PARTY RULE* 181, 190 (Lance L.P. Gore & Yongnian Zheng eds., 2019); Xin He, *The Party’s Control Over the Judiciary*, in *THE PARTY LEADS ALL: THE EVOLVING ROLE OF THE CHINESE COMMUNIST PARTY* 157 (Jacques Delisle & Guobin Yang, eds., 2022).

politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.”²⁰ In a similar if less emphatic vein, Lewis Kornhauser has asserted that “judicial independence is not a useful, analytic concept”; it “does not promote either our understanding of how courts function or the design of desirable judicial institutions.”²¹ “It is very difficult,” observed one commentator, “to separate the meaning of judicial independence from the politics that surround it.”²²

These arguments can easily be overstated. Our contention here is not that the concepts of rule of law or judicial independence are empty. One could well imagine legal systems that do not qualify on any reasonable formulation of the rule of law and judicial independence. Moreover, the vehement disagreements about what these concepts entail are not necessarily pathological. The philosopher W. B. Gallie suggests that there are certain concepts—“essentially contested concepts”—whose “proper use . . . inevitably involves endless disputes about their proper uses on the part of their users.”²³ These disputes “cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone.”²⁴ Essentially contested concepts “are present to us only in the form of contestation about what the ideal really is”; “the contestation between rival conceptions deepens and enriches all sides’ understanding of the area of value that the contested concept marks out.”²⁵ The rule of law, in Jeremy Waldron’s view, is just such a concept. Judicial independence arguably is too.²⁶ If these philosophers are right, the concepts of the rule of law and judicial independence are critical elements of our normative vocabulary.

But the long shadow cast by the rule of law and judicial independence over inquiries into the Chinese legal system threatens to muddle rather than clarify our thinking. First, because the concepts are appraisive, questions about whether there is rule of law or judicial independence in China are double-barreled.²⁷ They invite both description and evaluation.²⁸ To say of a polity that the rule of law is absent—that it lacks judicial independence—is

20. Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

21. Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 45, 45 (Stephen B. Burbank & Barry Friedman eds., 2002); see also Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 558 (1999).

22. Roger E. Hartley, Book Review, 12 LAW & POL. BOOK REV. (2002), <http://www.lawcourts.org/LPBR/reviews/burbank-stephen.htm> [<https://perma.cc/6UML-X8S2>].

23. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956).

24. John N. Gray, *On the Contestability of Social and Political Concepts*, 5 POL. THEORY 331, 344 (1977).

25. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 LAW & PHIL. 137, 151–52 (2002).

26. See, e.g., Sanford Levinson, *Identifying “Independence”*, 86 B.U. L. REV. 1297, 1298 (2006); Roderick A. Macdonald & Hoi Kong, *Judicial Independence as a Constitutional Virtue*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 831, 836 (Michel Rosenfeld & András Sajó eds., 2012).

27. *Id.* at 853.

28. See John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMPAR. L. 617, 623 (1998).

to criticize the status quo.²⁹ That is why essentially contested concepts are actually contested.³⁰ Differences cannot be reconciled by stipulating a definition and sticking to it. But precisely because debates cannot be so settled, disquisitions into the rule of law or judicial independence in China risk devolving into one of two argumentative tropes. The observer's beliefs about Chinese culture, politics, and society might lead him or her to assume that "any law that [he or she is] likely to find in [an] order [that rules through virtue] will not qualify as 'real' law."³¹ Or the observer might draw from the fields and spaces she inhabits the standards by which Chinese legality is to be measured and criticized. In any case, because the concepts of rule of law and judicial independence are always up for grabs, they become prisms through which observers project their own hopes and prejudices on the legal system being studied.³²

Second, even if there were value to thinking in terms of rule of law and judicial independence³³—and we do believe there is—blinkered attention to these concepts can obscure the innate logic of the Chinese legal system and its practical operation. As Donald Clarke once cautioned,

[t]he problem with an evaluation as a description is that it is an incomplete and possibly misleading description. If all we do is evaluate the Chinese legal system, especially from the standpoint of the [ideal Western legal order] model, then all we can say about differences we find is a series of statements about elements that the ideal contains and that the Chinese legal system lacks, or elements that the ideal rejects that the Chinese legal system has. All we can say about the system's future is to express the hope that it will become more like the ideal Western legal order. This kind of analysis is in principle unable, except by sheer luck, to

29. See, e.g., TAMANAHA, *supra* note 1, at 33 ("Th[e] apparent unanimity in support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement."); Laurence Lustgarten, *Socialism and the Rule of Law*, 15 J.L. & SOC'Y 25, 25 (1988) ("The rule of law is considered by common consent to be a 'good thing'. It is one of those essentially contested concepts every theorist, advocate, and political protagonist wants to claim for her or his own."); Larkins, *supra* note 1, at 606 ("[D]espite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law.")

30. WILLIAMS E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 40 (2d ed. 1974). ("Politics involves the clash that emerges when appraisive concepts are shared widely but imperfectly, when mutual understanding and interpretation is possible but in a partial and limited way, when reasoned argument and coercive pressure commingle precariously in the endless process of defining and resolving issues.")

31. Teemu Ruskola, *Law Without Law, or is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL RTS. J. 655, 660 (2003).

32. See Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System"*, 2 WASH. U. GLOB. STUD. L. REV. 37, 66–67 (2003) ("[T]he biggest problem was the assumption, sometimes implicit and sometimes explicit, that a socialist system that rejected liberal democracy could not be serious about legal reforms and rule of law.")

33. Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 530–33 (2002).

grasp important internal relationships within the Chinese legal system, because it is uninterested in them.³⁴

Against this view, Randall Peerenboom insists that the rule of law ought to remain the predominant theoretical framework for considering, comparing, and critiquing the Chinese legal system.³⁵ In particular, he advocates the rule of law paradigm over alternatives that “tr[y] to avoid or at least minimize generalizations, metaphors, and conceptualizations as explanatory mechanisms.”³⁶ First, “abandoning reference to rule of law is neither possible nor desirable” since “[a]s a practical matter, people both in China and abroad will continue to invoke rule of law.”³⁷ Clarity, Peerenboom holds, is better than avoidance. Moreover, “the normative appeal of rule of law may be used [by reformers] to support controversial legal and political reforms” and to “open up discussion of sensitive topics such as multiparty elections, separation of powers and freedom of thought.”³⁸ The “rule of law,” Peerenboom continues, can also “provide[] a useful heuristic guide for legal reforms,” providing “structure to what otherwise could be a chaotic, piecemeal reform process.”³⁹ Finally, and “most important[ly] from a theoretical standpoint,” refusing to apply the concept of rule of law to non-liberal democracies exaggerates the differences between legal systems that, all said and done, tend to converge on “the basic elements of a thin rule of law.”⁴⁰

Is the rule-of-law paradigm truly preferable to more granular and situated analyses? Peerenboom’s defense of the rule of law archetype is sweeping. The archetype is invoked to predict and to prescribe. The advantages claimed for it range from the pragmatic to the strategic to the teleological. Some of Peerenboom’s arguments take certain values and objectives for granted. For instance, inciting discussion about “multiparty elections, separation of powers and freedom of thought”⁴¹ is assumed to be a good thing, presumably because they underlie liberal democracy. Other arguments can be challenged on their own terms. For example, even if we agree that a sharp theoretical lens for surveying the Chinese legal landscape is one that allows us to inter-

34. See Donald Clarke, *Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOUR OF JEROME A. COHEN 93, 112–13 (2003); see Jerome Alan Cohen, *The Chinese Communist Party and “Judicial Independence”: 1949–1959*, 82 HARV. L. REV. 967, 972 (1969) (“We can also speculate whether it is useful to apply this contemporary Western standard to China or whether some other framework of analysis might be more appropriate.”); Suli Zhu, *Political Parties in China’s Judiciary*, 17 DUKE J. COMPAR. & INT’L L. 533, 539–40 (2007) (“To insist on the distinction [between social, administrative, or Party interference in the judicial system and its operation] is to apply a standard Western model of a judiciary, inapposite for China. It fits China into a procrustean bed, akin to ‘cutting one’s feet to fit shoes’ or ‘marking a boat to see where one has dropped a knife in a river.’”).

35. RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 145 (2002).

36. *Id.*

37. *Id.* at 145–46.

38. *Id.* at 146.

39. *Id.*

40. *Id.* at 148.

41. *Id.* at 146.

pret current reforms and chart future directions, it is not clear that the rule of law model best explains contemporary observations.⁴² Scholars have proposed order maintenance, governmentality, or policy implementation as better paradigms for making sense of the Chinese legal system.⁴³ The discretion permeating the judicial process is, on these rival accounts, an enduring feature of Chinese legality rather than a temporary aberration from the rule of law ideal.⁴⁴

But these disputes need not detain us. Our contention is, after all, a modest one: that the hegemony of evaluative terms like “the rule of law” and “judicial independence” in comparative legal studies peremptorily closes off interesting and fruitful avenues of investigation. The contention cannot be dismissed by saying that people will continue to invoke these concepts anyway. At the same time, it is incumbent on critics to show how alternative questions, methods, and frameworks can generate fresh perspectives and deeper insights. Already, social scientists and interdisciplinary legal scholars have produced many empirically grounded, theoretically rich portraits of law in China that go beyond asking whether the rule of law or judicial independence exists. They have documented, for example, how Chinese judges hearing disputes navigate between formal law, traditional values, and bureaucratic incentives.⁴⁵ They have also revealed how Chinese citizens strategically exploit the legal and political rhetoric of the party-state to resist the excesses of local governments.⁴⁶ These nuanced and sophisticated studies not only call into question the aptness of the rule of law and judicial independence paradigms, they also caution against any simplistic account of law and legality in China.

In contrast to the bottom-up perspective offered by researchers in the law and society tradition, we do not try to interrogate legal forms and discourse by looking at how they are deployed in everyday interactions. Rather, we propose to identify the core ideological and doctrinal commitments of socialist legality and then ask how these commitments bear on the way the legal system operates.⁴⁷ Here, we limit our attention to the socialist denial

42. *Cf. id.* at 144; Donald C. Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 541, 544 (2022) (“If too many observations don’t fit the model, then it’s time to change the model, not to dismiss the observations.”).

43. Clarke, *supra* note 42, at 559–83; Xin He, (Non)legality as Governmentality in China 4–6 (May 28, 2020) (unpublished manuscript) (on file with authors); Ng, *supra* note 12, at 811. Note, however, that Clarke’s claim is that order maintenance is the animating political goal behind Chinese institutions now often *mischaracterized* as legal, because it is “not their purpose to engage in legal activity.” Clarke, *supra* note 42, at 554. He does not assert order maintenance to be the “animating principle behind the Chinese legal system” as a whole.

44. Ng, *supra* note 12, at 816.

45. Suli Zhu, *SENDING LAW TO THE COUNTRYSIDE* (2016).

46. Kevin J. O’Brien & Lianjiang Li, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006).

47. From a comparative law perspective, we can be taken as asking whether “macro” distinctions make a difference at the “micro” level. *Cf.* Gilles Cuniberti, *GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* 21 (2015) (“À un niveau micro-juridique, il est tout d’abord possible de comparer des institutions particulières, ou des questions particulières. . . . Il est encore possible de comparer non pas

of separation of powers in favor of democratic centralism. The principle of democratic centralism entails the subordination of courts to the party-state. The concomitant rejection of separation of powers implies, however, that there are no constitutional impediments to courts taking on non- or extra-judicatory functions. Have Chinese courts taken on such functions, and if so, how have they discharged them? By exploring this question, we might discern how socialist dogma and doctrine shape the boundaries of legal institutions even if they do not wholly determine them. We might even come to appreciate, even if dimly and darkly, the deficiencies and possibilities of socialist legality.

B. *Socialist Legality on Its Own Terms*

We have so far made two premises which ought to be confronted and addressed. First, socialist states in general and the People's Republic of China in particular have rules, norms, and institutions that, together, constitute a "legal system" rather than some other kind of arrangement or mechanism, and their organs for dispute resolution are best described as "courts" rather than "teams," "offices," or "bureaus." This assumption is not anodyne.⁴⁸ It is forcefully argued in some quarters that the terms "legal systems" and "courts" connote qualities absent in socialist regimes, qualities such as organic unity or rule-boundedness.⁴⁹ Legality, on these views, is not the appropriate conceptual lens through which to make sense of socialist institutional-normative orders.⁵⁰

These points are well-taken, but we do not take ourselves to be making any grand or bold statements in speaking of the legal systems and courts of avowedly socialist countries like China.⁵¹ Although it is unnecessary for us to espouse any one theory, the account provided by Joseph Raz is adequate for our purposes. Raz characterizes a legal system as "a system for guiding behavior and for settling disputes which claims supreme authority to interfere with any kind of activity" and "also regularly either supports or restricts the creation and practice of other norms in society."⁵² This characterization of a legal system bears three core features: claim to compre-

des institutions particulières, mais des systèmes juridiques. À ce niveau macro-juridique, la comparaison a alors pour objet le fonctionnement des systèmes juridiques, et leurs caractéristiques fondamentales. En particulier, il s'agit de comparer le mode de production des normes et le fondement des systèmes considérés.")

48. See Clarke, *supra* note 34, at 97.

49. STANLEY B. LUBMAN, *BIRD IN A CAGE* 3 (1999); Clarke, *supra* note 42, at 544-45; see GORDON B. SMITH, *SOVIET POLITICS: CONTINUITY AND CONTRADICTION* 137 (1988) ("To call the [arbitrary and repressive system used to punish critics of the regime] an apparatus for the administration of justice distorts the concept of justice beyond all recognition.")

50. Clarke, *supra* note 42, at 547.

51. See MATHIAS SIEMS, *COMPARATIVE LAW* 17-18 (1998) (cautioning against misleading translations but also suggesting that "the reader ought not to be underestimated").

52. JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 154 (1999).

hensiveness, claim to supremacy, and openness.⁵³ Not only do they explain the centrality of law and its uniqueness, they are also present to a varying degree in socialist legal orders.⁵⁴

In the same spirit, courts are those organs of a legal system responsible for adjudicating disputes between persons and whose decisions, unless overturned or nullified by a hierarchical superior, are said to be determinative of the parties' rights, obligations, and liabilities.⁵⁵ Of course, adjudicatory institutions may vary in their fidelity to the rules and norms they purport to apply. Their pronouncements may be accorded more or less respect, and their judgments may be scrupulously obeyed or conveniently ignored. Be that as it may, the notion of weak or venal courts is an eminently intelligible one and we doubt the term "courts" has the normative heft to valorize those bodies so described.

Second, having implicitly posited socialist legal regimes as a coherent group of legal systems, we should pause to consider if there is anything that unifies them.⁵⁶ Generally speaking, socialist legal regimes are the legal regimes of socialist states transitioning towards communism under the leadership of a vanguard party.⁵⁷ Beyond this definition, observations tend to be theory-laden.⁵⁸ Theoretical preconceptions direct the attention of comparativists to some features at the expense of others. The perceived commonali-

53. *Id.* at 150–53 (1999).

54. *Id.* at 150 ("The general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees. . . . [It] is possible to find systems in which all or some are present only to a lesser degree or in which one or two are absent altogether. It would be arbitrary and pointless to try and fix a precise borderline between normative systems which are legal systems and those which are not.")

55. *Cf.* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981) (arguing against the adoption of an ideal prototype of courts and identifying the "root concept" of "courtiness" as the "simple one of conflict structured in triads").

56. It is possible to draw a distinction between the socialist legal family and the socialist legal tradition. *See, e.g.*, Alan Uzelac, *Survival of the Third Legal Tradition*, 49 SUP. CT. L. REV. 377, 379 (2010); Rafał Mańko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, 4 COMP. L. REV. 1, 3–4 (2013). On this distinction, a legal family refers to a group of national legal systems that share fundamental assumptions and methodology while a legal tradition refers to "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught." JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 2 (2019). The socialist legal tradition can therefore live on in states that are no longer socialist.

57. One should not, however, equate legal changes in socialist states to socialist legal transformations. As Michael Dowdle remarks, "[i]n order to constitute a meaningful topic of discussion and enquiry, the idea of socialism that informs our search for a socialist legal transformation has to function as an independent, rather than dependent, variable." Michael Dowdle, *Of 'Socialism' and 'Socialist' Legal Transformations in China and Vietnam*, in ASIAN SOCIALISM & LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 21, 21 (John Gillespie & Pip Nicholson eds., 2005); *see also* Sergei Belov, William Partlett & Alexandra Troitskaya, *Socialist Constitutional Legacies*, 9 RUSS. L.J. 8, 13 (2021).

58. *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 62–65 (2012); Vivan Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 58 (1998) ("The questions comparativists ask will reflect their own perceptual prisms and affect their receptivity to data from observed legal cultures: 'Subjects or fields of study are determined by the kinds of questions to which they have been invented to provide the answers.'").

ties between socialist legal regimes are thus not only those broadly shared by most if not all members of the class, but also those that distinguish them from familiar models or schemas. That is, those that are in some sense abnormal or unusual to the observer. As Konrad Zweigert remarked, “an index of the ‘importance’ of a feature is when the level of surprise in the mercury-in-glass of the researcher, coming from *another* legal system, rises to a high level. That is why it is easier to recognize stylistic elements in foreign legal systems than in one’s own.”⁵⁹

Hence, Harold Berman remarked on the parental nature of the socialist legal system which “treats the individual as a child or youth, as a dependent member who needs to be trained and guided in the interest of the whole as conceived by the state.”⁶⁰ For John Hazard, the “common core” of socialist legal systems lies in the mobilization of law to operate centrally planned, state-owned economies, to maintain the political dominance of the communist party, and to regulate social, family, and individual life and thereby create a new “socialist man.”⁶¹ “[T]he elusive Marxist concept of the ‘withering away of the state’ [is also] a mark of distinction of the [socialist] legal system.”⁶² Legal comparativists also pointed to these same aspects of socialist law to argue for its unity as a legal family apart from the civil law tradition which had held sway in almost all Marxist-Leninist states pre-revolution.⁶³

The academic debate over the distinctiveness of socialist legality was, however, interrupted by the collapse of the Soviet Union in 1991. John Merryman captured the intellectual sentiment of the times when he wrote that “socialist law was little more than a superstructure of socialist concepts imposed on a civil law foundation,” and “with the end of the Soviet empire the superstructure is being rapidly dismantled, and nations once considered

59. Péter Cserne, *Conceptualising ‘Style’ in Legal Scholarship: The Curious Case of Zweigert’s ‘Style Doctrine’*, 15 INT’L J.L. CONTEXT 297, 304 (quoting Konrad Zweigert, *Zur Lehre von den Rechtskreisen*, in TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 42, 47 (Kurt Nadelmann, Arthur T. von Mehren & John N. Hazard eds., 1961).

