

ABSTRACT

Questo articolo esamina in modo critico il rapporto tra il sistema di interpretazione giudiziaria cinese e la giustizia. Rispetto alla fase iniziale di tale sistema, il potere giudiziario si è espanso incessantemente, con l'interferenza di complesse considerazioni politiche, e si è cercato di superare i limiti procedurali dell'interpretazione giudiziaria. Ciò solleva il dubbio che il sistema di interpretazione giudiziaria stia ora deviando, in una certa misura, dalla giustizia. Il presente articolo analizza in modo innovativo i tre paradossi nascosti dietro queste controversie, ovvero il paradosso tra certezza giuridica e flessibilità, il paradosso tra impegno politico e indipendenza giudiziaria e il paradosso tra centralizzazione giudiziaria e specializzazione.

This article critically examines the relationship between China's judicial interpretation system and justice. Compared with the early stage of the judicial interpretation system, the judicial legislative power has been expanding unceasingly, with complex political considerations having been mixed in, and attempts have been made to exceed the procedural restrictions on judicial interpretation. This leads to doubt as to whether the judicial interpretation system is now deviating from justice to some extent. This article innovatively analyzes the three paradoxes hidden behind these controversies, namely the paradox of judicial certainty and flexibility, the paradox of political commitment and judicial independence, and the paradox of judicial centralization and specialization. It proposes three targeted paths to alleviate the paradoxes. First, the judicial interpretation system should be more strictly regulated and cleaned up. Second, the promulgation of judicial interpretations should be carefully refined, and guiding cases should gradually replace the function of judicial interpretations in the long term. Third, informal mechanisms should be constructed within the court system to reduce the information collection costs of judges and integrate trial resources within the court system, thereby improving the trial capabilities of local judges. It provides a new sample for understanding China's judicial interpretation system and the relationship between the judicial system and China's political and social environment.

PAROLE CHIAVE

Interpretazione giurisprudenziale, SPC, Giurisprudenza di riferimento, Giustizia

KEY WORDS

Judicial interpretation, SPC, Guiding cases, Justice

JINGSHAN CHEN*, TIANXIANG HE**

*TOWARDS OR AWAY FROM JUSTICE:
DECODING THE ROLE OF JUDICIAL INTERPRETATION SYSTEM
IN CHINA*

SUMMARY: 1. Introduction. 2. The Nature and Formulation Basis of Judicial Interpretation. 3. How the Judicial Interpretation System May Promote Justice. 4. Disputes Over Judicial Interpretations in China. 5. Paradoxes of the Judicial Interpretation System in China. 6. The Way Forward of Judicial Interpretation System in China. 7. Conclusion.

1. Introduction

How a legal system interprets its own laws is never a purely technical matter. It reflects deeper choices about the relationship between the legislature and the courts, between the stability of written rules and the flexibility demanded by a changing society, and – ultimately – between law and political power. These choices take different forms in different legal traditions, and situating China's approach within that broader comparative landscape is essential to understanding what makes it distinctive.

In common law systems – exemplified by England and the United States – courts are traditionally understood as authoritative interpreters of statutory text, with their reasoning set out in binding precedents. The judge does not merely apply a rule but actively participates in its creation through the doctrine of *stare decisis*. As H.L.A. Hart famously argued, even the clearest legislative text contains an 'open texture' that requires judicial elaboration in unanticipated cases.¹ In civil law (code law) systems, by contrast, the dominant tradition – rooted in the French and German models and analysed comparatively by Zweigert and Kötz – treats legislation as the primary and

* China University of Political Science and Law, Beijing, China.

** National University of Singapore, Singapore.

¹ H.L.A. HART, *The Concept of Law*, Clarendon Press, Oxford 1961, 124-136.

self-sufficient source of law. Judges are expected to be the ‘mouth of the law’ (*bouche de la loi*), filling gaps through systematic reasoning from the code rather than creating binding precedents.² Yet even in civilian systems, judicial interpretation has always played a substantial role: the French *Cour de cassation* and the German *Bundesgerichtshof* regularly issue guidance that shapes the uniform application of the law in ways that bear a pragmatic resemblance to precedent. Ronald Dworkin’s constructive interpretation theory, which holds that legal interpretation always involves a moral and political dimension irrespective of legal family, further complicates any sharp dichotomy.³ China’s judicial interpretation system, as described below, shares features with both traditions while also departing from both in significant ways that reflect its own historical and institutional context.

A preliminary clarification is also necessary for Western readers. What may appear, through the lens of Montesquieu’s doctrine of separation of powers, to be a confusion of legislative, judicial and even executive functions in China is in fact a deliberate institutional design rooted in a different constitutional tradition. China has never embraced the Western separation of powers model, neither during the Imperial period nor since 1949. Scholars therefore rightly refer to China as a ‘Rule by law’ rather than a ‘Rule of Law’ system – law serves as an instrument of governance rather than a constraint upon sovereign power.⁴ The great reform effort launched by Deng Xiaoping was aimed at borrowing from the West those institutions functional to economic growth, not at transplanting liberal constitutionalism as such. This article therefore does not evaluate China’s judicial interpretation system against a standard it does not profess to meet. Rather, the critical lens adopted here is pragmatic and functional: to what extent does the system, on its own terms, provide the stability, predictability and dispute-resolution capacity that a sophisticated market economy and complex society such as China’s requires? Pragmatism is deeply embedded in Chinese political culture, and finding workable solutions to practical problems is a central preoccupation of the current leadership. It is against this

² K. ZWEIGERT, H. KÖTZ, *An Introduction to Comparative Law*, tr. T. Weir, Oxford University Press, Oxford 1998, 68-117.

³ R. DWORKIN, *Law’s Empire*, Belknap Press, Cambridge MA 1986, 45-73.

⁴ R. PEERENBOOM, *China’s Long March toward Rule of Law*, Cambridge University Press, Cambridge 2002, 1-55.

pragmatic standard – not against an ideal-type liberal rule of law – that the following analysis proceeds.

Judicial interpretation can be regarded as the legal system with Chinese characteristics. At present, judicial interpretation in China is formulated and promulgated by two judicial organs, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP)⁵. Since the promulgation of the first judicial interpretation in 1997, China's judicial interpretation system has been continuously improved, and the number of judicial interpretations has gradually increased. They are playing an increasingly important role in China's judicial system. Whether it is a civil law system or a common law system, judges in both legal traditions have a common task when hearing cases, which is to apply legal rules to the facts of the case to be tried. And in a civil law system country like China, judges face the same challenges posed by the need to codify rules and a constantly changing society. In order to solve this problem, they will inevitably have judicial discretion in applying legal rules and take an evolutionary approach to the rules. However, since the reform and opening up of the country, Chinese society has undergone rapid change and reform. Relying solely on judicial discretion sometimes cannot achieve satisfactory results, which has forced judicial institutions and judges to play a more active role in interpretation and even in the legislative process. It is against this background that the judicial interpretation system has evolved. From the perspective of institutional expectations, the judicial interpretation system is expected to promote justice. The core meaning is 'same case, same judgment,' that is, for the same or similar cases, judges should reach the same or similar conclusions based on rigorous interpretation. This principle is underpinned by the concept of 'equality for all', which requires courts to disregard the socioeconomic background of the parties and make objective judgments based solely on the facts of the case and the legal rules. However, for a long time after the reform and opening up, China's legal system was not yet complete, and judges' abilities to adjudicate were very limited, resulting in different judges often reaching different conclusions on similar cases⁶. The judicial interpretation system is considered to help promote justice precisely because it has the function of unifying the standard of discretion.

⁵ This paper mainly focuses on the judicial interpretations issued by the Supreme People's Court.

⁶ H. DONG, *Judicial Interpretation in New China: Sixty Years*, in *Lingnan Journal* 5 (2019) 51.

However, as the judicial interpretation system has evolved, problems in practice have also been revealed, and there has been huge controversy over whether it really helps to promote justice. These controversies come from multiple dimensions, including both criticism of the judicial interpretation system itself and doubts about the actual effect of the system. To a large extent, these controversies stem from the SPC's attempts to expand its powers through judicial interpretations, and the reality of the ever-increasing number of judicial interpretations. If the judiciary is considered to have only a mechanical role in trying cases, then the SPC's promulgation of judicial interpretations is undoubtedly *ultra vires*. Moreover, reality shows that the SPC's formulation of judicial interpretations is not based solely on the consideration of addressing practical needs, as the system is designed to do, but may be mixed with more complex factors of interest. At the same time, the chaotic expansion and system confusion within judicial interpretations have also led to many misunderstandings and even mistakes in the actual application by lower courts. The exposure of these problems has triggered new discussions about China's judicial interpretation system, especially considering its connection to China's unique political and social environment. Whether the judicial interpretation system is moving towards justice or away from it, whether it is still necessary to continue to exist, and how it should be improved, are important and meaningful questions for understanding China's judicial system and the relationship between justice and politics.