60. HAROLD J. BERMAN, *JUSTICE IN RUSSIA* 288 (1950); see also Harold J. Berman, *The Spirit of Soviet Law*, 23 WASH. L. REV. 152, 166 (1948) (“However repressive the Soviet legal system may appear to the ‘reasonable man’ of American tradition, the importance of the underlying conception of *Law as a teacher* should not be minimized.”). By 1971, however, Berman had formed the view that “[i]t [w]as becoming harder and harder to find any single characteristic that is common to the legal systems of the 14 countries generally called Communist.” Harold J. Berman, *What Makes Socialist Law Socialist?*, 20 PROBS. COMMUNISM 24, 26 (1971).

61. JOHN N. HAZARD, *COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES* 523–24 (1969). Hazard also noted that “[b]ecause the family of Marxist systems offers no novelty in attitudes taken toward sources of law or in attitudes shown by judges toward these sources, it has lost the interest of some professors of law engaged in the comparison of legal families as such” and has instead “attracted the attention . . . of political scientists, of economists, of philosophers, and of sociologists who look upon the law not as a technique but as a reflection of social values and as an instrument of social change.”

62. *Id.* at 524.

63. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM J. COMPAR. L. 781, 783–84 (1989); see also William E. Butler, *What Makes Socialist Legal Systems Socialist?*, 13 J. COMPAR. L. 1, 9–10 (2018).

'lost' to the European civil law are returning to it."⁶⁴ Entire chapters on socialist law were abruptly deleted from textbooks, leaving in their place a "legal black-hole."⁶⁵ The "socialist legal family," one author declared, was "dead and buried, and although it will take a long time to erase the traces of more than forty years of total subjection to political ideology, it seemed right to discard the chapters on socialist law."⁶⁶ Today, the number of self-proclaimed socialist states has dwindled to five: the People's Republic of China, the Republic of Cuba, the Lao People's Democratic Republic, the Socialist Republic of Vietnam and, ostensibly, the Democratic People's Republic of Korea.

The divergent paths taken by these countries post-Cold War cast further doubt on whether the idea of a socialist legal family remains analytically useful. China, for example, has embarked on a policy of economic and social liberalization that has witnessed public and private property rights being accorded equal protection under law and the decline of the guaranteed lifetime employment at state-owned enterprises. Vietnam has also embarked on socio-economic reforms that create greater opportunities for entrepreneurship and expression.⁶⁷ Laos has even been described as taking a "Leninist road to capitalism."⁶⁸

Yet, there are structural and ideological congruities that persist across extant socialist legal systems, rendering them alien to the common and civil law models. One of them is democratic centralism, pithily summarized by Vladimir Lenin as "freedom of discussion, unity of action."⁶⁹ Encapsulated by the notion of democratic centralism is the vanguard party's leadership of the state whose organs ultimately serve the party's cause. In Laos, Article 3 of the Constitution enshrines the Lao People's Revolutionary Party as the "leading nucleus" of the political system. Article 5 affirms that "[t]he National Assembly and all other state organizations are established and function in accordance with the principle of democratic centralism." Similarly, Article 4 of the Vietnamese Constitution declares that "[t]he Communist Party of Vietnam, the vanguard of the Vietnamese working class, the faith-

64. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* vii (1994).

65. ZDENĚK KÚHN, *THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION* 293 (2011).

66. KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* v (1998).

67. Pham Duy Nghia & Do Hai Ha, *The Soviet Legacy and Its Impact on Contemporary Vietnam*, in *SOCIALIST LAW IN SOCIALIST EAST ASIA* 97, 116–19 (Hualing Fu, John Gillespie, Pip Nicholson & William Partlett eds., 2018).

68. Simon Creak & Keith Barney, *Conceptualising Party-State Governance and Rule in Laos*, 48 *J. CONTEMP. ASIA* 693, 693 (2018).

69. Vladimir Lenin, *Freedom to Criticize and Unity of Action*, in 10 *LENIN COLLECTED WORKS* 380 (2d ed., 1965); see also ANDREI Y. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 370 (Hugh W. Babb trans., 1961) ("The Soviet state administration, in opposition to bourgeois administration, is built on principles of democratic centralism, uniting the force of decisions of higher organs as binding upon lower organs with complete and unimpeded development 'of local initiative and diversity of ways, means, and methods of moving toward the general goals.'").

ful representative of the rights and interests of the working class, the toiling people, and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh's thought, is the force leading the State and society." "Democratic centralism," Article 6 holds, "is the principle governing the organization and activity of the National Assembly, the People's Councils, and all other State organs." Likewise, Article 3 of the Chinese Constitution states that "[t]he State organs of the People's Republic of China apply the principle of democratic centralism" and that "[a]ll administrative, supervisory, judicial and procuratorial organs of the State are created by the people's congresses to which they are responsible and by which they are supervised." In particular, under democratic centralism, the party-state does not answer to the courts. It is the courts that answer to the party-state, being the "transmission belts" of its policies.⁷⁰ "The fact of the matter . . . is that in a socialist constitutional system the judiciary is not co-equal with the political branches of government."⁷¹ Moreover, the subjugation of the judicial organs to political power is neither veiled nor disavowed. It is officially proclaimed and justified by reference to Marxist-Leninist ideology.⁷²

Democratic centralism is thus one of the features of contemporary socialist legal systems that distinguish them from liberal democracies and many regimes dubbed authoritarian.⁷³ None of this is to say that democratic centralism is necessarily unique to socialist legal systems,⁷⁴ nor are we trying to revive socialist law as one of the world's major legal families. The point,

70. William Partlett & Eric C. Ip, *Is Socialist Law Really Dead*, 48 N.Y.U. J. INT'L L. & POL. 463, 471 (2016) (quoting Vladimir Lenin, Speech Delivered at a Joint Meeting of Communist Delegates to the Eighth Congress of Soviets: The Trade Unions, The Present Situation, and Trotsky's Mistakes (Dec. 30, 1920)).

71. MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 684 (1985).

72. See Susan Trevaske, *Socialist Law*, in *AFTERLIVES OF CHINESE COMMUNISM: POLITICAL CONCEPTS FROM MAO TO XI* 251, 254 (Christian Sorace, Ivan Franceschini & Nicholas Loubere eds., 2019). As explained by M.A. Kroutogolov and V.A. Toumanov, "[L]e pouvoir d'État dans les pays socialistes appartient aux travailleurs qui en sont la source unique. De ce fait découlent les principes d'unité des pouvoirs d'État et la souveraineté des organes représentatifs consacrées par les constitutions. Les États socialistes ne partent pas du concept de « la séparation des pouvoirs » et du système des « freins et des contrepoids » dans les rapports entre les organes d'État. Les constitutions socialistes partent du fait que l'unité des pouvoirs d'État—qui n'exclut pas la délimitation des compétences entre les différents organes d'État—n'en exige pas moins la concentration des principaux pouvoirs d'État dans les organes représentatifs populaires, auxquels son subordonnées l'administration et la justice . . . Le principe de l'unité des pouvoirs d'État est étroitement lié aux principe du centralisme démocratique dans l'organisation et l'activité des organes du pouvoir d'État et de l'administration. Il est exprimé dans les constitutions socialistes. Le centralisme fondé sur la démocratie est lié à la démocratie fondée sur la direction centralisée : tel est l'important principe de tout le système constitutionnel des pays socialistes." M.A. Kroutogolov and V.A. Toumanov, *Le Droit Constitutionnel*, in *INTRODUCTION AUX DROITS SOCIALISTES* 155, 168–69 (B.T. Blagojervic et al. eds., 1971).

73. See, e.g., Sarah Biddulph, *Democratic Centralism and Administration in China*, in *SOCIALIST LAW IN SOCIALIST EAST ASIA* 195, 197–98 (Hualing Fu, John Gillespie, Pip Nicholson & William Partlett eds., 2018).

74. See Belov et al., *supra* note 57, at 13; see also Glenn Tiffert, *Socialist Rule of Law with Chinese Characteristics: A New Genealogy*, in *SOCIALIST LAW IN SOCIALIST EAST ASIA* 72, 76 (Hualing Fu, John Gillespie, Pip Nicholson & William Partlett eds., 2018).

rather, is that taking democratic centralism and its implications seriously helps us better comprehend and assess Chinese legality and legal institutions.⁷⁵ Conversely, describing, analyzing, and criticizing the Chinese legal system through the prism of democratic centralism promises to illuminate more generally the legal-political architectures of socialist states.

Consider the status and role of courts in the Chinese socialist state. Article 126 of the Constitution of the People's Republic of China states that "[t]he people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual." At the same time, Article 128 makes the Supreme People's Court "responsible" to the National People's Congress and its Standing Committee. Local courts, in addition to being supervised by higher level courts, are "responsible to the organs of state power which created them." As a matter of constitutional design, then, the Chinese judiciary is not a separate locus of power that acts as a check on legislative prerogative. Although courts enjoy adjudicative independence (*shen pan du li*) and may enforce central laws and policies against local officials, they are subordinate to the party-state and can be enlisted to implement its agenda.⁷⁶

In the context of socialist legality, adjudicative independence means

that in deciding a particular case a judge is to be protected from direct intervention by the local party and union organs. Throughout his entire judicial activity, however, he is bound to serve the political objectives set up by the Communist Party and he remains subject to constant party control, supervision, and accountability. It will be clear that under these circumstances justice cannot have the status of an independent "third power"; indeed, given that in the Soviet view the doctrine of separation of powers was developed by the bourgeois states simply in order to counter the absolutism of monarchy, it has no place in a legal system whence class antagonisms have been banished.⁷⁷

75. See Pierre F. Landry, Yanqi Tong & Mingming Shen, *Introduction: Markets, Courts, and Leninism*, 9 THE CHINA REV. 1, 1 (2009) ("Despite thirty years of reform, key features of the Leninist party-state remain in place, particularly with respect to the political control of legal institutions.").

76. See generally Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 AM. J. COMPAR. L. 37 (2016).

77. KONRAD ZWEIGERT & HEIN KOTZ, 1 INTRODUCTION TO COMPARATIVE LAW 324 (1987); see Belov et al., *supra* note 57, at 19. Writing about the Chinese legal regime, Xin He distinguishes between legitimate and illegitimate influences on the court. The former "are required and even hailed as the key to effective governance." To take one example, "both the court officials and government or party leaders are supposed to instruct the responsible judge . . . on how to handle politically sensitive or influential cases such as those affecting social stability." Xin, *supra* note 19, at 169–70; see also Suli Zhu, *The Party and the Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 52, 67 (Randall Peerenboom ed., 2009).

Insofar as the powers of legislation and adjudication are reposed in separate bodies, “its meaning and purpose should not be sought in its being intended to bring about some kind of balance between the branches of authority,” but “follows from the fact that in the [s]ocialist state [lawmaking] authority had logically to be assured to . . . organs created on the principle of the widest representation, the bearers of sovereignty.”⁷⁸ In the People’s Republic of China, the doctrine of the Three Supremes—introduced by then-Secretary-General Hu Jintao—affirms “the Supremacy of the Party’s Cause, the Supremacy of the People’s Interest and the Supremacy of the Constitution and the Law.”⁷⁹ The contradiction inherent in the formula⁸⁰ is unremarkable for the Chinese Communist Party “imagines itself as the leader and defender of law, rather than an organization under law.”⁸¹ In a speech entitled “The Question of whether the Party or the Law is Greater is a False Question,” Secretary-General Xi Jinping cautioned that “[c]omprehensively promoting ‘Ruling the Country in Accordance with Law’ [*yifa zhiguo*] does not mean to blur or weaken or indeed deny the Party’s leadership.”⁸² Rather, it is a call “to further consolidate the Party’s governing status, improve the Party’s governance methods, raise the Party’s governance capacity, and ensure long-term stability of the Party and state.”⁸³

Political domination of the courts—exercised through internal party groups whose members are simultaneously judicial officers and communist cadres—allows for hierarchical intervention in touchier cases.⁸⁴ It also facili-

78. Imre Szabó, *The Socialist Conception of Law*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ONLINE (David René et al. eds., 2018), https://referenceworks.brillonline.com/entries/international-encyclopedia-of-comparative-law-online/iii-the-socialist-conception-of-law-COM_020103 [https://perma.cc/3J8Z-HUAS]; see also Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China’s Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT’L & COMPAR. L.J. 1, 58–61 (2010).

79. Haikun Yang, *Dang de Shiye Zhibang Renmin Liyi Zhibang Xianfa Falü Zhibang* (党的事业至上、人民利益至上、宪法法律至上) [The Supremacy of the Party’s Cause, The Supremacy of the People’s Interest, and The Supremacy of the Constitution and the Law], FAZHI RIBAO (法制日报) [People’s Court Daily], <https://news.sina.com.cn/o/2008-02-01/082513366336s.shtml> (China).

80. As He Weifang asks, “Who is supreme in this Three Supremes? When a family of three has a disagreement, who do they listen to? . . . Between the interests of the CCP, the interests of the people and the interests of the Constitution, who is bigger?” Weifang He, *Sange Zhibang Shui Zhibang* (“三个至上”谁至上?) [“Three Supremes” Which is Supreme], RENMIN JIANDU WANG (人民监督网) [People Supervision Net], <http://www.rmjd.com/mingjialuntan/20060501/7466.html> [https://perma.cc/N5L4-LN69] (China).

81. Xiaodong Ding, *Law According to the Chinese Communist Party: Constitutionalism and Socialist Rule of Law*, 43 MODERN CHINA 322, 326 (2017).

82. Xi Jinping, *Jianding Buyi Zou Zhongguo Tese Shehui Zuyi Fazhi Daolu wei Quanmian Jianshe Shehui Zuyi Xiandaihua Guojia Tigong Youli Fazhi Baozhang* (坚定不移走中国特色社会主义法治道路 为全面建设社会主义现代化国家提供有力法治保障) [Unswervingly Following the Path of Socialist Rule of Law with Chinese Characteristics Provides A Strong Legal Guarantee for Comprehensively Building A Modern Socialist Country], 5 QUSHI (求是) [Seeking Truth] (2021), http://www.qstheory.cn/dukan/qs/2021-02/28/c_1127146541.htm [https://perma.cc/N4CZ-ULCC] (China).

83. Xi, *supra* note 82.

84. Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, 37 LAW & SOC. INQUIRY 848, 855 (2012).

tates corruption by leaders who abuse their discretion for personal gain.⁸⁵ And while coordination between public security agencies, procuracies, and the courts helps dissolve jurisdictional “gridlocks,” the predetermination of outcomes by party political-legal committees denies criminal defendants meaningful participation in the judicial process and may produce injustice.⁸⁶ We do not minimize these criticisms. Insofar they are not ventilated here, it is because they have been well-traversed elsewhere. But are there any non-adjudicatory functions that could be performed by socialist courts because of the fluidity between law, policy, and politics? Why have such functions, if any, been assigned to them? And how do they discharge these functions in reality?

Although the Western tradition of constitutionalism holds the separation of powers to be necessary for political liberty and conducive to efficient government,⁸⁷ there is ambiguity as to whether the principle applies to institutions, functions, personnel or some combination of them.⁸⁸ The doctrine of separation of powers may thus encompass one or more of the following propositions: (1) “*differentiation* of the concepts ‘legislative,’ ‘executive’ and ‘judicial’”; (2) “*legal incompatibility* of office-holding as between members of one branch of government and those of another, with or without *physical separation* of powers”; (3) “*isolation, immunity, or independence* of one branch of government from the actions or interference of another”; (4) “*checking or balancing* of one branch of government by the action of another”; (5) “*co-ordinate* status and lack of accountability of one branch to another.”⁸⁹ For instance, the separation of functions comprises the first and third propositions. It assumes that “[t]o each branch, there is an identifiable function which, in turn, gives the branch its name,” and that “each branch must be confined to the exercise of its own (single) function and should not encroach upon the functions of other branches.”⁹⁰ To the extent that the separation of powers entails functional separation, it circumscribes the tasks that can le-

85. *Id.* at 858; see Juan Wang & Sida Liu, *Institutional Proximity and Judicial Corruption: A Spatial Approach*, 35 GOVERNANCE 633 (2021).

86. Li, *supra* note 76, at 67, 70 (2016); see also Biddulph, *supra* note 73, at 215–17.

87. See N.W. Barber, *Prelude to the Separation of Powers*, 59 CAMBRIDGE L.J. 63–65 (2001); Aileen Kavanaugh, *The Constitutional Separation of Powers*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 229–31 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

88. Kavanaugh, *id.* at 225; see also M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1130 (2000) (distinguishing between the “separation of functions,” that is, “the need to keep the three government powers in different departments,” and “balance of power,” that is, “the need to balance the departments of government, primarily through the creation and maintenance of tension and competition among them”); Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 442–43 (2013) (distinguishing between the separation of powers, division of power, and check and balances principles).

89. GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 100 (1971). Indeed, Marshall goes on to say that the principle itself is “infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.” *Id.* at 124.