In the above context, this article aims to examine the role of the judicial interpretation system in the Chinese context today. The structure is as follows: Section 2 analyses the rationale behind the judicial interpretation system, briefly introducing the nature, legal basis, promulgation process and content structure of judicial interpretations. Section 3 explains why the judicial interpretation system is considered to help promote justice, which stems mainly from the four core functions of the judicial interpretation system, namely the function of source of law, the function of filling the legislative blank, the function of clarifying the application of legal norms, and the function of guiding the trial work. Section 4 distils the core disputes in the evolution of the judicial interpretation system, including the expansion of judicial law-making power, political considerations in judicial interpretation, and the emergence of judicial interpretation documents, which are not considered to promote justice. Section 5 critically analyses the real causes of these disputes on this basis, and argues that they stem from three paradoxes

in China's judicial system: the paradox of judicial certainty and flexibility, the paradox of political commitment and judicial independence, and the paradox of centralization and specialization. These paradoxes are not necessarily unique to China, but their manifestations are closely linked to China's political and social environment. Section 6 discusses the future direction of China's judicial system and proposes three possible reform options. In the short term, the judicial interpretation system is still necessary, but in order to consolidate its function of promoting justice, the nature and scope of judicial interpretation should be clarified to prevent the arbitrary expansion of judicial power. In the long term, the judicial interpretation system should gradually be replaced by a system of guiding cases. The court system should try to establish informal mechanisms to improve the case-handling capacity of local courts and alleviate the challenges posed by the judicial reform of centralization. Section 7 concludes.

To help navigate the substantive analysis that follows, it is worth previewing at this stage the article's central analytical framework: the three paradoxes of the judicial interpretation system. These paradoxes are introduced fully in Section 5, but their basic logic is as follows. *First*, the paradox of legal certainty and legal flexibility: the very need for judicial interpretation arises because rigid statutory law cannot keep pace with rapid social change, yet expanding interpretive power inevitably erodes the legal certainty that the rule of law – even in its Chinese ‘rule by law’ form – requires. *Second*, the paradox of political commitment and judicial independence: the SPC must simultaneously demonstrate political loyalty to the Party-State and maintain sufficient professional autonomy to develop a coherent body of law that can function effectively in a sophisticated market economy. *Third*, the paradox of judicial centralization and specialization: the centralization reforms designed to reduce local protectionism end up undermining the professional judgment of lower-court judges, creating dependency rather than capacity. Understanding these three paradoxes in advance will allow the reader to see, in the institutional details of Sections 2–4, the deeper tensions that Section 5 will then unpack.

2. The Nature and Formulation Basis of Judicial Interpretation

Judicial interpretation in China is legislative rather than judicial in nature⁷. Unlike case law in common law systems, it does not target individual disputes but instead fills loopholes in statutory law in the abstract (*abstrakte Ausfuellung von Gesetzesluecken*). The power to issue judicial interpretations is a form of legislative power delegated by the legislature to the SPC, and the resulting interpretations form part of the statutory legal system⁸. As such, they must satisfy the requirements of legal conformity: logical coherence on the one hand, and consistency of values on the other.⁹ Although a particular judicial interpretation may be triggered by an individual case, the case itself merely provides the occasion – the interpretation, once issued, operates as a general norm and cannot be applied retroactively to the case that prompted it. The legitimacy of judicial law-making therefore rests not on resolving individual disputes but on maintaining systemic justice.

This legislative character shapes how the SPC approaches the interpretive task. Rather than simply ensuring that a new interpretation does not conflict with existing rules, the SPC should, in the spirit of legal continuation, identify and repair weaknesses in the legal system so that it functions more coherently as a whole¹⁰. This systemic orientation reflects China's civil law heritage: since the late Qing Dynasty, China has transplanted law primarily from Germany via Japan, importing not only legal rules but also the systematic mode of legal thinking that underpins the civil law tradition¹¹ – a mode that seeks solutions through the internal logic of the code rather than through the case-by-case reasoning characteristic of common law.

A threshold question is whether the SPC's interpretive power constitutes an unauthorised usurpation of the National People's Congress (NPC)'s legislative interpretation power. The legal basis for judicial interpretation has

⁷ M. JIA, *Chinese Legal Culture in the Eyes of a Western Scholar – Reflection on He Yizhi's Overview of Chinese Legal Culture*, in *The Jurist* 5 (2001) 125.

⁸ Y. NIE, *On the Legislative Nature of Judicial Interpretation*, in *Journal of East China University of Political Science and Law* 3 (2020) 142.

⁹ L. LEI, *Legal System, Legal Method and Rule of Law*, China University of Political Science and Law Press, Beijing 2016, 81.

¹⁰ Y. SU, *Searching for New Civil Law*, Peking University Press, Beijing 2014, 581.

¹¹ Y. SU, *Searching for New Civil Law*, Peking University Press, Beijing 2014, 525. About the opposition thought of two legal systems, cf. SU, *Searching for New Civil Law* cit., 577-582.

evolved through three distinct stages, each progressively consolidating and formalising SPC authority.

In the *first stage*, following the establishment of the legislature in 1954, the Standing Committee of the NPC adopted the *Resolution on the Interpretation of Legal Questions* (1955), which explicitly authorised the SPC's Judicial Committee to interpret questions arising in the application of laws in judicial proceedings¹². This marked the formal origin of the judicial interpretation system¹³.

In the *second stage*, after the reform and opening-up, the *Resolution on Strengthening the Work of Legal Interpretation* (1981) reaffirmed this mandate, directing the SPC to interpret all matters concerning the specific application of laws in court proceedings. The contemporaneous *Organic Law of the People's Courts* (1979, Article 33, now Article 32) provided a parallel statutory foundation.

In the *third stage*, the *Legislation Law* (2000, amended 2015) brought judicial interpretation within a more comprehensive constitutional framework. Article 45 vests the power of law interpretation in the Standing Committee of the NPC, while Article 46 establishes the procedure by which courts may request interpretation¹⁴. Under this framework, the SPC's authority to issue judicial interpretations derives from NPC authorisation, and all interpretations must be filed with the Standing Committee pursuant to the *Supervision Law* (2006)¹⁵. A technical note on hierarchy: since the *Supervision Law* is enacted by the Standing Committee while the *Legislation Law* is enacted by

¹² The Judicial Committee of the Supreme People's Court is the leading organ of the Supreme People's Court whose tasks are to summarize experience in judicial work and discuss major or difficult cases and other questions related to judicial work.

¹³ Y. NIE, *The Origin Status, Normative Effect and Rule of Law Regulation of Judicial Interpretation Documents*, in *Law and Social Development* 4 (2020) 211.

¹⁴ Article 46 of the *Legislation Law* stipulates that 'the State Council, the Central Military Committee, the Supreme People's Court, the Supreme People's Procuratorate, all special committees of the Standing Committee and the Standing Committee of the People's Congress of all provinces, autonomous regions and centrally-governed municipalities may make a request for legislative interpretation to the Standing Committee of the National People's Congress'.

¹⁵ Article 31 of the *Supervision Law* stipulates that 'any interpretation of the Supreme People's Court or the Supreme People's Procuratorate regarding the specific application of laws in the judicial and procuratorial work shall be reported to the Standing Committee of the National People's Congress for archival filing within 30 days upon promulgation'.

the full NPC, the latter is the superior instrument – but no conflict of effectiveness has arisen in practice.

Procedurally, a judicial interpretation must be discussed and approved by the SPC's Judicial Committee and promulgated through the *People's Court Daily*, with the relevant meeting date recorded in its preamble. Once issued, it may be cited directly in judicial documents, though in terms of formal sequence, applicable statutory provisions must be cited before the corresponding judicial interpretation.