90. Kavanaugh, *supra* note 87, at 225.

gitimately be performed by each of the major organs of state. As Jeremy Waldron puts it, the separation of powers

holds that [the legislative, executive, and judicial] tasks have, each of them, an integrity of their own, which is when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are tangled up with the tasks of law-making and adjudication.⁹¹

Because socialist legality does not recognize the separation of powers principle, the organization and distribution of governmental powers is less fettered. However, this does not mean that the judicial, executive, and legislative powers must always be commingled. Indeed, Larry Catá Backer maintains that in a socialist regime like the People's Republic of China, "the function of interpreting law can be separated from the function of applying law to a dispute, and that each can be administered through distinct institutional means."⁹² "What is suggested as both possible and likely within a Marxist-Leninist state apparatus true to its theoretical foundations," he writes, "is institutional multi-hierarchies in judging."⁹³ The interpretation of law may "be given [over] to a legislative authority, a separate political body charged exclusively with issues of interpretation in the context of disputes or some other body, perhaps in the [Chinese Communist Party] itself."⁹⁴ The judge's sole charge under such a division of labor is to give effect to official constructions of the law. But one should not be too quick to assume that the remit of socialist courts is perforce narrower than that of their common or civil law counterparts. Insofar as the party-state retains ultimate prerogative over the judicial organs, courts may also be assigned responsibilities that are not adjudicative in nature.⁹⁵

Two points might be raised at this juncture. First, despite constitutional acknowledgement of the separation of powers in Western liberal democracies, it is an "open secret that [in reality] the departments all perform the functions of the other departments."⁹⁶ As acknowledged by M. J. C. Vile, the doctrine of separation of powers "has rarely been held in [its] extreme form, and even more rarely put into practice."⁹⁷ Common law judging, for

91. Waldron, *supra* note 88, at 460.

92. Larry Catá Backer, *Between the Judge and the Law: Judicial Independence and Authority with Chinese Characteristics*, 33 CONN. J. INT'L L. 1, 36 (2017).

93. *Id.* at 37.

94. *Id.*

95. See, e.g., Peter B. Maggs, *Judicial Activism in the USSR*, in JUDICIAL ACTIVISM IN COMP. PERSP. 202, 203 (Kenneth M. Holland ed., 1991).

96. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 758 (1999).

97. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 14 (Liberty Fund, 2nd ed. 2012) (1967).

example, is a form of judicial lawmaking.⁹⁸ Administrative agencies promulgate authoritative interpretations of vague statutes, bring enforcement actions against regulated entities, and also sit in judgment of those very same cases. They thereby exercise powers that can be characterized as quasi-legislative, quasi-executive, and quasi-judicial. The thrust of these examples is that even in jurisdictions that recognize the principle, the separation of powers is more honored in the breach than in the observance.

Second, it is not always easy to delineate the legislative from the executive from the judicial spheres. As early as 1788, James Madison concluded that “[e]xperience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces”⁹⁹ Writing two hundred years later, Gary Lawson notes that “[t]he problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law.”¹⁰⁰ Consider the non-delegation doctrine in the United States. The U.S. Constitution vests the legislative power in Congress and this power is, to repeat a memorable turn of phrase, “the power to make laws, not the power to make legislators.”¹⁰¹ Put simply, legislative power cannot be delegated by Congress to any other entity. But how is this prohibition enforced? American constitutional doctrine tells us that the powers conferred on administrative agencies are not legislative if the statutory grant is qualified by an “intelligible principle.”¹⁰² The “intelligible principle” doctrine, however, has very little bite. Under prevailing case law, “public interest, convenience, or necessity” suffices as an “intelligible principle” cabinining a commission’s authority to regulate radio broadcasting.¹⁰³ Similarly, a war-time statute instructing a presidentially-appointed administrator to fix “fair and equitable prices” was upheld against a separation of powers challenge, as the act “stated the legislative objective, . . . prescribed the method of achieving that objective—maximum price fixing—and . . . laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established.”¹⁰⁴ It might hence be said that the amorphous nature of governmental powers allows the separation of powers doctrine to be vindicated in theory but violated in practice.¹⁰⁵ The upshot is that the contrast

98. See Waldron, *supra* note 88, at 462.

99. THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

100. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 (1994).

101. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35 (1997).

102. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

103. *National Broadcasting Co. v. United States*, 319 U.S. 190, 193–94, 216–17 (1943).

104. *Yakus v. United States*, 321 U.S. 414, 423 (1944).

105. See, e.g., MARSHALL, *supra* note 89, at 118 (“It is perhaps true that American administrative agencies with their mixture of adjudicatory and rule-making functions are in some sense a standing violation of the separation of powers principle, and in both Britain and the United States minor miracles have been worked with the concept of the ‘quasi-judicial’ function.”).

between jurisdictions that adhere to the principle of separation of powers and those that do not is illusory.

Certainly, the separation of powers principle is more easily stated than applied. But this does not make it irrelevant. Although judges of the early American republic dispensed legal advice to the ruling elite and delivered political sermons to packed courtrooms,¹⁰⁶ judicial intervention in hypothetical, abstract debates is now frowned upon.¹⁰⁷ The purview of the judiciary, as circumscribed by the separation of powers doctrine, is the adjudication of live, concrete disputes. Innovations in criminal procedure and sentencing, designed to cure rather than merely curb social ills, have been criticized as an erosion of the traditional barriers between the three branches of government.¹⁰⁸ In recent years, separation of powers has been invoked in the United States to attack the aggrandizement of the administrative state, expertise and effectiveness notwithstanding.¹⁰⁹ These criticisms have gained substantial traction with both the academy and the bench.¹¹⁰

In England, the Lord Chancellor was once a senior member of the cabinet, the head of the judiciary, and the speaker of the House of Lords.¹¹¹ The three hats of the Lord Chancellor facilitated executive interference in judicial matters,¹¹² but they also permitted him to “act as a lightning conductor at times of high tension between the [two branches].”¹¹³ Judges serving on England’s highest court also used to sit in the House of Lords as Lords of Appeal in Ordinary.¹¹⁴ This fusion of powers “was defended on the basis of efficiency and effectiveness; the Law Lords, it was said, took benefit from their direct exposure to the concerns of politicians and the practicalities of the legislative process.”¹¹⁵ Parliament, in turn, “derived benefit from the

106. STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 112 (1997); Neal Kumar Katyal, *Judges as Advicegivers*, 50 *STAN. L. REV.* 1709, 1741–52 (1998).

107. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“[T]he rule against advisory opinions implements the separation of powers prescribed by the Constitution. . . .”); see Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 *HARV. L. REV.* 970, 973 (1924). Some state courts do render advisory opinions. But the practice remains controversial and in some states, statute authorizing advisory opinions have been held unconstitutional for violating the separation of powers. Jonathan D. Persky, “*Ghosts that Slay*”: *A Contemporary Look at State Advisory Opinions*, 37 *CONN. L. REV.* 1155, 1168–69 (2005).

108. Morris B. Hoffman, *Commentary, The Drug Court Scandal*, 78 *N.C. L. REV.* 1437, 1523–28 (2000).

109. See, e.g., Lawson, *supra* note 100; PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

110. See Gillian E. Metzger, *The Supreme Court 2016 Term Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1, 17–33 (2017).

111. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 *S. CAL. L. REV.* 597, 605–66 (1999).

112. *Id.* at 606–07.

113. Lord Woolf, *The Rule of Law and a Change in the Constitution*, 63 *CAMBRIDGE L.J.* 317, 320 (2004).

114. Stevens, *supra* note 111, at 611.

115. ROGER MASTERMAN, *THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION: JUDICIAL COMPETENCE AND INDEPENDENCE IN THE UNITED KINGDOM* 218 (2011).

legal expertise of the Lords of Appeal in Ordinary.”¹¹⁶ The position of the Lord Chancellor was, however, abolished with the passage of the Constitutional Reform Act in 2005. The Act also removed the Law Lords from Parliament, reconstituting them as the newly created Supreme Court. These changes were animated at least in part by separation of powers concerns.¹¹⁷ So the separation of powers principle, even if “bedeviled by indeterminacy and confusion,”¹¹⁸ does matter. It engenders resistance to certain kinds of institutional structures and arrangements.

II. JUDICIAL SUGGESTIONS IN SOCIALIST CHINA

So, how has democratic centralism and the denial of the separation of powers shaped the remit of socialist courts? One of the most visible, non-adjudicatory functions of courts in the People’s Republic of China is the promulgation of judicial interpretations. Since the 1950s, the highest national court, the Supreme People’s Court (“SPC”), has been exercising quasi-legislative power through judicial interpretations.¹¹⁹ These interpretations take the forms of “Interpretation (*jie shi*),” “Provision (*gui ding*),” “Rule (*gui ze*),” “Reply (*pi fu*),” and “Decision (*jue ding*),” and can be issued in the absence of a case or controversy.¹²⁰ They address legal questions arising from the concrete application of laws in adjudication and are intended to clarify statutory gaps or ambiguities and to guide the decisionmaking of local courts.¹²¹ As “the most frequent and influential interpretations in China’s legal practice,”¹²² judicial interpretations carry the force of law.¹²³ Although they were initially for internal circulation only, the SPC began in 1985 to

116. *Id.*

117. See Lord Phillips of Worth Matravers, *The Birth and First Steps of the UK Supreme Court*, 1 CAMBRIDGE J. INT’L & COMPAR. L. 9, 9 (2012) (“Notwithstanding the shock of the manner of the announcement, I had for many years shared the opinion of Lord Bingham and other senior jurists that the importance in our unwritten constitution of the separation of powers required the UK to change its arrangements for hearing appeals at the highest level.”).

118. Kavanaugh, *supra* note 87, at 222.

119. Chenguang Wang, *Law-making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 4 FRONT. L. CHINA 524, 533–36 (2006).

120. Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People’s Court on the Judicial Interpretation Work] (promulgated by the Sup. People’s Ct., June 9, 2021, effective June 16, 2021), art. 6 (China).

121. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 10, 1981, effective June 10, 1981), art. 2 (China).

122. Xiaohong Kong, *Legal Interpretation in China*, 6 CONN. J. INT’L L. 491, 499 (1991).

123. See Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding, *supra* note 120, at art. 5. Kong, *supra* note 122, at 494 (“[T]he beginnings of the legal system of the PRC were almost entirely created by legislation coming from a governmental organ which in fact had no legislative power [, i.e. the SPC].”).

publish its interpretations regularly in the *Gazettes*.¹²⁴ Between 1949 and 1995, the SPC issued over 3,000 judicial interpretations.¹²⁵ One of the early judicial interpretations was an instructive opinion furnished by the SPC in 1954, before the promulgation of the first Criminal Law, to standardize the conviction and sentencing of criminals who raped underage girls.¹²⁶ Today, judicial interpretations span a broad range of subjects, from affirming the protection of a constitutional right,¹²⁷ to supplementing statutory provisions in response to novel economic activities,¹²⁸ to re-defining the scope of certain crimes.¹²⁹ Given that the drafts of judicial interpretations are subject to review by the SPC or its standing committee, judicial interpretations issued by the SPC are sometimes characterized as “secondary law.”¹³⁰ The status and significance of judicial interpretations have been extensively studied.¹³¹

124. Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao (中华人民共和国最高人民法院公报) [The Gazette of the Supreme People's Court of China], http://gongbao.court.gov.cn/ArticleList.html?serial_no=sfjs (China). Kong, *supra* note 122, at 499.

125. Jingrong Wang, *Lun Zhongguo Zuigao Renmin Fayuan de Sifa Jieshi* (论中国最高人民法院的司法解释) [Analyzing Judicial Interpretations of the Chinese Supreme People's Court], 3 ZHONGGUO FALÜ (中国法律) [China Law] 9, 9 (1995) (China).

126. Zuigao Renmin Fayuan Guanyu Chuli Jianyin Younü Anjian de Jingyan Zongjie he Dui Jianyin Younü Zuifan de Chuxing Yijian (最高人民法院关于处理奸淫幼女案件的经验总结和对奸淫幼女罪犯的处罚意见) [The Supreme People's Court's Summary of Experience in Handling Cases of Raping Underage Girls and Sentencing Opinions against Criminals Who Have Raped Underage Girls] (promulgated by the Sup. People's Ct., Sept. 21, 1954, effective Sept. 21, 1954) (China).

127. *See, e.g.*, Qi Yuling Su Chen Xiaoqi Deng yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jiben Quanli Jiufen An (齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案) [Qi Yuling v. Chen Xiaoqi et al.], 2001 Sup. People's Ct. Gaz. 63 (Sup. People's Ct. 2001) (China).

128. *See, e.g.*, Zuigao Renmin Fayuan Guanyu Shenli Duli Baohan Jiufen Anjian Ruogan Wenti de Guiding (最高人民法院关于审理独立保函纠纷案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Independent Guarantee Dispute Cases] (promulgated by the Sup. People's Ct., Nov. 18, 2016, effective Dec. 1, 2016) (China); Zuigao Renmin Fayuan Guanyu Zhengque Chuli Keji Jiufen Anjian de Ruogan Wenti de Yijian (最高人民法院关于正确处理科技纠纷案件的若干问题的意见) [Provisions of the Supreme People's Court on Several Issues Concerning Correctly Handling Technology-Related Disputes] (promulgated by the Sup. People's Ct., Apr. 2, 1995, effective Apr. 2, 1995) (China).

129. *See, e.g.*, Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxi Wangluo Shishi Feibang Deng Xingshi Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等形式案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in the Handling of Defamation Through Information Networks and Other Criminal Cases] (promulgated by the Sup. People's Ct. and the Sup. People's Proc., Sept. 5, 2013, effective Sept. 10, 2013) [hereinafter “Interpretation Concerning the Specific Application of Law”] (China).

130. Ronald C. Keith & Zhiqiu Liu, *Judicial Interpretation of China's Supreme People's Court as “Secondary Law” with Special Reference to Criminal Law*, 23 CHINA INFO. 223, 224 (2009); Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding, *supra* note 120, at art. 18.

131. *E.g.*, Qi Yuling Su Chen Xiaoqi Deng yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jiben Quanli Jiufen An, *supra* note 127; TAO JIANG, ZUIXING FADING XIA WOGUO XINGFA SIFA JIESHI DE WANSHAN (罪刑法定下我国刑法司法解释的完善) [The Improvement of China's Criminal Judicial Interpretations under Nulla Poena Sine Lege] (2015) (China); CHENG JI, ZUIGAO RENMIN FAYUAN SIFA JIESHI YANJIU (最高人民法院司法解释研究) [Research on Judicial Interpretation of the Supreme People's Court] (2006) (China); Cheng Wang, *Zuigao Fayuan Sifa Jieshi Xiaoli Yanjiu* (最高法院司法解释效力研究) [Research on the Effect of Judicial Interpretations of the Supreme People's Court], 28 ZHONGWAI FAXUE (中外法学) [Peking University Law Journal], no. 1,

Because of its reserved power to revoke the SPC's judicial interpretations, the NPC has come to rely on the SPC's expertise in elaborating the law and even indulged some interpretations that were perhaps beyond the SPC's authority to make.¹³² The SPC's judicial interpretations alleviate the legislative burdens of the NPC.¹³³ Some, however, questioned the legitimacy of these interpretations as they “blur[red] the functions of legislature and judiciary.”¹³⁴ Judicial interpretations taking the form of replies to inquiries from local courts were criticized for interfering with the independence of adjudication.¹³⁵ Certain judicial interpretations were also attacked for being ultra vires, notwithstanding their positive impact on society. Ding Wang, for example, criticized a judicial interpretation issued in 1986 which imposed criminal responsibility for serious accidents on more parties than was legally prescribed under the Criminal Law.¹³⁶

Besides judicial interpretations, the SPC also formulates normative documents, such as guiding opinions, notices, and conference summaries, which may touch on adjudication and administration in the lower courts.¹³⁷ Despite not being formally authoritative, these normative documents are nonetheless considered “an important source of norms used by the courts,” and are “often cited by courts as a supplementary legal basis for a judgment.”¹³⁸ In 2018 alone, twenty-one judicial interpretations and thirty-one other normative documents appeared in the SPC Gazettes.¹³⁹ In 2011, the SPC established the Guiding Cases system.¹⁴⁰ Guiding Cases are selected from judgments rendered by courts nationwide and all judges are obliged to “refer to (*can zhao*)” the Guiding Cases when adjudicating similar cases.¹⁴¹ By

2016, at 263, 263–79 (China); Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 THE CHINA Q. 121, 121–39 (2014); Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1, 1–61 (2012).

132. Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 87, 105 (1997).

133. *Id.* at 112.

134. Wang, *supra* note 119, at 528.

135. Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 172 (1993).

136. Ding Wang, *Lun Xingshi Sifa Jieshi de Yuanze Fangshi ji Shiyong* (论刑事司法解释的原则、方式及适用) [The Principle, Method, and Application of Criminal Judicial Interpretation], 2 FAXUE JIA (法学家) [The Jurists] 9, 9 (1993) (China).

137. Ding Qi, *Zuigao Renmin Fayuan Sifa Jieshiquan Shifa Yibuo Zaofa* (最高人民法院司法解释权：释法抑或造法) [The Supreme People's Court's Power of Judicial Interpretations: Interpreting the Law or Making the Law], 27 XIAMEN DAXUE FALÜ PINGLUN (厦门大学法律评论) [Xiamen University Law Review] 66, 66–77 (2016) (China); Finder, *supra* note 135, at 180–84.

138. Susan Finder, *China's Translucent Judicial Transparency*, 14 J. COMPAR. L. 222, 239–40 (2019).

139. Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao, *supra* note 124.

140. *Zhidao Anli* (指导案例) [Guiding Cases], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN (中华人民共和国最高人民法院) [The Supreme People's Court of the People's Republic of China], <http://www.court.gov.cn/shenpan-gengduo-77.html> (China).

141. *Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize* (最高人民法院关于案例指导工作的规定实施细则) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance] (promulgated by the Sup. People's Ct., May 13, 2015, effective May 13, 2015), arts. 9–11 (China).

requiring judicial attention to specific cases, the SPC “independently perform[s] a legislative function to a certain extent with no routine surveillance” by the legislature.¹⁴²

Of the diverse types of court documents, judicial suggestions have received limited attention. This indifference is unsurprising as judicial suggestions are not of general application, are not legally binding, and are not always publicly available. At the same time, the neglect of judicial suggestions is unfortunate. Unlike normative documents which can only be issued by high courts and are attended by formal procedures, courts at all levels can employ judicial suggestions to exercise some influence on broad matters of public administration and social policy. For instance, while trying a criminal action arising from an altercation between blood donation intermediaries,¹⁴³ a court in Shanghai became aware of inadequacies in local regulations governing blood collection.¹⁴⁴ The court then investigated the business model of these intermediaries—which were operating illicitly—and sent a judicial suggestion to the regional health commission calling for necessary responses and measures.¹⁴⁵ This episode is one of many instances across the country where courts went beyond the confines of an individual dispute to address social ills and challenges.