The most common form is the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of [Statute] X*, which supplements and refines a superior statute and carries equivalent legal force. Two examples illustrate how this works in practice. The *Second Judicial Interpretation of the Company Law*¹⁶ (2008) elaborates on Article 183 of the *Company Law* 2018, which permits shareholders holding at least ten percent of voting rights to petition for judicial dissolution where a company faces “serious difficulty in business management” - a standard the statute left undefined. The interpretation supplies concrete criteria, for instance that the inability to convene a valid shareholders' meeting for two or more consecutive years constitutes such difficulty, while disputes over profit distribution do not. The *Second Judicial Interpretation of the Bankruptcy Law*¹⁷ (2013) similarly addresses Article 42 of the *Enterprise Bankruptcy Law*, which listed certain categories of community liabilities without clarifying the treatment of restructuring loans. The *Third Judicial Interpretation* subsequently resolved this ambiguity by classifying restructuring loans as community liabilities and specifying the creditors' meeting procedure for court approval – eliminating the divergence in judicial practice that had previously prevailed.

3. How the Judicial Interpretation System May Promote Justice

There is no doubt that the judicial interpretation system is expected to promote, rather than impede justice from the very beginning, despite its dis-

¹⁶ The full name of the judicial interpretation is omitted below.

¹⁷ For the analysis of the Second Judicial Interpretation of the Bankruptcy Law, cf. J. CHEN, *Analysis on the Second Judicial Interpretation of the Bankruptcy Law*, in *Studies of the Bankruptcy Law* (Korea) (2015).

putes arising from the practice afterwards. Before the judicial interpretation system was officially set up, there were four major problems in Chinese legal practice: first, the social practice of China after the reform and opening up has faced rapid transformation, but fragmented and inadequate laws cannot effectively respond to the needs of practice; second, even among the limited laws, there is still a strong flavor of planned economy, and many of the necessary institutions and rules have not been established; third, some legal rules contain concepts and expressions that are not specific and clear enough, and there are even conflicts between each other; fourth, as many judges have not received formal legal education, and some are former military personnel, their ability to adjudicate is relatively low, therefore cannot accurately grasp the rules and standards of adjudication. Some of these problems are common to civil law systems, while others stem from China's unique historical and social environment. Reasonable and complete legal rules (good laws) and rigorous and uniform judicial application (fair trials) are the two basic conditions for achieving justice. Obviously, for China at that time, neither of these conditions was met. The reason why the judicial interpretation system is expected to promote justice is that its four major functions help to meet the above two conditions.

In China, judicial interpretations are a formal source of law. Judicial interpretations are binding on court decisions once they are issued. The problem of legal scarcity existed even before judicial interpretations emerged. In order to solve this problem, courts in the past usually relied on other administrative documents to guide judges in adjudicating cases. However, judicial interpretation is different from other administrative documents. The common types of other administrative documents are 'regulations', 'replies' and 'minutes'¹⁸ and so on, which are formulated from the internal 'trial work needs' of the court. The documents, issued under different names, are equivalent to 'departmental regulations' issued by the SPC. The regulating object is people's courts at all levels who must comply with them. This kind of interpretation documents provide guidance based on the intention of the parties (for example, the real intention of the contracting parties) and fact-finding. Since the interpretation object is not the law, they can be regarded as the handling methods and rules provided by the SPC for the reference of

¹⁸ Minutes differ from meeting records. The meeting record is the whole content of the meeting while the minutes are the summary of the main core content.

the courts at all levels in judgment in order to improve judicial ability. Such regulations need not apply universally to the whole society nor to natural persons in particular. The ‘regulations’, ‘replies’ and ‘minutes’ of such nature shall be different from the judicial interpretation of ‘specific applied laws and decrees’.

In addition, there is a form of ‘notice’ which should be regarded as judicial policy and only guide the judicial activities of the court for a certain period of time. For example, on December 29, 2017, the SPC issued the *Relevant Provisions on Issues Concerning Applications for Verification of Arbitration Cases under Judicial Review*. In 2018, the *Notice of the Supreme People’s Court on Properly Hearing Private Lending Cases According to the Law*¹⁹ was issued to people’s courts at all levels. The letterhead of the *Notice* clearly states ‘the higher people’s courts of all provinces, autonomous regions, and municipalities directly under the Central Government; the Military Court of the People’s Liberation Army; and the Production and Construction Corps Branch of the Higher People’s Court of Xinjiang Uygur Autonomous Region’.