The concept of judicial suggestions originated from *chastnye opredeleniia* in the Soviet Union.¹⁴⁶ Soviet courts could, at any stage of a criminal or civil proceeding, issue *chastnye opredeleniia* criticizing individuals and entities, including government ministries and officials, for their violations of the law or other wrongdoings.¹⁴⁷ Recipients of such rulings had a month to report back on the remedial measures they had adopted.¹⁴⁸ According to Article 3 of the Fundamental Principles of Court Organization of the Union of Soviet Socialist Republics (U.S.S.R.), “[b]y all its activities, the court shall educate citizens of the USSR in the spirit of devotion to the Motherland and the cause

142. Shucheng Wang, *Guiding Cases as a Form of Statutory Interpretation: Expansion of Supreme People's Court's Judicial Lawmaking Authority in China*, 48 H.K. L.J. 1067, 1067 (2018).

143. Blood donation intermediaries often refer to persons who make profits from recruiting blood donors.

144. Jianping Wei, *Shanghai: Xiaojianyi Zuocheng Dawenzhang* (上海: “小建议”做成“大文章”) [Shanghai: Small Judicial Suggestions Make Big Impact], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Oct. 22, 2013, http://rmfyb.chinacourt.org/paper/images/2013-10/22/08/2013102208_pdf.pdf [https://perma.cc/4RC2-BPN7] (China).

145. *Id.*

146. Hongbo Li, *Zai Caipan yu Jiaoyu Zbijian Dangdai Zbongguo de Sifa Jianyi Zhidu* (在裁判与教谕之间: 当代中国的司法建议制度) [Between Judgments and Educations: The Judicial Suggestions System of Contemporary China], 3 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [Legal System and Social Developments] 39, 40 (2013) (China); Yitong Liu, *Sifa Jianyi Zhidu Zhi Chongsu* (司法建议制度之重塑) [Rebuilding the Judicial Suggestions System], 20 SHENYANG DAXUE XUEBAO (SHEHUI KEXUE BAN) (沈阳大学学报 (社会科学版)) [Journal of Shenyang University (Social Sciences)] 64, 64 (2018) (China).

147. Harold J. Berman, *The Educational Role of the Soviet Courts*, 21 INT'L & COMPAR. L. Q. 81, 83 (1972).

148. Serge L. Levitsky, ‘*Chastnoe Opredelenie*’: A Soviet ‘*Mandamus*’?, 9 REV. SOCIALIST L. 165, 165 (1983).

of communism [and] in spirit of strict and undeviating execution of Soviet laws.”¹⁴⁹ The practice of *chastnye opredeleniia* instantiated the educational function of Soviet courts.¹⁵⁰ *Chastnye opredeleniia* was later assimilated by China into its judicial suggestion system to involve courts in the orderly administration of society and in inculcating public adherence to laws.¹⁵¹

In the late 2000s, the Hu-Wen administration advocated a more active role for the judiciary in safeguarding economic growth, societal stability, and people’s livelihoods after the global financial crisis.¹⁵² In a national speech in 2007, Hu Jintao stressed that “political-legal work [was] an important component of the Party and country’s work, [which] must be carried out under the bigger picture of the Party and country’s work, [and which must] serve the bigger picture of the Party’s and the State’s work.”¹⁵³ Then President of the SPC, Wang Shengjun, elaborated that “[i]n a modern society with ever-changing economic and social conditions,” “even if cases were decided perfectly according to the law, [courts] wouldn’t necessarily earn the satisfaction of or strike a chord with the public.”¹⁵⁴ Only an active judiciary could “serve the bigger picture and administer justice for people.”¹⁵⁵ Wang further called for the judiciary to be service-oriented by taking account of policies, balancing interests, and promoting harmony; to be proactive by identifying the problems in social and economic development; and to be

149. Berman, *supra* note 147 (quoting Fundamental Principles of Court Organization of the Union of Soviet Socialist Republics, art. 3).

150. *Id.* at 82–83 (“[I]n Communist countries heavy stress is laid upon what Soviet jurists call ‘the educational role of the courts’—its role, not only in actively protecting the interests of individuals and groups (and above all, the interests of the State), but also in inculcating among all the participants in a case, and among people generally, the values which the legal system represents.”).

151. Guolong Wang, *Fayuan Canyu Jiceng Zhili Ji Qi Juese Dingwei* (法院参与基层治理及其角色定位) [Courts’ Participation in Grassroots Governance and Their Roles], 41 DONGYUE LUNCONG (东岳论丛) [Dongyue Tribune] 138, 144 (2020) (China); Jian Liu, *Shenpan Zhongxin Shiye Xia de Sifa Jianyi Zhibu* (审判中心视野下的司法建议) [Judicial Suggestions from the Trial-Centered Perspective], 6 FAXUE ZAZHI (法学杂志) [China Legal Science] 118, 120 (2017) (China).

152. Weidong Ji, *The Judicial Reform in China: The Status Quo and Future Directions*, 20 INDIANA J. GLOB. LEGAL STUD. 185, 209 (2013); see also Xiaorong He, *Nengdong Sifa shi Renmin Fayuan Fuwu Jingji Shebui Fazhan Daju de Biran Xuanze* (能动司法是人民法院服务经济社会发展大局的必然选择) [An Active Judiciary is the Necessary Choice of People’s Courts to Serve the Bigger Picture of Economic and Social Developments], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Sept. 1, 2009, <https://www.chinacourt.org/article/detail/2009/09/id/372822.shtml> [<https://perma.cc/4AB5-8NYZ>] (China).

153. Hang Xiang, *Lizu Zhongguo Tese Shebui Zhuyi Shiye Fazhan Quanju Zhazhashibi Kaichuang Woguo Zhengfa Gongzuo Xin Jumian* (立足中国特色社会主义事业发展全局扎扎实实开创我国政法工作新局面) [Standing from the Overall Development of the Cause of Socialism with Chinese Characteristics, Taking Solid Steps to Open Up New Prospects of China’s Political and Legal Work], RENMIN RIBAO (人民日报) [People’s Daily], Dec. 26, 2007, http://www.npc.gov.cn/zgrdw/npc/wbgwyz/content_1615828.htm [<https://perma.cc/DL5N-VNKM>] (China).

154. Hong Li, *Renmin Fayuan Bao Pinglun Lichang Geng Jian Fangxiang Geng Ming* (人民法院报评论：立场更坚 方向更明) [People’s Court Daily Comments: Firmer Stand, Clearer Direction], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Sept. 12, 2009, <https://www.chinacourt.org/article/detail/2009/09/id/374414.shtml> [<https://perma.cc/U669-4ZYT>] (China).

155. *Id.*

effective by planning and providing solutions ahead.¹⁵⁶ Giving judicial suggestions is a “concrete manifestation” of judicial dynamism.¹⁵⁷

As a form of official documents issued by Chinese courts, judicial suggestions bring social problems to the attention of relevant organizations or individuals and urge the recipients to take certain measures.¹⁵⁸ Through these suggestions, the Chinese judiciary aims to “extend [its] adjudicative functions . . . to resolve social conflicts and participate in and innovate the administration of society.”¹⁵⁹ Unlike judgments, judicial suggestions can transcend the legal questions presented for decisions and be directed to any private actor or public entity, including non-litigants.¹⁶⁰ The concerns raised by judicial suggestions can be specific or generic, and can draw on the examination of individual cases, cases of the same type, or economic and societal developments over a period of time.¹⁶¹ Although the SPC recommended for judicial suggestion based solely on a single case to await the closing of that case, judicial suggestions have, in practice, been sent at all stages of judicial proceedings.¹⁶² Take judicial suggestions in administrative cases for instance. Suggestions may be directed to the defendant agency before trial to request a timely correction of its erroneous actions, during trial to urge the appearance of agency leaders in hearings, and after trial to ensure the performance of remedies and to advise on future actions and activities.

Judicial suggestions can be drafted by adjudication departments (*shenpan yewu bumen*) and relevant general departments (*zongbexing bumen*) in people’s courts.¹⁶³ According to the standard format introduced by the SPC in 2012, a judicial suggestion consists of three parts, the first part being the name of the court, the title and number of the suggestion, and the name of the recipient, and the third part being the seal of the court, the date of issuance,

156. Shengjun Wang, *Bawo Sifa Guilü Jianchi Sifa Nengdong Nuli Tuidong Renmin Fayuan Gongzuo Kexue Fazhan* (把握司法规律 坚持司法能动努力推动人民法院工作科学发展) [Grasp the Rules of the Judiciary, Insist on Judicial Dynamism, Strive to Promote the Scientific Developments of People’s Courts’ Work], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], May 6, 2010, <https://www.chinacourt.org/article/detail/2010/05/id/407279.shtml> [<https://perma.cc/DZ5P-ZKHF>] (China).

157. Dongchuan Luo & Guangyu Ding, *Woguo Nengdong Sifa de Lilun yu Shijian Pingshu* (我国能动司法的理论与实践评述) [Review on the Theory and Practice of the Active Judiciary in China], 2 *FALÜ SHIYONG* (法律适用) [Journal of Applied Law] 15, 20 (2010) (China).

158. ZHONGHUA FAXUE DA CIDIAN (中华法学大辞典) [China Law Dictionary] (2003), at 598 (China); Liu, *supra* note 151, at 119; Li, *supra* note 146, at 39.

159. Zuigao Renmin Fayuan Yinfā Guanyu Jiaqiang Sifa Jianyi Gongzuo de Yijian de Tongzhi (最高人民法院印发《关于加强司法建议工作的意见》的通知) [Notice of the Supreme People’s Court on Issuing the Opinions concerning Strengthening the Work of Judicial Suggestions] (promulgated by the Sup. People’s Ct., Mar. 15, 2012, effective Mar. 15, 2012), arts. 2 & 3 (China).

160. *Id.*, arts. 7 & 8; see also, Zhixin Liu, *Sifa Jianyi de Zhengdangxing Wenti Yanjiu* (司法建议的正当性问题研究) [Research on the Legitimacy of Judicial Suggestions], 34 *HEBEI FAXUE* (河北法学) [Hebei Legal Science] 103, 105–7 (2016) (China).

161. Zuigao Renmin Fayuan Yinfā Guanyu Jiaqiang Sifa Jianyi Gongzuo de Yijian de Tongzhi, *supra* note 159, art. 8.

162. *Id.*, art. 12.

163. Zuigao Renmin Fayuan Yinfā Guanyu Jiaqiang Sifa Jianyi Gongzuo de Yijian de Tongzhi, *supra* note 159, art. 10.

and the full names of any entities copied.¹⁶⁴ The main body of the judicial suggestion—its second part—should specify the problems identified, analyze their causes, and offer specific solutions in accordance with relevant laws, regulations, and policies.¹⁶⁵ Before a judicial suggestion is sent in the name of the court, the draft will be reviewed by an office which routinely oversees judicial suggestion work and signed by departmental leaders (*jenguan yuan lingdao*)¹⁶⁶ or, when necessary, the president of the court (*yuan zhang*).¹⁶⁷

The concept of judicial suggestions first appeared in an official Chinese document in 1956, in a reply issued by the Ministry of Justice.¹⁶⁸ According to the reply,

[i]n the course of adjudication of cases, people's courts may and shall issue suggestions to urge relevant agencies and organizations to make amends, when discovering flaws existing in [their] work which criminals can take advantage of; when necessary, [the court] shall suggest their superiors at higher levels to assist in rectifying [the flaw]; if the flaw is generic, [the court] may report to party and government leaders to instruct to rectify.¹⁶⁹

At the 1983 NPC meeting, the then President of the SPC, Jiang Hua, praised the contribution of judicial suggestions in ameliorating organizational deficiencies and preventing crimes.¹⁷⁰ The first Administrative Procedure Law and the Civil Procedure Law of the People's Republic of China conferred on courts the authority to raise certain issues through judicial suggestions;¹⁷¹ the adoption of judicial suggestions by recipients has also been

164. *Id.*, art. 9.

165. *Id.*

166. *Id.* In general, there are various departments responsible for a certain type of judicial works, such as adjudication, enforcement, and human resources, in each people's court of China. Departmental leaders manage and oversee the affairs undertaken in the department. See Guodong Du, *Ten "Confusing" Names of Departments and Positions in Chinese Courts*, CHINA JUSTICE OBSERVER, Oct. 10, 2021, <https://www.chinajusticeobserver.com/a/ten-confusing-names-of-departments-and-positions-in-chinese-courts> [<https://perma.cc/VD2M-4EKP>].

167. Zuigao Renmin Fayuan Yinfa Guanyu Jiaqiang Sifa Jianyi Gongzuo de Yijian de Tongzhi, *supra* note 159, art. 10.

168. Guanyu Renmin Fayuan Zai Shenli Anjian Zhong Ru Faxian Danwei Zai Gongzuo zhong Cunzai Quedianshi Buyao Yong Gebie Caiding Yingyong Jianyishu De Pifu (关于人民法院在审理案件中如发现单位在工作中存在缺点时不要个别裁定应用建议书的批复) [Reply concerning the Circumstance of Discovering Flaws Existing in an Organization's Work, Under Which People's Courts Shall Issue Suggestions Instead of Individual Rulings] (promulgated by the Ministry of Justice, July 13, 1956, effective July 13, 1956) (China).

169. *Id.*

170. Jiang Hua, Sup. People's Ct., *Zuigao Renmin Fayuan Gongzuo Baogao* (1983 nian) (最高人民法院工作报告(1983年)) [Work Report of the Supreme People's Court (1983)], RENMIN RIBAO (人民日报) [People's Daily], June 26, 1983, http://www.gov.cn/test/2008-03/27/content_929837.htm [<https://perma.cc/7G9G-A8B5>] (China).

171. Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 64, <http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-06/29/>

one of the evaluation criteria for judicial performance since 1995.¹⁷² Despite statutory provisions for judicial suggestions, the power to make them laid dormant in the hands of the courts for a long time.¹⁷³ Among the few judicial suggestions issued by courts prior to 2000, a notable example is a suggestion sent by the Shanghai High People's Court to the Shanghai Branch of People's Bank of China.¹⁷⁴ This over-5,000 word suggestion drew on the Shanghai courts' adjudication of cases involving financial institutions to point out multiple shortcomings of financial institutions in drafting standard guaranty agreements, performing loan contracts, and operating loan and deposit businesses.¹⁷⁵ It also urged financial institutions and professionals to raise their legal consciousness and advance their understanding of China's Guaranty Law and the soon-to-be implemented Contract Law.¹⁷⁶ The general office of People's Bank of China subsequently forwarded the suggestion to its local branches, commercial banks, policy lenders, and other financial institutions for reference.¹⁷⁷

In the face of disparities in practice between regions, inconsistent formats, and lackluster follow-up and monitoring, the SPC, in its 2007 and 2012 notices, reiterated the importance of judicial suggestions and provided specific guidance for the content, layout, and issuance procedure of judicial suggestions.¹⁷⁸ Since then, the value of judicial suggestions has been fre-

content_2024894.htm [https://perma.cc/Y99T-2R73] (China); Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 103 <http://www.npc.gov.cn/npc/c30834/201706/71680113fdf741608c23bc87f3c71398.shtml> [https://perma.cc/N4C9-86MK] (China).

172. Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国法官法) [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995), art. 28., <http://www.npc.gov.cn/npc/c30834/201904/1d7e75427ffb4b3fb020af13d0959e4b.shtml> [https://perma.cc/AX27-L9Q5] (China).

173. Maojin Huang & Yajun Yin, *Sifa Jianshe: Fayuan de Gonggong Zhili Zhi Dao* (司法建议: 法院的公共治理之道?) [Judicial Suggestions: Public Governance Theory of Courts], 41 LIAONING SHIFAN DAXUE XUEBAO (SHEHUI KEXUE BAN) (辽宁师范大学学报 (社会科学版)) [Liaoning Normal University Journal (Social Sciences)] 43, 44–45 (2018) (China).

174. Shanghai High Ct., Guanyu Jinyi bu Guifan Jinrong Jigou Cun Dai Kuan Yewu Fangfan Jinrong Fengxian de Jianshi (关于进一步规范金融机构存、贷款业务防范金融风险的建议) [Suggestion concerning Further Regulating the Deposit and Loan Business of Financial Institutions in the Purpose of Preventing Finance Risks], Hu Gao Fa [1999] 317 (沪高法【1999】317号) [Shanghai High Ct. [1999] No. 317] (China); *Id.*, at 45.

175. *Id.*

176. *Id.*

177. People's Bank of China, Zhongguo Renmin Yinhang guanyu Zhuanfa Shanghai Shi Gaoji Renmin Fayuan youguan Guifan Cun Dai Kuan Xingwei Sifa Jianshi de Tongzhi (中国人民银行关于转发上海市高级人民法院有关规范存贷款行为司法建议的通知) [Notice of the People's Bank of China Forwarding the Shanghai High Ct.'s Judicial Suggestion Concerning Regulating the Deposit and Loan Business] (issued by People's Bank of China, Dec. 10, 1999, effective Dec. 10, 1999) (China).

178. See generally Zuigao Renmin Fayuan Jinyibu Jiaqiang Sifa Jianshi Gongzuo wei Goujian Shehui Zhuyi Hexie Shehui Tigong Sifa Fuwu de Tongzhi (最高人民法院关于进一步加强司法建议工作为构建社会主义和谐社会提供司法服务的通知) [Notice of the Supreme People's Court on Further Strengthening the Work on Judicial Suggestions to Provide Judicial Services for Building a Harmonious Socialist Society] (promulgated by the Sup. People's Ct., Mar. 1, 2007, effective Mar. 1, 2007) (China);

quently stressed in legal and regulatory texts and judicial suggestions have become more prevalent. During the national crackdown campaign against underworld forces, for instance, both the notices issued by the CCP Central Committee and the State Council and the opinions published by the SPC called on courts to direct suggestions to relevant authorities for crime prevention and social control.¹⁷⁹ In September 2011, the People's Court Daily, a national periodical managed by the SPC, launched a special column featuring selected judicial suggestions "[i]n order to make the whole society understand the significant role of judicial suggestions and promote people's courts to further strengthen their work on judicial suggestions."¹⁸⁰ Simultaneously, the SPC announced its first national contest for excellent judicial suggestions.¹⁸¹ Among the sixty winning entries, all of them provided thorough and specific solutions to the identified problems and forty-eight put forward at least two proposals for improvement.¹⁸² These suggestions exemplified the evolution of courts from passive adjudicators to proactive agents who strive to diagnose and tackle social problems.

In addition to national initiatives by the SPC, regional high courts also devised schemes to encourage judges to improve the quantity and quality of their suggestions and to monitor responses more assiduously. For example, a guideline formulated by the Beijing High People's Court in 2011 made judicial suggestions a substantial component of performance appraisal.¹⁸³ It

see also Zuigao Renmin Fayuan Yinfa Guanyu Jiaqiang Sifa Jianyi Gongzuo de Yijian de Tongzhi, *supra* note 159.

179. The CCP Central Committee and the State Council, Zhonggong Zhongyang Guowuyuan Fachu Guanyu Kaizhan Saohei Chuwu Zhuaxiang Douzheng de Tongzhi (中共中央、国务院发出《关于开展扫黑除恶专项斗争的通知》) [The CCP Central Committee and the State Council Issue Notice Concerning the Launch of Special Combat Against Organized Crimes], Jan. 24, 2018, http://www.gov.cn/zhengce/2018-01/24/content_5260130.htm [https://perma.cc/Z5NM-6F9S] (China); Renmin Fayuan Guance Luoshi Zhonggong Zhongyang Guowuyuan Guanyu Kaizhan Saohei Chu'e Zhuaxiang Douzheng de Tongzhi de Shishi Yijian (人民法院贯彻落实《中共中央、国务院关于开展扫黑除恶专项斗争的通知》的实施意见) [Implementation Opinions of People's Courts Carrying Out "The Notice of the CCP Central Committee and the State Council concerning the Launch of Special Combat against Organized Crimes"] (promulgated by the Supreme People's Court, Jan. 29, 2018, effective Jan. 29, 2018) (China); *see also* Liang Yang, *Qianghua Sifa Jianyi Zhuli Saobei Chui'e* (强化司法建议 助力扫黑除恶) [Strengthening Judicial Suggestions, Boosting Crackdowns on Organized Crime], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Apr. 28, 2019, http://rmfyb.chinacourt.org/paper/html/2019-04/28/content_154764.htm?div=-1 [https://perma.cc/SM2N-7SKZ] (China).

180. The People's Ct., *Zhenggao Qishi* (征稿启事) [Call for Papers], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Sept. 29, 2011, http://rmfyb.chinacourt.org/paper/html/2011-09/29/content_34113.htm?div=-1 [https://perma.cc/MHH8-PF6D] (China).

181. Xianming Zhang, *Jianchi Nengdong Sifa de Dianfan Wanshan Shehui Guanli de Liangce* (坚持能动司法的典范 完善社会管理的良策) [Follow Models of Judicial Dynamism, Perfect Valuable Suggestions for Social Administration], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], May 17, 2012, <https://www.chinacourt.org/article/detail/2012/05/id/517857.shtml> [https://perma.cc/P7KY-YNJX] (China).

182. Jianrong Du, *Sifa Jianyi Xiaoguo Nanti zhi Pojie Xilun* (司法建议效果难题之破解析论) [Solution and Analysis of Dilemma of the Effects of Judicial Suggestions], 7 LILUN DAOKAN (理论导刊) [Journal of Socialist Theory Guide] 99, 100 (2016) (China).

183. Yumei Dou, "Bian" Chulai de Guangkuo Fazhan Kongjian Dui Beijingshi Sanji Fayuan Xingshi Sifa Jianyi Gongzuo Jizhi Chuanxin de Diaocha ("变"出来的广阔发展空间 – 对北京市三级法院刑

also exhorted courts to involve bureaus for the comprehensive management of public order in the process of evaluating the practical impact of judicial suggestions and the adoption of suggested measures by recipients.¹⁸⁴ In 2010, courts from Jiangsu Province started to regularly select and award excellent judicial suggestions based on their content and influence.¹⁸⁵ Since 2009, courts in Shanghai have been required to upload their judicial suggestions within three working days of issuance to a regional database.¹⁸⁶ The database will flag any suggestions which have not been addressed by recipients without reason for more than ninety days, and remind the issuing courts to follow up with the recipient or report the default to the recipient's higher-ups or supervisory departments.¹⁸⁷ As a result, from 2008 to 2010, the annual number of judicial suggestions issued by Shanghai courts rose from 124 to 509, with the response rate climbing from 47.6% to 68.8%.¹⁸⁸

Driven by these national and local initiatives, Chinese courts have, through judicial suggestions, intervened in policy domains such as public health, education, and crime.¹⁸⁹ These suggestions represent an official channel for judges to reach actors who might not otherwise come before the court.¹⁹⁰ In venturing beyond the bounds of adjudication, judges "play societal and political roles, exercise societal and political functions, and realize the integration of legal, social, and political impact."¹⁹¹ As a local judge expounded in an essay published in the People's Court Daily,

事司法建议工作机制创新的调查) [Great Potential for Development Brought by "Changes": Investigation on the Innovation of Criminal Judicial Suggestion Mechanisms of Courts at Three Levels in Beijing], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Feb. 24, 2010, http://rmfwb.chinacourt.org/paper/html/2010-02/04/content_3779.htm?div=0 [<https://perma.cc/42D2-JN4C>] (China).

184. *Id.*

185. JIANGSUSHENG GAOJI RENMIN FAYUAN, JIANGSUSHENG GAOJI RENMIN FAYUAN GUANYU JIN YIBU JIAQIANG HE GUIFAN QUANSHENG FAYUAN SIFA JIANYI GONGZUO DE YIJIAN (江苏省高级人民法院关于进一步加强和规范全省法院司法建议工作的意见) [OPINIONS OF THE HIGH PEOPLE'S COURT OF JIANGSU CONCERNING FURTHER STRENGTHENING AND REGULATING THE WORK OF JUDICIAL SUGGESTIONS OF ALL COURTS IN THE PROVINCE], Oct. 8, 2010, art. 20-26, <http://www.ask64.com/Html/1318.html> [<https://perma.cc/B97F-UVJX>] (China).

186. However, only judges serving in Shanghai courts have access to the database. Jianping Wei & Jiayun Gao, *Yitiao Jianyi Quancheng Genzong* (一条建议 全程跟踪) [A Piece of Suggestion Comprehensive Tracing], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], July 12, 2011, <https://www.chinacourt.org/article/detail/2011/07/id/456735.shtml> [<https://perma.cc/E8YA-7WEQ>] (China).

187. Wei & Gao, *supra* note 186.

188. Zhixian Shen, "Shenpan Zhineng" de Yanshen yu Tisheng ("审判职能"的延伸与提升) [Expansion and Advancement of "Judicial Functions"], 11 FALÜ SHIYONG (法律适用) [Journal of Applied Law] 113, 113-14 (2011) (China).

189. See Liu, *supra* note 160, at 107.

190. See Gangliang Wen, *Sifa Jianyi Gongzuo de "Sandu" Siwei* (司法建议工作的"三度"思维) ["Three-Dimensional" Thinking of the Work of Judicial Suggestions], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Sept. 18, 2012, http://rmfwb.chinacourt.org/paper/html/2012-09/18/content_51074.htm [<https://perma.cc/2Q8H-MC8B>] (China).

191. Xin Xu, *Sifa Jianyi Zhidu de Gaige yu Jianyi Xing Sifa de Zhuanxing* (司法建议制度的改革与建议型司法的转型) [The Reform of the Judicial Suggestions System and the Transition of the Suggestive Judiciary], 2 XUEXI YU TANSUO (学习与探索) [Study & Exploration] 96, 97 (2011) (China).

as an extension of judicial function of courts, [judicial suggestions] break out of the conventional role of the judiciary, which solely provides “ex post remedies” and resolves disputes, and have become “social woodpeckers.” They discover the “hidden dangers” that are more likely to cause conflicts in a timely fashion . . . , take precaution, identify and plug loopholes, and strive to nip conflicts in the bud.¹⁹²

Under democratic centralism, courts in China have neither the constitutional responsibility nor the constitutional wherewithal to bridle political power. To the contrary, they implement the agenda and priorities of the party-state and can be assigned non-adjudicative tasks like the offering of judicial suggestions.

III. EMPOWERING COURTS IN THE ADMINISTRATION OF SOCIETY

In recent decades, there have been many instances of courts advancing national policies and administering social order through judicial suggestions. The following examples illustrate how courts in China draw on individual cases, certain types of cases, or even no cases at all to identify societal ills and propose solutions to the recipients of judicial suggestions.

A. Formulating and Implementing Public Policy

Chinese courts have shouldered greater social responsibilities since the judicial dynamism (*sifa nengdong*) reform in the late 2000s. Specifically, judges are sometimes expected to go above and beyond adjudication to participate in policy formulation and implementation. Because of their versatility and non-bindingness, judicial suggestions have been employed to discharge such responsibilities. An example which attracted considerable media attention is a judicial suggestion, borne out of a civil case handled by the Basic People’s Court of Xuhui in Shanghai, that urged the Ministry of Health to adopt an elimination-of-danger confirmation system for medical emergency services.¹⁹³ In January 2010, the daughter of the plaintiff, Ms.

192. Chuan Qin, *Chongfen Fabui Sifa Jianyi Canyu Shehui Guanli Chuangxin de Zuoyong* (充分发挥司法建议参与社会管理创新的作用) [Fully Realize the Functions of Judicial Suggestions in Participating in Social Administration and Innovations], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Dec. 25, 2011, http://rmfyb.chinacourt.org/paper/html/2011-12/25/content_38090.htm [https://perma.cc/QA6P-NH79] (China).

193. Guanqun Zhang, Jianping Wei & Yingjie Ao, *Shanghai: Sifa Jianyi wei Shehui Guanli Zhibizhao* (上海: 司法建议为社会管理支招) [Shanghai: Judicial Suggestions Give Advice for the Administration of Society], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Mar. 10, 2012, http://rmfyb.chinacourt.org/paper/html/2012-03/10/content_41433.htm [https://perma.cc/TDS2-DUFA] (China); see also Jianping Wei, Jianyi Yan & Jian Liu, *Sifa “Xiao Jianyi” Zuochu Shenpan “Da Zhibui”* (司法“小建议”做出审判“大智慧”) [Small Judicial Suggestion Made Big Adjudication Wisdom], FAZHI RIBAO (法制日报) [Legal Daily], Mar. 13, 2013, <http://epaper.legaldaily.com.cn/fzrb/PDF/20130313/04.pdf> (China).

Zhang, called an ambulance after suffering from gas poisoning.¹⁹⁴ The ambulance, however, left twenty minutes after arriving at the scene because no one answered the door.¹⁹⁵ Ms. Zhang and her two roommates were found dead in the apartment three days later.¹⁹⁶ Ms. Zhang's parents sued the emergency services center for compensation.¹⁹⁷ They claimed that the center was liable for Ms. Zhang's death because its personnel did not take any further actions to locate Ms. Zhang and failed to provide her with timely rescue.¹⁹⁸ The court found the defendant not liable for the death of the victims as the defendant did not violate any of the rules applicable to rapid emergency treatments. The presiding judge, however, perceived a lacuna in these rules and therefore sent a judicial suggestion to the Ministry of Health advocating coordination between the medical and other departments in handling similar situations.¹⁹⁹ The suggestion also recommended the establishment of a confirmation system which would require first responders to verify that the danger was no longer present before discontinuing pre-hospital urgent care services.²⁰⁰ In response to the court, the Ministry stated that it had held a meeting to discuss the judicial suggestion and would consider the proposal carefully in the drafting of the "Management Measures for Pre-hospital Medical Emergency."²⁰¹ Whilst the Management Measures that came into effect two years later did not clearly incorporate any of the court's proposals, the Standing Committee of the People's Congress of Shanghai issued regulations in 2016 putting in place the elimination-of-danger confirmation system suggested by the court.²⁰² Article twenty-one of the Regulations stipulates that first responders may request support from the police and fire departments if they encounter difficulties in reaching the caller to enter the dwelling, and the relevant departments should provide immediate assistance at the scene.²⁰³ A representative to the Municipal People's Congress, Qu Jun, opined: "The case ended. The cause of the dispute and the loss of three lives, however, reflected the urgent need to improve the pre-

194. Zhang, Wei & Ao, *supra* note 193.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. See generally Yuan Qian Yiliao Jijiu Guanli Banfa (院前医疗急救管理办法) [Management Measures for Pre-hospital Medical Emergency] (promulgated by Nat'l Health and Family Planning Comm'n of the People's Republic of China, Nov. 29, 2013, effective Feb. 1, 2014) <http://www.nhc.gov.cn/fz/s3576/201808/b0c32451fe9843d5a420815b1fd5f6a1.shtml> [<https://perma.cc/YDS8-JC42>] (China); see also Shanghai Shi Jijiu Yiliao Fuwu Tiaoli (上海市急救医疗服务条例) [Regulations of Medical Emergency Services of Shanghai] (promulgated by the Standing Comm. of People's Cong. of Shanghai, July 29, 2016, effective Nov. 1, 2016), SHANGHAI MED. ETHOS ASS'N, June 8, 2017, <http://www.smheea.org/policy/flfg/580.html> [<https://perma.cc/QNU8-67T3>] (China).

203. Yuan Qian Yiliao Jijiu Guanli Banfa, at art. 21.

hospital medical emergency system . . . the ‘elimination-of-danger’ confirmation system is indispensable.”²⁰⁴

Besides precipitating policy change, courts have also made judicial suggestions in furtherance of national campaigns. Delivered to eleven regional schools, local education bureaus, and other education departments, the judicial suggestion issued by the Basic People’s Court of Taocheng from Hebei Province recommended restricting the children of untrustworthy individuals from attending expensive private schools.²⁰⁵ This suggestion did not arise out of any dispute and was instead based on opinions issued by the State Council and a judicial interpretation promulgated by the SPC²⁰⁶ in concert with the national crackdown on “*lao lai*”—“a very dishonest person who refuses to pay his/her debts.”²⁰⁷ To “urge judgment debtors to fulfill the obligations prescribed by effective judgments in due course,”²⁰⁸ the court submitted that:

First, the admissions guide of your school shall specify that student applicants whose parents are untrustworthy judgment debt-

204. Liping Yao, *Shanghai Ni Mingque: Queren Xianqing Jiechubou Jiubuche Caineng Likai* (上海拟明确: 确认险情解除后救护车才能离开) [Shanghai Plans to Clarify: The Ambulance Can Leave Only After Confirming Dangers Are Eliminated], XINMIN WANBAO (新民晚报) [Xinmin Evening News], Dec. 4, 2015, <https://china.huanqiu.com/article/9CAkrnJS0ir> [<https://perma.cc/N2NR-NHQF>] (China).

205. Radio & Television Station of Hengshui, *Hengshui Shi Taocheng Qu Renmin Fayuan Facbu Sifa Jianyi Shu* (衡水市桃城区人民法院发出司法建议书) [People’s Court in Taocheng District of Hengshui Issued Judicial Suggestions], PENGPAI XINWEN (澎湃新闻) [The Paper], Aug. 19, 2020, https://www.thepaper.cn/newsDetail_forward_8793368 [<https://perma.cc/XX98-3G4U>] (China).

206. Guanyu Jiakuai Tuijin Shixin Beizhixingren Xinyong Jiandu Jingshi he Chengjie Jizhi Jianshe de Yijian (关于加快推进失信被执行人信用监督、警示和惩戒机制建设的意见) [Opinions Concerning Accelerating the Establishment of Mechanisms for the Supervision, Warning, and Punishment of Credits of Untrustworthy Judgment Debtors], (promulgated by the General Office of the Central Comm. of the Communist Party of China and the General Office of the St. Council, Sept. 25, 2016, effective Sept. 25, 2016), art. 7(4), <http://www.scio.gov.cn/32344/32345/42294/44631/xgzc44637/Document/1695613/1695613.htm> [<https://perma.cc/N5L4-LN69>] (China); Zuigao Renmin Fayuan Guanyu Xianzhi Beizhixingren Gaoxiaofei de Ruogan Guiding (最高人民法院关于限制被执行人高消费的若干规定) [Several Provisions of the Supreme People’s Court on Restricting High Consumption of Judgment Debtors] (promulgated by the Sup. People’s Ct., July 1, 2010, effective Oct. 1, 2010), art. 3(7), <https://law.pkulaw.com/chinalaw/cbd20f8c655dc6b1bdfb.html> (China); Zuigao Renmin Fayuan Guanyu Xiugai Zuigao Renmin Fayuan Guanyu Xianzhi Beizhixingren Gaoxiaofei de Ruogan Guiding de Jueding (最高人民法院关于修改《最高人民法院关于限制被执行人高消费的若干规定》的决定) [Decision of the Supreme People’s Court on Amending the Several Provisions of the Supreme People’s Court on Restricting High Consumption of Judgment Debtors] (promulgated by the Sup. People’s Ct., July 20, 2015, effective July 22, 2015), <https://pkulaw.com/chl/251793.html?taio=0> (China).