In November, 2019, the *Minutes of the National Courts’ Civil and Commercial Trial Work Conference* was officially promulgated. The full text includes altogether 12 parts with 130 articles. The minutes defines the judgment thought in respect of company disputes, contract disputes, guarantee disputes, financial disputes, bankruptcy disputes and commercial trial procedures. Taking the disregard of corporate personality as an example, ‘minutes’ explicitly defines that independent corporate personality and limited liability of shareholders are the basic principles of the *Company Law 2018*. To deny the independent corporate personality and make the shareholders who abuse the independent status of the corporate personality and the shareholders with limited liability bear joint and several liability for the company’s debt is the exception of the shareholders’ limited liability, aiming at using the balanced method to correct the unbalanced phenomenon of the protection of creditors in the limited liability system when the specific legal facts occur. However, in practice, there exists the phenomenon of the abuse

¹⁹ Cf. the Head of the Second Court of the Supreme People’s Court Answering Press Questions on the Minutes of the National Courts’ Civil and Commercial Trial Work Conference, cited on the general press network of People’s Court Press and Publication, https://www.thepaper.cn/newsDetail_forward_4960007.

of this exception system due to the lax mastery of standards as well as the phenomenon where legal provisions are not skillfully or boldly applied due to the principled, abstract and difficult to apply. To solve these, the minutes detailed how to master the three typical situations of the disregard of corporate personality.

To be clear, these documents are not issued in the form and procedure of judicial interpretation, which is distinguished from the aforementioned type of judicial interpretations of 'several regulations'. Therefore, they cannot function as sources of law. For example, 'minutes' were originally meeting records which ultimately formed unified opinion and unified judgment thoughts taken as a reference by the court in the trial work. It is true that there have been cases in which minutes are taken as judicial interpretations. For example, in 1989, the '*Notice of the Supreme People's Court on Printing the Minutes of the Symposium on the Work of the National Courts about Commutation and Parole*' was used as a judicial interpretation.²⁰ However, after 1997, the SPC issued '*Several Opinions on the Work of Judicial Interpretation*' to standardize judicial interpretation and meeting minutes were no longer allowed to be used as judicial interpretation.

Between the founding of the People's Republic of China in 1949 and the reform and opening up in the 1980s, China's legislative work was obviously lagging behind and legal regulations were blank. The NPC, the legislature of China²¹, was established in 1954. There were only a limited number of laws, such as the *Marriage Law* and the *Military Service Law*, that were passed by the legislature while the *Criminal Law*, the *Civil Law* and the *Procedural Law* were absent. At that time, the old laws were abolished and the new law system was not perfect, leading to the result that the judicial interpretations were issued by the judicial organ to guide the judicial work²². Although this

²⁰ Cf. S. CAO, *The Legal Status of the Judgments and Judicial Interpretations of the Supreme People's Court*, in China Legal Science 3 (2016).

²¹ The Constitution of China provides that the legislature in China is the National People's Congress and its Standing Committee. In the broad sense of 'law', the scope of the legislature also expanded accordingly. For example, the State Council may enact administrative rules and regulations; the people's congress and its standing committee of the provinces, autonomous regions and municipalities directly under the central government may enact local rules and regulations; the people's congress of national autonomous areas may formulate autonomous laws and regulations, etc.

²² Cf. Y. HU, *The Judicial Interpretation in China: Its Origins, Current State and Future Development*, in Tribune of Political Science and Law 3 (2015) 38-39.

problem has been alleviated with the continued promulgation of laws, the scarcity of legal rules still exists. To make the trial work go smoothly, the SPC had to issue a series of normative documents to guide the work of local courts. In the absence of legislation, the early judicial interpretations were issued by the SPC from the perspective of trial guidance in order to solve the conflicts between courts in different regions during the process of judicial application. They were not legislative interpretations of legal provisions.

Judicial interpretation can fill the loopholes of the law, for example by introducing a specific institution without amending the law, or by amending or refining an existing institution²³. It is a more pragmatic and efficient way to fill loopholes than the formal legislative process. As mentioned above, the *Provisions (III) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China*, the *Provisions (V) and Provisions (VI) of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China* issued in 2019 are typical fillers of the legislative loopholes. These judicial interpretations were issued to improve the business environment, and promptly correct the imperfections in the legal provisions by means of judicial interpretation. For example, the clear provisions on the plaintiff, the defendant and the third party in shareholder representative litigation in the *Provisions (V) of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China* fill up the provision about shareholder representative litigation system in Article 151 of the *Company Law 2018*.