207. Chuncheng Liu, *Multiple Social Credit Systems in China*, 21 *ECON. SOCIO.* 22, 25 (2019).

208. Ju Jiang, “*Laolai*” *Zi Ni Shangxue Shouxian, Zhebui Gei Fayuan Dianzan* (“老赖”子女上学受限, 这回给法院点赞) [“Lao Lai” Children’s Education Facing Restrictions, Giving a Like to the Court This Time], RENMIN RI BAO (人民日报) [People’s Daily], July 10, 2018, <https://baijiahao.baidu.com/s?id=1605590483965738023&wfr=Spider&for=PC> (China); Dehui Fu & Hui Shi, *Gang Fasheng!* “*Fumu Laolai, Zinv Zaoyang*,” *Fayuan Gei Hengshui Yizhong de Sifa Jianyi Shu!* (刚发生! “父母老赖, 子女遭殃”, 法院给衡水一中的司法建议书!) [Just in! “If Parents are Dishonest, the Children Suffer,” The Court’s Judicial Proposal to Hengshui No. 1 Middle School], FAWU ZHI JIA (法务之家) [Legal Counsel Home], July 7, 2018, https://www.sohu.com/a/239872479_464165 [<https://perma.cc/N8TK-TL3Z>] (China).

ors are not allowed to register for examinations; second, review the basic information of the parents of recruited or to-be-recruited students at your school. No offers shall be given to [students whose parents] are listed as untrustworthy judgment debtors; third, students who have already been enrolled with the above-mentioned circumstances, once discovered, shall be demanded to withdraw or transfer to other relevant public schools.²⁰⁹

Public opinion towards these suggestions was mixed. Some condemned the restrictions as reminiscent of collective punishment in ancient China where relatives were punished along with wrongdoers. Others lauded the disciplining effect such restrictions would have on untrustworthy and elusive debtors.²¹⁰ According to a local newspaper, during the following summer admissions seasons, a number of judgment debtors voluntarily fulfilled their obligations in order to prevent their children from being subject to educational restrictions.²¹¹

B. Preventing Crime and Social Conflict

The Chinese judiciary also promotes social harmony through prophylaxis: preventing crimes and forestalling conflicts.²¹² In addition to fashioning expost legal remedies, courts are also responsible for distilling the causes of recurrent disputes and generating proposals for reducing future offenses.²¹³ Judges discharge this duty through judicial suggestions. In May 2010, the Basic People's Court of Tongshan from Jiangsu province heard a case in which the defendant, using an unregistered SIM card, scammed eleven people of 74,600 yuan.²¹⁴ Upon further research, the court found that major phone service providers did not verify buyers' identities at the time of sale, creating an opportunity for criminals to commit fraud without being traced.²¹⁵ Attributing rampant phone fraud to the lack of real-name registration for SIM cards, the court issued a judicial suggestion to the phone carrier

209. Radio & Television Station of Hengshui, *supra* note 205.

210. *Fayuan Zhe Feng Sifa Jianyisbu Huo le Weile Zhi Laolai Dajia Keyi Shuosbi Hen Pin le* (法院这封司法建议书火了，为了治“老赖”大家可以说是很拼了) [This Judicial Suggestion by the Court Went Viral, Everyone Tried So Hard to Tackle “Laolai”], BEIJING RIBAO XIN MEITI (北京日报新媒体) [Beijing Daily New Media], July 10, 2018, <https://baijiahao.baidu.com/s?id=1605560016196613339&wfr=Spider&for=PC> (China).

211. Radio & Television Station of Hengshui, *supra* note 205.

212. Du, *supra* note 182, at 100.

213. Zhihang Zheng, *Fayuan Rube Canyu Shebui Guanli Chuangxin* (法院如何参与社会管理创新) [How Do Courts Take Part in Social Administration and Innovations], 2 FASHANG YANJIU (法商研究) [Research on Law & Business] 26, 31 (2017) (China).

214. Youfeng Xia, Mingjun Du & Peng Qin, *Zhutui Shouji Ka Shiming Zhi* (助推手机卡实名制) [Help to Promote the Real-Name System for SIM Cards], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Dec. 22, 2011, http://rmfyyb.chinacourt.org/paper/html/2011-12/22/content_37926.htm [<https://perma.cc/725K-6YUM>] (China).

215. *Id.*

servicing the defendant, China Mobile Communications Group.²¹⁶ In its suggestion, the court briefly described the criminal case and the kinds of undesirable activities that could be perpetrated through untraceable phone user identities. It further advised China Mobile to compel real-name registration, to prohibit its retailers from selling unregistered SIM cards, and to require existing phone users to register in due course. China Mobile replied to the court promptly and positively and implemented a two-stage plan for effectuating the real-name registration requirement.²¹⁷ This judicial suggestion also captivated media attention.²¹⁸ The other two major telecommunication operators, China Unicom and China Telecom, learned of the case and adopted a similar registration system.²¹⁹ According to a news report published in December 2011, because of the publicity generated by the judicial suggestion and the measures undertaken by the telecommunication operators, no criminal cases involving fraud using an unregistered phone number had occurred in Xuzhou City since September 2010.²²⁰ In 2013, the Ministry of Industry and Information Technology issued the “Provisions on the Registration of True Identity Information of Phone Users,” mandating the registration of identifying information for all telephone and mobile phone users.²²¹

Besides exposing the *modus operandi* of criminals, courts also identify vulnerable classes of victims and engage related organizations in pre-empting crimes. A judicial suggestion issued by the Basic People’s Court of Erqi in Henan province demonstrates.²²² In 2019, the court heard a criminal case where the defendants were accused of making “*tao lu*” loans, that is, of “inducing [borrowers] to sign lending, pledging or guarantee agreements before inflating loan amounts or maliciously fabricating contractual breach events in order to create ‘false debts.’”²²³ At trial, the court found that the

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Zhixin Liu, *supra* note 160; Dianhua Yonghu Zhenshi Shenfen Xinxi Dengji Guiding (电话用户真实身份信息登记规定) [Provisions on the Registration of True Identity Information of Phone Users] (promulgated by the Ministry of Indus. and Info. Tech., July 16, 2013, effective Sept. 1, 2013), art. 3, http://www.gov.cn/gzdt/2013-07/19/content_2451366.htm [<https://perma.cc/M5ZY-32JQ>] (China).

222. Shuang Li, *Fachu Sifa Jianyishu Fayuan Jiaoni Fan “Tao lu”* (发出司法建议书 法院教你反“套路”) [Issue Judicial Suggestions, The Court Teaches You Against “Tao Lu”], Zhengzhoushi Erqiqi Renmin Fayuan (郑州市二七区人民法院) [People’s Court of Erqi District of Zhengzhou City], Aug. 19, 2020, <http://eqqfy.hncourt.gov.cn/public/detail.php?id=2779> (China).

223. *Id.*; CBNEditor, *Chinese Authorities Investigate 1890 Organised “Tao lu” Loan Cases, Seize 16.176B Yuan in Assets*, CHINA BANKING NEWS, Sept. 4, 2019, <https://www.chinabankingnews.com/2019/09/04/chinese-authorities-investigate-1890-organised-taolu-loan-cases-seize-16-176b-yuan-in-assets/> [<https://perma.cc/SK27-CX4J>]; see also Guanyu Banli “Tao luda” Xingshi Anjian Ruogan Wenti de Yijian (关于办理“套路贷”刑事案件若干问题的意见) [Opinions Concerning the Handling of “Tao Lu” Loans Criminal Cases] (promulgated by the Sup. People’s Ct., Sup. People’s Proc., Ministry of Pub. Sec. & Ministry of Just., Feb. 28, 2019, effective Apr. 9, 2019), art. 1, http://www.gov.cn/zhengce/zhengceku/2019-09/05/content_5427500.htm [<https://perma.cc/LEA9-UMRT>] (China).

defendants primarily targeted college students who were in urgent need of money or young adults who had just entered the workforce.²²⁴ They advertised no-collateral loans with low interest rates and fast approval to entice victims.²²⁵ Recognizing that “students are easily targeted by criminals due to their lack of social experience and weak capacity of identifying right and wrong” and to “reduce crime at its source,” the court addressed a judicial suggestion to the twelve schools where the student victims were enrolled.²²⁶ The suggestion asked that the schools organize legal education activities, raise students’ awareness of the adverse consequences of taking out “*tao lu*” loans, and investigate and report on all types of small loan advertisements on campus.²²⁷

As judicial suggestions can be made even in the absence of any legal controversy, courts may employ them as a channel for communicating and cooperating with local governments to head off social unrest before it materializes.²²⁸ For instance, the financial crisis of 2008 bankrupted many enterprises in Zhangjiagang of Jiangsu province.²²⁹ The owners of some of these enterprises fled, leaving employees in the lurch.²³⁰ To help the local government and party committees defuse the situation and restore social order, the Intermediate People’s Court of Zhangjiagang issued judicial suggestions setting out recommended solutions and measures.²³¹ These suggestions included the establishment of a joint early warning system, an emergency response mechanism, a joint rights protection scheme, and a security fund for unpaid wages.²³²

C. Advising on Business Activities

Courts do not only help administrative authorities and civil organizations formulate policies and prevent crimes. Through judicial suggestions, they occasionally function as legal advisors to private enterprises.²³³ In 2016, the Basic People’s Court of Pudong District of Shanghai heard several personal injury cases arising from traffic accidents caused by couriers from an online food ordering platform, *Ele.me* (“Hungry Now”).²³⁴ After reviewing a num-

224. Li, *supra* note 222.

225. *Id.*

226. *Id.*

227. *Id.*

228. See Fangmin Li, *Dui Gaijin Sifa Jianyi Gongzuo de Jidian Kanfa* (对改进司法建议工作的几点看法) [Some Thoughts on Improving the Work of Judicial Suggestions], 27 SHANDONG SHENPAN (山东审判) [Shandong Trial] 24, 24 (2011) (China).

229. Li, *supra* note 146, at 45.

230. *Id.*

231. *Id.*

232. *Id.*

233. Liu, *supra* note 160.

234. Zhiguo Wang & Yejie Wang, *Fayuan Jianyi “Eleme” Jiaqiang Yuangong Daolu Jiaotong Shipin Anquan Fangmian Peixun* (法院建议“饿了么”加强员工道路交通、食品安全方面培训) [Court Suggested Ele.me Strengthen Training for Employees in the Aspects of Road Traffic and Food Safety], ZHONGQING ZAIXIAN (中青在线) [China Youth Online], Aug. 15, 2016, <https://>

ber of disputes presenting similar issues, the court detected some objectionable commonalities in how food delivery services conducted business.²³⁵ It found that part-time couriers used their own vehicles, joined the platform without contracts or insurance, had to teach themselves road safety information, and earned uniforms, helmets, and other delivery equipment based on their number of completed deliveries.²³⁶ *Ele.me*, for instance, would deduct service fees if the courier did not complete the delivery within forty-five minutes.²³⁷ Therefore, “[the couriers] often race[d] against time by ‘sticking a pin wherever there is room,’” resulting in traffic accidents.²³⁸ The court directed a judicial suggestion to *Ele.me*, advising the company to adopt the same standard for full-time and part-time employees in training, management, and assessment, to strengthen its real-time road safety monitoring, to implement data-driven delivery assignments, and to expand insurance coverage.²³⁹ The company promptly responded with a promise to embrace the court’s suggestions and to live up to its social responsibility.²⁴⁰ Similarly, a judge from Jiangsu province analyzed eighty-nine cases involving traffic accidents caused by food couriers and issued suggestions to two main online food ordering platforms in 2020.²⁴¹ These judicial suggestions alerted food delivery providers to the importance of road safety and urged them to undertake effective measures to reduce the danger of accidents. In September 2020, *Ele.me* posted on its Weibo account that it would incentivize customers to agree to “wait for five or ten more minutes,” and introduce a positive reinforcement mechanism whereby couriers would be rewarded for good performance but would not be penalized if some of their deliveries time out.²⁴²

A winning party in a lawsuit may nonetheless receive judicial suggestions on other aspects of its behavior. In March 2011, the labor contracts of sixteen workers were terminated by Shanghai Labor Resource Development

www.chinanews.com.cn/cj/2016/08-15/7972913.shtml [https://perma.cc/2QTL-EQ32] (China); see also Zhiguo Wang & Yejie Wang, *Fayuan Xiang “Eleme” Fachu Sifa Jianyi* (法院向“饿了么”发出司法建议) [Court Issued A Judicial Suggestion to Ele.me], ZHONGQING ZAIXIAN (中青在线) [China Youth Online], Aug. 16, 2016, http://zqb.cyol.com/html/2016-08/16/nw.D110000zqgnb_20160816_2-06.htm [https://perma.cc/LZ6Q-LQDN] (China).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. Huan Liu, Jinwen Zhu, & Xiaodi Yang, *Gusu Sifa Jianyi Guifan Waimai Xiaoge* (姑苏司法建议规范外卖小哥) [The Gusu Court’s Judicial Suggestions Establish Criteria for Delivery Persons], JIANGSU FAZHI BAO (江苏法制报) [Jiangsu Legal Daily], Aug. 28, 2020, http://k.sina.com.cn/article_1716182294_664add1602000t0uw.html [https://perma.cc/B98F-DQ4F] (China).

242. *Eleme: Jiang Tuichu “Duo Deng Wu Fenzhong/Sbi Fenzhong Xin Gongneng”* (饿了么：将推出“多等5分钟/10分钟”新功能) [Ele.me is About to Introduce a New Function of “Wait for 5 or 10 More Minutes”], MEIRI JINGJI XINWEN (每日经济新闻) [Economy News Daily], Sept. 9, 2020, <https://www.163.com/money/article/EM2MKPGU00258105.html> [https://perma.cc/SEG4-N8PZ] (China). As of Jan. 6, 2022, the option of “I am willing to wait for five or ten more minutes” was not available on the *Ele.me* App.

Co., Ltd. due to their misappropriation of factory parts.²⁴³ The workers subsequently sued the company alleging unlawful termination and sought compensation and unpaid wages.²⁴⁴ Although the court upheld the company's action, it also had doubts about how the firm computed wages and how it determined employment duration in assessing eligibility for paid annual leave.²⁴⁵ After the case was closed, the court served the company a judicial suggestion.²⁴⁶ It advised the company to specify the wage system in their labor contract attachments, notify employees of the calculation methods for overtime wages, and make employees who have worked continuously for twelve months eligible for paid annual leave.²⁴⁷ The presiding judge justified the suggestion, noting:

Jiading [where the defendant company is located], as a nodal district in the Yangtze River area, gathers many labor-intensive enterprises, and most of the employees in these enterprises come from other places. Returning home to visit families during vacation became a dilemma for labor rights protection.²⁴⁸

Shortly afterwards, the company reported to the court that it had undertaken corresponding measures.²⁴⁹ The company's manager, Mr. Xu, spoke graciously about the judicial suggestion. He told a reporter that "although [we] won the lawsuit, our work, indeed, had inadequacies and omissions."²⁵⁰ He thanked the court for alerting them to these problems and for protecting the interests of both the employees and the company.²⁵¹

We have elucidated how judicial suggestions can assist in the formulation and implementation of public policy, help prevent crime and social conflict, and advise businesses on the legality or appropriateness of their practices. Our discussion thus far may have given the impression that judicial suggestions are separate from or even complementary to adjudication. But judicial suggestions can sometimes be employed as a substitute for adjudication. In administrative law cases, for instance, courts may issue judicial suggestions instead of ruling against defendant administrative agencies, even when their actions are in violation of law.²⁵² These suggestions, which can be sent at any stage of the litigation, are often inaccessible to claimants.²⁵³ The use of

243. Wei, *supra* note 144.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. Zhanqing Wang & Yang Li, *Yuewei Cuowei yu Guiwei: Xingzheng Shenpan Sifa Jianyi Zhidu Jianshi* (越位、错位与归位：行政审判司法建议制度检视) [Examining the Judicial Suggestions System in Administrative Adjudication], TEQU FANTAN (特区法坛) [Special Administrative Region Law Review] 34, 35 (2010) (China).

253. *Id.*

judicial suggestions to avoid an adverse adjudicative decision is controversial. On the one hand, it could undermine the judicial review of administrative acts and tarnish the neutrality of courts.²⁵⁴ On the other hand, it might represent a second-best compromise given that “the status of administrative bodies is far above the one of judicial organs” and “the power of government often overrides the law.”²⁵⁵

IV. THE IMPACT OF JUDICIAL SUGGESTIONS

As judicial suggestions are not legally binding orders, their actual influence depends in large part on the willingness of the recipients to consider and adopt the courts’ proposals. Some scholars, therefore, refer to judicial suggestions as a kind of “soft enforcement.”²⁵⁶ Although judicial suggestions have proliferated in recent decades, response rates still fluctuate across regions. For example, 710 of the 868 judicial suggestions directed to administrative agencies in Zhejiang province received responses.²⁵⁷ By contrast, only a quarter of the 177 administrative judicial suggestions sent by courts in Fujian province around the same time drew responses from the recipients.²⁵⁸ According to a report of the High People’s Court of Guangdong which assessed the work of fourteen courts in the region, a considerable number of judicial suggestions issued between 2008 and 2010 had not been acknowledged or adopted by their recipients, and there existed significant regional disparity in receptivity to judicial suggestions.²⁵⁹ In Dongguan

254. *Id.* at 36.

255. Li, *supra* note 146, at 48; see Xin He, *Judicial Innovation and Local Politics: Judicialization of Administrative Guidance in East China*, 69 CHINA J. 20, 32–33 (2013) (pointing out that while the issuance of judicial suggestions might “reflect the courts’ embarrassing and frustrating lack of power,” it can also “expose[] flawed administrative practice” and “exert[] pressure on agencies to adjust”).

256. Huang & Yin, *supra* note 173, at 43–44, 49; Zuyin Xia, *Sifa Jianyi de Shijian Jiazhi, Xianshi Wenti ji Wanshan Lujing* (司法建议的实践价值、现实问题及完善路径) [Practical Value, Actual Problems, and Improvement Approaches of Judicial Suggestions], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Aug. 31, 2016, http://rmfyb.chinacourt.org/paper/html/2016-08/31content_115971.htm [https://perma.cc/75W5-FNSN] (China); Jianjun Yao, *Sifa Jianyi: Shehui Zhili Wenti de Sifa Shenshi* (司法建议：社会治理问题的司法审视) [Judicial Suggestions: Judicial Perspective of Social Administration Issues], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Sept. 16, 2020, <https://www.chinacourt.org/article/detail/2020/09/id/5457844.shtml> [https://perma.cc/Q2T6-QSH5] (China).

257. Zhiyong Huang & Mengmeng Zhang, *Xingzheng Susong Sifa Jianshe Zhidu de Kunjing yu Kuozhan* (行政诉讼司法建议制度的困境与扩展) [Predicament and Expansion of the Administrative Judicial Suggestions System], 6 ZHONGGUO RENMIN GONG’AN DAXUE XUEBAO (中国人民公安大学学报) [Journal of People’s Public Security University of China] 92, 94 (2017) (China).

258. *Id.*

259. Chunjian Xu et al., *Hua Wuxu wei Qiushi Yi Sifa Jianyi Cu Shenpan Gongzuo* (化务虚为求是以司法建议促审判工作) [Change Discussing Ideology to Seeking Truth: Advancing Adjudication Work Through Judicial Suggestions], RENMIN FAYUAN BAO (人民法院报) [People’s Court Daily], Oct. 18, 2012, http://rmfyb.chinacourt.org/paper/images/2012-10/18/08/2012101808_.pdf [https://perma.cc/9GYD-93F7] (China); Yuanguo Tu, *Guizhi yu Guifan: Lun Sifa Shijian Zhong de Sifa Jianyi* (规制与规范：论司法实践中的司法建议) [Regulations and Standards: Analyzing Judicial Suggestions in Judicial Practice], 35 HENAN JIAOYU XUEYUAN XUEBAO (河南教育学院学报) [Journal of Henan Institution of Education] 65, 66 (2016) (China).

city, for instance, around 90 percent of judicial suggestions served by courts were replied to whereas the same figure for Zhuhai city stood at only 40 percent.²⁶⁰

These statistics must be taken with a grain of salt. The so-called dialogues initiated by judicial suggestions frequently amount to little more than a ritualistic exchange of letters. To satisfy targets, some judges give judicial suggestions to organizations which are closer to or more likely to cooperate with the court.²⁶¹ Devoid of constructive proposals, these suggestions are often perfunctory and demand very little by way of feedback from recipients.²⁶² Moreover, among the responses received by courts, many are either formalistic, empty acknowledgements or straight-out refusals to undertake the suggested measures.²⁶³

According to local courts, the non-compulsory nature of judicial suggestions, insufficient follow-up procedures, and impractical proposals are all factors contributing to low response rates.²⁶⁴ Moreover, recipients fear that a concessionary reply could hurt their defense in future lawsuits or result in negative appraisals from their superiors.²⁶⁵ Organizations are also worried that media coverage of their replies would damage their reputations and public images by attracting scrutiny to the failings surfaced by the courts.²⁶⁶

260. Xu et al., *supra* note 259.

261. Zhirong Tao & Jianhong Wang, *Sifa Jianyi Huiyinglü Di de Yuanyin Tanxi* (司法建议回应率低的原因探析) [Exploring and Analyzing the Reasons of the Low Response Rates of Judicial Suggestions], BEIJING SHI GAOJI RENMIN FAYUAN (北京市高级人民法院) [Higher People's Court of Beijing Municipality], Jan. 29, 2010, <https://bjgy.bjcourt.gov.cn/article/detail/2010/01/id/873638.shtml> [<https://perma.cc/WGL3-DFUX>] (China).

262. *Id.*

263. Research Project Team of Judicial Suggestions for Juvenile Adjudication at Higher People's Ct. of Beijing, *Guanyu Weibengnianren Shenpan Sifa Jianyi Gongzuo Qingkuang de Shizheng Fenxi* (关于未成年人审判司法建议工作情况的实证分析) [Empirical Analysis of the Work on Judicial Suggestions for Juvenile Adjudication], 3 YUFANG QINGSHAONIAN FANZUI YANJIU (预防青少年犯罪研究) [Research on Prevention of Juvenile Delinquency] 66, 71 (2020) (China).

264. Lihong Dong, *Sifa Jianyi Luoshibili Di Fayuan Yigen Daodi Qiu Shixiao* (司法建议落实率低法院一跟到底求实效) [Judicial Suggestions Have Low Implementation Rates: Courts Follow All the Way to the End to Pursue Practical Results], PUYANG SHI ZHONGJI RENMIN FAYUAN (濮阳市中级人民法院) [Puyang Intermediate People's Court], Nov. 25, 2014, <http://pyzy.hncourt.gov.cn/public/detail.php?id=6309> (China); Tao & Wang, *supra* note 261; Basic People's Ct. of Dongfeng Dist., *Dongfeng Fayuan dui Sifa Jianyi Fankuilü Di Tichu Jianyi* (东风法院对司法建议反馈率低提出建议) [Dongfeng Court Put Forward a Proposal Regarding the Low Response Rate of Judicial Suggestions], JIAMUSI SHI ZHONGJI RENMIN FAYUAN (佳木斯市中级人民法院) [Intermediate People's Court of Jiamusi], Nov. 15, 2012, <http://jmszy.hljcourt.gov.cn/public/detail.php?id=315> (China); Xin Shen, *Mengzhou Shi Renmin Fayuan Zbendui Sifa Jianyi Fankuilü Di Tichu Sandian Jianyi* (孟州市人民法院针对司法建议反馈率低提出三点建议) [People's Court of Mengzhou Put Forward Three Proposals Regarding the Low Response Rates of Judicial Suggestions], HENANSHENG GAOJI RENMIN FAYUAN (河南省高级人民法院) [Higher People's Court of Henan Province] Dec. 15, 2011, <http://www.hncourt.gov.cn/public/detail.php?id=123367> (China).

265. Tao & Wang, *supra* note 261.

266. *Id.*

For this reason, some courts were even asked to retract their judicial suggestions.²⁶⁷

Although courts sometimes exerted pressure on recipients by forwarding their suggestions to the latter's superiors or to higher-level authorities, judicial suggestions, unlike judgments, do not create legal rights or obligations in any interested parties.²⁶⁸ Recipients remain free to accept, acknowledge, ignore, or reject the courts' proposals. For example, the plaintiff in an administrative law case from Jiangsu Province was cited by the local traffic patrol after driving his car into a bus-only lane on S road. He challenged the factual basis of the citation arguing that there were no bus-only signs on S Road.²⁶⁹ Accompanying the court's judgment in favor of the plaintiff was a judicial suggestion to the defendant on how the configuration of traffic signs could be improved: "the installment of traffic signals and signs should meet the standards of being clear, eye-catching, accurate, and intact."²⁷⁰ The defendant agency brushed aside the judicial suggestion, replying:

If bus lanes are marked at all intersections of S Road, the high density [of the signs] will affect the appearance of the city. The priority should be strengthening the publicity [of the rules] among workplaces along the road and informing the commuters [of these workplaces] of where the bus-only lanes are.²⁷¹

Another noteworthy example demonstrating the softness of judicial suggestion is a local lawyer association's reply to a suggestion made by a Fujian court. In September 2018, the Immediate People's Court of Quanzhou imposed a 500 yuan fine on two criminal defense lawyers who brought an axe to a hearing.²⁷² The defense lawyers later asserted that the axe, of the same type as the weapon used in the crime, would be essential to determining

267. Research Project Team of Judicial Suggestions for Juvenile Adjudication at Higher People's Ct. of Beijing, *Guanyu Weibengnianren Shenpan Sifa Jianyi Gongzuo Qingkuang de Shizheng Fenxi* (关于未成年人审判司法建议工作情况的实证分析) [Empirical Analysis of the Work on Judicial Suggestions for Juvenile Adjudication], 3 YUFANG QINGSHAONIAN FANZUI YANJIU (预防青少年犯罪研究) [Research on Prevention of Juvenile Delinquency] 66, 71 (2020) (China); Liying Wang, *Cong Yifen Beijujue de Sifa Jianyi Shuoqi* (从一份被拒绝的司法建议说起) [Speaking Out on a Rejected Judicial Suggestion], RENMIN FAYUAN BAO (人民法院报) [People's Court Daily], Apr. 18, 2011, http://rmfwb.chinacourt.org/paper/images/2011-04/18/08/2011041808_pdf.pdf [https://perma.cc/QF6B-4358] (China).

268. Guohua Chen, *Dangqian Sifa Jianyi Gongzuo Cunzai Wenti ji Duice Yanjiu* (当前司法建议工作存在问题及对策研究) [Research on Existing Problems and Solutions of the Present Work of Judicial Suggestions], ZHONGGUO FAYUAN WANG (中国法院网) [China Courts Online], Mar. 20, 2015, <https://www.chinacourt.org/article/detail/2015/03/id/1570918.shtml> [https://perma.cc/H3KZ-2M7M] (China).

269. Xuexian Huang & Jue Ding, *Xingzheng Shenpan Zhong de Sifa Jianyi Zhidu Yunxing Fenxi* (行政诉讼中的司法建议制度运行分析) [Analysis of the Operation of the Judicial Suggestions System in Administrative Adjudication], 3 XINGZHENG FAXUE YANJIU (行政法学研究) [Research on Administrative Law] 86, 89 (2011) (China).

270. *Id.*

271. *Id.*

272. Du Shen, *Fujian Liangming Lishi "Shanzi Xiedai Futou Shang Fating"* (福建两名律师“擅自携带斧头上法庭”) [Two Lawyers in Fujian "Brought an Axe to the Trial Room Without Permission"],

whether the defendant intended murder or merely assault.²⁷³ However, the court found that presenting an axe in the courtroom without its permission “seriously endangered the safety of the trial,” and issued a judicial suggestion to the relevant authority to discipline the lawyers concerned.²⁷⁴

After investigation, the Lawyers Association of Quanzhou decided not to impose any penalties on the lawyers in question and announced publicly its reply to the court. The Association found that one of the lawyers did not violate any legal or professional rules as she did not carry or touch the axe prior to and during the hearing.²⁷⁵ As for the other lawyer, his motivation was “to assist the court in investigating the facts of the case.”²⁷⁶ Given that the axe was “under the actual control of [the lawyer] for the entire time,” the Association concluded that the act in question did not constitute a “serious circumstance of endangering the safety of the trial” as alleged by the judicial suggestion.²⁷⁷ This episode incited debates among legal practitioners about the deference due to judicial suggestions. For instance, a Chinese lawyer, Liu Chuang, argued in a since-deleted essay posted on the Beijing Ocean Law Firm’s website that “courts do not have rights to demand any entities, let alone administrative or judicial bodies at the same level, to report work to and take commands from them. The power of judicial suggestions is, in essence, a notification of circumstances only.”²⁷⁸

The soft, dialogistic nature of judicial suggestions is not only reflected in the recipients’ non-responses and their refusals to comply but can also be exemplified by inaction following positive replies. In October 2006, an eighty-four-year-old woman, Mrs. Zhang, suffered from shock, shortness of breath, and excessive sweating after taking part in a clinical trial of a new drug manufactured by Bayer Pharmaceuticals.²⁷⁹ Mrs. Zhang later discovered Bayer Group had insured the drug trial with a maximum coverage of

YANGSHI WANG XINWEN (央视网新闻) [CCTV News] (Sept. 18, 2019), <https://baijiahao.baidu.com/s?id=1612023748438597614&wfr=Spider&for=PC> (China).

273. *Id.*

274. Fawu zhi Jia, *Tufa! Liangming Bianbu Lüshi Shanzi Xiedai Futou Canyu Tingsben Bei Chufa!* (突发! 两名辩护律师擅自携带斧头参与庭审被处罚!) [Breaking! Two Defense Lawyers Carrying an Axe to Participate in the Trial Hearing Without Permission Have Been Penalized!], SOHU (Sept. 18, 2018, 21:34 PM), https://www.sohu.com/a/254633770_164794 [<https://perma.cc/KK5M-XBHN>] (China).

275. Tai Niu, *Lüshi “Shanzi Xie Futou Shang Fating” Xu: Lüxie Diaocha Hou Fawen Cheng Bu Yu Chufa* (律师“擅自携斧头上法庭”续: 律协调查后发文称不予处罚) [The Aftermath of Lawyers “Bringing an Axe to the Trial Room”: Bar Association Issues Announcement After Investigation Claiming That It Will Not Dole Out Punishment], SHANGYOU XINWEN (上游新闻) [Shangyou News] (Sept. 29, 2018), <https://baijiahao.baidu.com/s?id=1612932006176837726&wfr=Spider&for=PC> (China).

276. *Id.*

277. *Id.*

278. Chuang Liu, *Qing Fayuan Buyao Suibian Fa “Sifa Jianyi Han” Yaoqiu dui Lüshi Jinxing Chufa* (请法院不要随便发“司法建议函”要求对律师进行处罚) [Courts, Please Do Not Send “Judicial Suggestions” At Will to Demand Punishing Lawyers], BEIJING HOUDA HECHUAN LÜSHI SHIWUSUO (北京厚大合川律师事务所) [Beijing Ocean Law Firm], Oct. 1, 2018, <http://www.oceanlawfirm.com/index.php?m=Content&c=index&a=show&catid=7&id=99> (China).

279. Yang Liu, *Guojia Shiyaojian Zongju Fu Han Sifa Jianyi* (国家食药监总局复函司法建议) [The Reply of the State Food and Drug Administration], XIN JING BAO (新京报) [The Beijing News] (Apr.

€500,000 for each drug trial volunteer, and sued Bayer Pharmaceuticals for compensation of €150,000.²⁸⁰ Although the defendant admitted the fact of insurance during the hearing, it refused to present the court with the said insurance contract for examination.²⁸¹ The court proceeding was prolonged due to the unavailability of evidence.²⁸² The trial lasted four years and the court eventually ruled in favor of Mrs. Zhang.²⁸³ While investigating the case, the presiding judge, Chen Xiaodong, discovered that neither the hospital nor the supervising authority—then the National Medical Products Administration—kept a copy of the insurance contract.²⁸⁴ Judge Chen also found that the rules were ambiguous as to whether insurance measures were part of a trial plan subject to review and whether insurance contracts should be submitted to the relevant medical products administration for record.²⁸⁵ The Basic People’s Court of Chaoyang therefore served a judicial suggestion to the State Food and Drug Administration and the Ethics Committee of People’s Hospital.²⁸⁶ In its suggestion, the court recommended the Administration revise the “Measures for the Administration of Drug Registration” to include the compulsory recording of insurance measures.²⁸⁷ The court also urged the Ethics Committee to strengthen the auditing of insurance measures and to keep relevant documents on record.²⁸⁸ After receiving the suggestion, officials of the State Food and Drug Administration visited the court to further probe the matter and seek advice on its management system for drug clinical trials.²⁸⁹ A week after the visit, the Administration replied to the court, stating that it would revise the rules and regulations in accordance with the court’s suggestion to clarify the requirements for insurance measures. The Administration also undertook to reinforce the obligation of the Ethics Committee to audit insurance measures adopted for drug clinical trial volunteers so as to protect the rights and safety of subjects to the fullest

12, 2013, 09:16 AM), <http://finance.people.com.cn/n/2013/0412/c70846-21113073.html> [https://perma.cc/BJ5K-JGS5] (China).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. Yang Liu, *Shiyao Suopei Nan Fayuan Jianyan Shiyaojian Zongju* (试药索赔难 法院建言食药监总局) [Difficulty of Compensation Claims of Drug Testing The Court Issued a Suggestion to the State Administration of Food and Drug], XIN JING BAO (新京报) [The Beijing News] (Mar. 26, 2013), http://epaper.bjnews.com.cn/html/2013-03/26/content_420467.htm?div=-1 [https://perma.cc/7GAN-JH65] (China). Yaowu Linchuang Shiyao Zhiliang Guanli Guifan (药物临床试验质量管理规范) [Quality Management Specifications for Drug Clinical Trials] (promulgated by the St. Food & Drug Admin., Aug. 6, 2003, effective Sept. 1, 2003), <https://www.nmpa.gov.cn/directory/web/nmpa/xxgk/fgwj/bmgzh/20030806010101443.html> (China); Yaopin Zhuce Guanli Banfa (Shixing) (药品注册管理办法 (试行)) [Measures for the Administration of Drug Registration (for Trial Implementation)] (promulgated by the Nat’l Med. Prods. Admin., Oct. 30, 2002, effective Dec. 1, 2002), <https://www.nmpa.gov.cn/directory/web/nmpa/xxgk/fgwj/bmgzh/20021031010101123.html> (China).

286. Liu, *supra* note 279.

287. Liu, *supra* note 285.

288. *Id.*

289. Liu, *supra* note 279.

extent.²⁹⁰ Despite these assurances, the 2020 Amendment to the “Measures for the Administration of Drug Registration” did not include any of the suggested changes to insurance measures for drug clinical trials.²⁹¹ Furthermore, whereas the recently revised “Quality Management Specifications for Drug Clinical Trials” lists insurance as part of a clinical trial protocol, to be subject to auditing under normal circumstances, it also permits contracts or agreements to stipulate otherwise.²⁹²

As previously observed, the real-world influence of judicial suggestions is dampened by their advisory character on the one hand and feeble post-issuance supervision on the other.²⁹³ The poor quality of judicial suggestions also diminishes their persuasiveness. Many suggestions are unsupported by clear logic or reasoning or overlook practical aspects of the problem.²⁹⁴ Others proffer vague and generic prescriptions, advising the recipient to “pay close attention,” “reinforce management,” and “intensify the efforts of publicity and education.”²⁹⁵ In order to enhance the effectiveness of judicial suggestions, some local courts have designated the quality of judicial suggestions as a job performance indicator.²⁹⁶ For example, the Basic People’s Court of Qingfeng County in Henan Province requires judges to conduct thorough investigation and collect sufficient data prior to issuing a suggestion.²⁹⁷ A local court from Sichuan takes the adoption and societal appraisal

290. *Id.*

291. Yaopin Zhuze Guanli Banfa (药品注册管理办法) [Measures for the Administration of Drug Registration] (promulgated by the State Admin. for Mkt. Regul., Jan. 22, 2020, effective July 1, 2020), https://gkml.samr.gov.cn/nsjg/fgs/202003/t20200330_313670.html [<https://perma.cc/KYP4-WM761>] (China).

292. Yaowu Linchuang Shiyang Zhiliang Guanli Guifan (药物临床试验质量管理规范) [Quality Management Specifications for Drug Clinical Trials] (promulgated by the Nat’l Med. Prod. Admin. & Nat’l Health Comm’n, July 1, 2020, effective July 1, 2020), art. 72, <http://www.nhc.gov.cn/yzygj/s7659/202004/1d5d7ea301f04adba4c4e47d2e92eb96.shtml> (China).

293. Zhixian Shen, “*Sbenpan Zbineng” de Yanshen yu Tisbeng* (“审判职能”的延伸与提升) [The Expansion and Advancement of “Adjudicatory Function”], 11 *FALÜ SHIYONG* (法律适用) [Journal of Applied Law] 113, 115–16 (2011) (China).

294. Shuanxue Mi, *Sifa Jianyi Guifan Yunxing Lujing Tanjiu* (司法建议规范运行路径探究) [Exploring the Operation of Judicial Suggestion Norms], 10 *ZHENGFA SHIYE* (政法视野) [Political & Legal Perspectives] 76, 77 (2018) (China).

295. *Id.*; Jianrong Du, *Sifa Jianyi Xiaoguo Nanti zhi Pojixi Lun* (司法建议效果难题之破解析论) [Analysis of Resolving the Dilemma of the Effect of Judicial Suggestions] 7 *MINZHU YU FAZHI* (民主与法制) [Democracy & Legal Systems] 99, 101 (2016) (China); Yong Wang, Shilun Sifa Jianyi Cunzai de Wenti ji Zhidu Wanshan (试论司法建议存在的问题及制度完善) [Existing Problem and Improvement of the Judicial Suggestions System], *JUECE YU XINXI* (决策与信息) [Decisions & Information] (2012) (China).

296. *See, e.g.*, Research Office, *Xichong Fayuan Fanying Jiceng Fayuan Sifa Jianyi Gongzuo Cunzai de Wenti bing Tichu Jianyi* (西冲法院反映基层法院司法建议工作存在的问题并提出建议) [The Xichong Court Reflected on the Existing Problems in the Judicial Suggestions Work of Local Courts and Put Forward Proposals], *ZHONGGUO FAYUAN WANG* (中国法院网) [China Courts Online], Oct. 17, 2016, <http://ncxfy.scSSFw.gov.cn/article/detail/2016/10/id/2318334.shtml> [<https://perma.cc/9MYD-RE3N>] (China); Wangchao Dong, Dangqian Sifa Jianyi Gongzuo Cunzai de Wenti ji Jianyi (当前司法建议工作存在的问题及建议) [The Problems and Proposals of the Judicial Suggestions Work at Present], *HENAN SHENG GAOJI RENMIN FAYUAN WANG* (河南省高级人民法院网) [Henan High People’s Court], May 3, 2013, <http://www.hncourt.gov.cn/public/detail.php?id=137868> (China).

297. Dong, *supra* note 264.

of judicial suggestions into consideration for judicial promotion.²⁹⁸ At the same time, courts have tried to foster a better understanding of judicial suggestions to ensure the adoption and execution of the proposals they put forward.²⁹⁹ Some courts have enquired into recipients' reasons for not responding, assigned judicial personnel to visit them, and invited decisionmakers from recipient organizations to the court for round-table discussions.³⁰⁰ Characterizing judicial suggestions as the catalyst for positive feedback loops, the Deputy Head of the High People's Court of Shanghai, Shen Zhixian, urged courts to "take the initiative to strengthen communication with the recipient unit."³⁰¹ "Judicial suggestions must not only be given well, but also delivered artfully, so that people can listen to it and things can be done," he added.³⁰²

The impression made by a judicial suggestion might also vary based on the status of the recipient. Despite years of reforms that focus on the de-administration (*qu xingzheng hua*) of courts in China,³⁰³ local authorities continue to have a say in many aspects of judicial activity, including courts' personnel, finances and, even occasionally, decisionmaking. According to a spreadsheet tabulating judicial suggestions by Nanjing courts at all levels in 2020, sixty-seven out of 142 judicial suggestions were directed to adminis-

298. Research Office, *supra* note 296.

299. Dong, *supra* note 296; Huailei Li, *Dongchangfu Qu Fayuan Tuixing Sifa Jianyi "Goutong Huiying" Jizhi* (东昌府区法院推行司法建议“沟通回应”机制) [The District Court of Dongchangfu Promoted the System of Judicial Suggestion “Communications and Responses”], QILU WANBAO (齐鲁晚报) [Qilu Evening News], Dec. 4, 2018, <https://epaper.qilwb.com.cn/qilwb/content/20181204/ArticleL02005FM.htm> [<https://perma.cc/9CJT-BUFM>] (China); People's Court of Dongfeng, *Dongfeng Fayuan dui Sifa Jianyi Fankui Liu Di Tichu Jianyi* (东风法院对司法建议反馈率低提出建议) [The Dongfeng Court Raised Proposals regarding the Low Response Rate of Judicial Suggestions], Intermediate People's Ct. of Jiamusi, Nov. 15, 2012, <http://jmszy.hljcourt.gov.cn/public/detail.php?id=315> (China).

300. *Id.*

301. Jinzhi Yang, *Shanghai: Sifa Jianyi Cheng "Shehui Zhuomuniao"* (上海: 司法建议成“社会啄木鸟”) [Shanghai: Judicial Suggestions Become “Social Woodpeckers”], XINHUA WANG (新华网) [Xinhua News], Jan. 7, 2010, <http://news.sohu.com/20100107/n269439188.shtml> [<https://perma.cc/MP3U-YSTC>] (China).

302. *Id.*

303. De-administration of courts often refers to measures taken to safeguard the adjudicatory power of judges and prevent courts from operating in a similar fashion as administrative agencies where “the inferiors obey the superiors and the subordinates obey the leaders.” Ziliang Xu and Yan Xiong, *Shenpan-quan Yunxing “Qu Xingzheng Hua” ji Qi Lifa: Cong Renmin Fayuan Zuzhifa Xugai Yinsubuzhi* (审判权运行“去行政化”及其立法: 从《人民法院组织法》修改引述之) [The “De-administration” and Legislation of the Operation of Adjudicatory Power: Analyzing from the Amendment to the Organic Law of the People's Courts of the People's Republic of China], Shanghai Shi Di'er Zhongji Renmin Fayuan (上海市第二中级人民法院) [Shanghai No. 2 Intermediate People's Court], <https://www.shefzy.com/view.html?id=112770> [<https://perma.cc/6J2Z-TX3J>] (China); *see also*, Anthony H. F. Li, *Centralisation of Power in the Pursuit of Law-based Governance: Legal Reform in China under the Xi Administration*, 2 CHINA PERSP. 63, 66 (2016) (“The reform with an aim of ‘de-administration’ (*qu xingzheng hua*) of courts not only enhances the personal prestige of frontline judges, but also increases the level of professionalism of the judiciary by barring high-ranking officials from internally intervening in cases.”); *see also*, Quanbao Wang, *Xin Yulun Fayuan Gaige: Zhibai Qu Xingzheng Hua Difang Hua* (新一轮法院改革: 旨在去行政化地方化) [A New Round of Judicial Reforms: Aiming at De-administration and De-localization], RENMIN WANG (人民网) [People's Daily Online], Nov. 15, 2013, <http://politics.people.com.cn/n/2013/1115/c1001-23557153.html> [<https://perma.cc/N6HT-EP85>] (China).

trative agencies while fifty-nine were sent to enterprises.³⁰⁴ Among the seventy-two suggestions that received replies, one suggestion was adopted and incorporated into a normative document.³⁰⁵ The issuance and adoption of two suggestions were broadcasted by official media at the central and provincial levels.³⁰⁶ The Guangzhou Intermediate People's Court reported in 2020 that fifteen out of sixteen judicial suggestions were directed to administrative agencies and seven of them did not receive any replies.³⁰⁷ While there is insufficient data to tease out any statistical patterns in the acceptance of judicial suggestions, it could well be argued that private enterprises within the jurisdiction of the court appear to be more receptive to judicial suggestions than public entities. Many of these recipient companies either attended roundtable workshops hosted by courts to discuss the problems and solutions or invited judges to lecture their managing teams and employees on relevant laws and regulations.³⁰⁸ As the manager of Shanghai Labor Resource Development, the defendant in one of our studied cases, forthrightly said, the company appreciated and valued the court's suggestion because they believed that judicial guidance would reduce their legal exposure in the future.³⁰⁹

304. *Nanjing Fayuan Sifa Jianyi Tongji Biao* (南京法院司法建议统计表) [Statistics on the Judicial Suggestions of Nanjing Courts], NANJING SHENPAN WANG (南京审判网) [Nanjing Adjudication Online], Sept. 14, 2021, http://www.njfy.gov.cn/www/njfy/sfjy_mb_a39210914139910.htm [https://perma.cc/MV4Z-TCDH] (China).

305. *Id.*

306. *Id.*

307. Research Office of Guangzhou Intermediate People's Ct., *2020 nian Diyi Jidu Sifa Jianyi Fachu ji Fankui Qingkuang Tongji Biao* (2020年第一季度司法建议发出及反馈情况统计表) [Statistics on the Issuance and Feedback of Judicial Suggestions in the First Quarter of 2020], GUANGZHOU SHENPAN WANG (广州审判网) [Guangzhou Adjudication Online], May 25, 2020, <http://www.gzcourt.gov.cn/sfjy/ck310/2020/05/25085328480.html> (China); Research Office of Guangzhou Intermediate People's Ct., *2020 nian Di'er Jidu Sifa Jianyi Fachu ji Fankui Qingkuang Tongji Biao* (2020年第二季度司法建议发出及反馈情况统计表) [Statistics on the Issuance and Feedback of Judicial Suggestions in the Second Quarter of 2020], GUANGZHOU SHENPAN WANG (广州审判网) [Guangzhou Adjudication Online], July 9, 2020, <http://www.gzcourt.gov.cn/sfjy/ck310/2020/07/09101202961.html> (China); Research Office of Guangzhou Intermediate People's Ct., *2020 nian Disan Jidu Sifa Jianyi Fachu ji Fankui Qingkuang Tongji Biao* (2020年第三季度司法建议发出及反馈情况统计表) [Statistics on the Issuance and Feedback of Judicial Suggestions in the Third Quarter of 2020], GUANGZHOU SHENPAN WANG (广州审判网) [Guangzhou Adjudication Online], Oct. 9, 2020, <http://www.gzcourt.gov.cn/sfjy/ck310/2020/10/09091528696.html> (China); Research Office of Guangzhou Intermediate People's Ct., *2020 nian Disi Jidu Sifa Jianyi Fachu ji Fankui Qingkuang Tongji Biao* (2020年第四季度司法建议发出及反馈情况统计表) [Statistics on the Issuance and Feedback of Judicial Suggestions in the Third Quarter of 2020], GUANGZHOU SHENPAN WANG (广州审判网) [Guangzhou Adjudication Online], Jan. 22, 2021, <http://www.gzcourt.gov.cn/sfjy/ck310/2021/01/22174605868.html> (China).

308. See, e.g., Wei Zhang & Yingming Zhu, *Suzhou Wujiang Fayuan Zhenze Fating Fachu Sifa Jianyi Guifan Cansiyi Jingying Xingwei* (苏州吴江法院震泽法庭发出司法建议 规范蚕丝业经营行为) [Zhenze Tribunal of the Wujiang Court from Suzhou Issued A Judicial Suggestion to Standardize the Business Activities of Silk Industry], JIANGSU FAYUAN WANG (江苏法院网) [Jiangsu Courts Online], Dec. 31, 2014, <http://www.jsfy.gov.cn/article/85687.html> [https://perma.cc/E9W4-UEXE] (China).

309. Wei, *supra* note 144.

In sum, the overall impact of judicial suggestions remains anemic. Still, the party-state has vested courts with the responsibility of making these suggestions because they can sometimes turn out to be helpful for improving social order and public administration. Private individuals, business enterprises, and other governmental agencies do not always have the capacity or incentive to think dynamically or in aggregate terms. Local public security bureaus may be more concerned about violent crime being committed in real-time. Big corporations pursue private profit rather than the common good. Despite their relatively shallow expertise in either criminal investigation or business management, courts can draw on evidence and experiences to discern patterns in the cases that come before them and bring them to the attention of relevant actors. Since the facts of these cases are uncovered as part of adjudication, the cost of performing this public service is marginal. Courts are also perceived as having greater legal expertise than many other official bodies. This advantage gives their suggestions—especially those that relate to legal rather than policy matters—more credibility. When followed, such suggestions can foster voluntary compliance and promote social harmony and stability.

Finally, judicial suggestions are, at best, official advice, not coercive orders. The softness of judicial suggestions is frequently cited as a reason for their ineffectualness. But this feature of judicial suggestions also makes them possible and useful. Judges do not always possess the requisite expertise, skill, or evidence for rulemaking. They may also not be able to consider an issue holistically from the perspective of multiple stakeholders. The non-binding and yet formal nature of judicial suggestions gives courts an official mechanism for initiating policy or behavioral change while minimizing the consequences of ill-thought-out ideas. The softness of judicial suggestions preserves the rights of non-litigants and keeps courts within the bounds of their institutional competence.

The theory and practice of judicial suggestions in China is instructive for understanding the functional possibilities and limits of socialist courts. Like other state organs, socialist courts answer to the party state under the doctrine of democratic centralism. Because of their political subordination, courts in socialist regimes can and do bear responsibilities that go beyond adjudication. Socialist regimes may enlist courts in identifying and addressing social ills, both on a case-by-case and at a systemic level. The Chinese SPC promulgates judicial interpretations of statutes bearing the force of law whereas Chinese courts at all levels have the authority and the duty to offer non-binding judicial suggestions to any entity, whether it is a litigant or not. At the same time, like in liberal democracies, the lack of institutional expertise and knowledge hampers judicial interventions in specialized domains of human activity. Moreover, the subdued status of courts in socialist regimes means that government entities and even private actors sometimes pay lip service to judicial overtures that are merely advisory. Still, it appears

that in the absence of a constitutional mandate of separation of powers, courts can be and are assigned non-adjudicatory tasks.

CONCLUSION

Writing in 1987, Christopher Osakwe noted that when confronted by the foreign logic and ideology of socialist law, scholars bred in the Western tradition are apt to dismiss it as an “oxymoron,” “undeserving of any serious study . . . because it is believed to be fundamentally lawless.”³¹⁰ The globalization of trade might spur some to “produc[e] instant digests of the commercial laws of socialist countries.”³¹¹ But there is also a third tendency,

manifested in what appears to be a carefully orchestrated effort by many individuals in the West to stress the evil character and systemic defects of socialist law. Scholars of this persuasion tend to concentrate their studies on the aspects of socialist law dealing with individual rights. In an effort to give their studies a semblance of respectability, they use a type of language that gives the illusion of science without any of its substance. In reality what they are doing is passing off political opinion as if it were science. The prevailing view in studies influenced by this thinking is the belief that socialist law is nothing more than a totalitarian machine for the suppression of individual freedoms and liberties.³¹²

Osakwe hailed a fourth way, one which “calls upon the scholar to predicate his investigation upon the principle of analytical detachment” and “means a willingness to probe all aspects of socialist law and to note its merits as well as demerits in comparison to other modern legal systems.”³¹³

Analytical detachment is hard if not impossible to achieve. Law, after all, is bound up with our sense of justice, reason, and right. Still, it could be helpful, in contemplating the varieties and qualities of legal systems, to eschew concepts that are not only normatively fraught but whose proper application is controversial even at the core. The notions of rule of law and judicial independence, for example, are not evaluatively inert and debates about whether there is rule of law in a particular country or whether its courts enjoy judicial independence turn, not only on factual predicates, but also on how the terms of the discourse are interpreted. Disputes over the proper understanding of these terms threaten not only to eclipse more descriptive inquiries but also to trap us into deontological modes of judgment.

310. Christopher Osakwe, *Introduction: The Greening of Socialist Law as an Academic Discipline*, 61 *TUL. L. REV.* 1257, 1259 (1987).

311. *Id.* at 1260.

312. *Id.* at 1260–61.

313. *Id.* at 1262.

Rather than asking whether the rule of law or judicial independence is present in a legal system—and hence, whether it is good or legitimate—one can proceed empirically by documenting the “existence, degree, and process of [political] influences on judicial behavior.”³¹⁴ More abstractly, one can also inquire into the pitfalls and promise of any given constitutional design, both in theory and in action. The principle of separation of powers demands that the legislative, executive, and judicial powers be lodged in separate branches of government. Montesquieu famously declared that “there is no liberty, if the judiciary power be not separated from the legislative and executive.”³¹⁵ Article sixteen of the Declaration of the Rights of Man and Citizens of 1789 proclaimed that “[a]ny society in which the separation of powers and rights is not guaranteed has no constitution.”³¹⁶ The People’s Republic of China, as a self-avowed socialist regime, renounces the separation of powers in favor of democratic centralism. One might therefore conclude that its legal system, like that of all socialist states, is fundamentally defective. But repudiation of the separation of powers principle also makes it possible for socialist courts to take on extrajudicial functions forbidden to their liberal democratic cousins and, perhaps, exercise influence in salutary ways.

This Article posed the question of the non-adjudicatory responsibilities of socialist courts. Our study of judicial suggestions in China demonstrates how socialist courts are sometimes able to reach beyond individual cases to address broader societal ills. In part because of their political accountability and in part because of the non-binding and dialogical nature of judicial suggestions, the people’s courts have both the obligation and the opportunity to reach beyond the legal dimension of disputes to participate in the ordering and administration of social life. The practical impact of these suggestions is limited by the lack of judicial subject matter expertise and the modest institutional standing of courts. But judicial suggestions can still initiate policy change by surfacing issues that have hitherto evaded attention and regulation. Overall, these observations do not establish the desirability of courts without separation of powers. Indeed, one could still conclude, reasonably, that the benefits of courts’ non-adjudicative interventions are meager compared to the dangers of permitting political or policy considerations to factor into adjudication.³¹⁷ But the approach exemplified here at

314. Zhu, *supra* note 77, at 60.

315. CHARLES-LOUIS DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., The Colonial Press 1899) 1:151 (1748).

316. Declaration of the Rights of Man and of the Citizen, France [1789], art. 16. As Carl Schmitt remarked, “such a theory understands dictatorship not just as an antithesis of democracy but also essentially as the suspension of the division of powers.” CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 41 (1985).

317. Xin, *supra* note 19, at 169–70. Of course, politics can also color adjudication even in jurisdictions that respect the separation of powers as a constitutional value. *See, e.g.*, Smith, *supra* note 111, at 606 (“For instance, during the Labour Government of 1945–51, Lord Chancellor Jowitt wrote Lord Goddard, the Lord Chief Justice whom he had appointed, that he sincerely hoped ‘the judges will not be

least encourages us to look beyond dichotomies in thinking about legal orders and institutions, even socialist ones.

* * *

lenient to these bandits [who] carry arms [to] shoot at the police.' Meanwhile, Attorney-General Shawcross wrote to the Chief Justice complaining that the Court of Criminal Appeal had gone too far in restricting questions about the manner by which the police had obtained confessions. The Chief Justice agreed and said he would raise the complaint with his fellow judges.")