In addition to filling the legislative blank, judicial interpretation can also make existing legal rules clearer. Due to the limitations of human language, both common law and civil law countries generally face the problem of ambiguity in legal interpretation. As Chief Justice Marshall noted, 'Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense.'²⁴

In China, the existing laws are always overly principled and abstract, which makes the problem more severe. Many provisions are transplanted

²³ H. SUN, *Reflections on Improving Judicial Interpretation in China*, in *China Journal of Applied Jurisprudence* 3 (2017) 5.

²⁴ E. CHEMERINSKY, *Interpreting the Constitution*, Praeger, New York 1987, 111.

from abroad and formulated without sufficient accumulation of precedents. Therefore, ambiguities and conflicts between legal rules are widespread in judicial practice. How to apply these laws becomes a difficult problem. Legal interpretation is to clarify legal doubts and make the legal meaning clear²⁵, which is different from filling legal loopholes. In fact, even the latest legislation is not immune to differences of interpretation, because defining the precise meaning of every concept in the code is an almost impossible task. For example, China's Civil Code has been in effect since 2021, and its judicial interpretations have been promulgated shortly thereafter. The purpose of formulating judicial interpretation is to clarify the vague concepts, define the requirements of the application of law, and stipulate the legal consequences of the application of law so as to make it more detailed, more operable and more able to meet the requirements of trial practice²⁶.

For example, the *Company Law 2018* of China does not stipulate the concept of promoter, the defect of capital contribution and the legal consequences of the failure of company establishment. However, in practice, the local court cannot identify the issues concerning the responsibility subject, the defect of capital contribution and the liability of shareholders as well as the liability of creditors. The SPC organized an argumentation over the problems reported by local court at all levels. In 2011, the *Provisions (III) of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China* clearly stipulated the concept of promoters, the remedy for defects in capital contribution, the identification of shareholders and the protection of creditor interests. For another example, the identification of the equal conditions in the equity transfer stipulated in the *Provisions (V) of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China* is a specific provision on the exercise of the preemptive right under the same conditions in the equity transfer stipulated in Article 71 of the *Company Law 2018*, which is convenient for application.

Clarifying the application of legal norms is no less important for promoting justice than filling legal loopholes. Its positive significance is not limited

²⁵ Cf. R. YANG, *Methodology of Jurisprudence*, China University of Political Science and Law Press, Beijing 1999, 129.

²⁶ Y. HU, *The Judicial Interpretation in China: Its Origins, Current State and Future Development*, in *Tribune of Political Science and Law* 3 (2015) 41.

to helping the courts in their judgments, but also lies in making the law more specific and more predictable²⁷. Especially in an authoritarian country like China, the public needs a clear understanding of the meaning of legal norms in order to regulate their own behavior while monitoring the courts. Although other administrative documents may have similar functions, most of these documents have a strong political coloration, and are flawed in terms of predictability due to the lack of strict limits on the procedures for their promulgation and amendment. In other words, they are more like temporary patches than reliable legislation, which makes people doubt whether they will continue to be effective tomorrow. In contrast, judicial interpretations, as a formal legal source, have higher legal effect and a stricter promulgation procedure. Therefore, clarifying the application of legal norms through judicial interpretations is a more appropriate option.

Under the circumstances where social disputes waited to be solved, the work of the court needed to be carried out while the judicial ability of judges differed widely. In the early days of the founding of the New China, most of the judges were professional soldiers, lacking of professionalism. Only after the national college entrance examination was resumed in 1978 did the country begin to train legal professionals. Different interpretations of different judges lead to the disunity of the application of law, resulting in different judgments in similar cases and different judgments in same cases. In order to ensure that the application of law will not affect the justice of the judgment result and the unity of the application of law²⁸ due to the deviation of the personal understanding of judges, judicial interpretation then assumes the function of guiding the trial work and unifying the application of law. Through judicial interpretation, the connotation of the law is clarified, the opinions of the courts on the questionable issues are unified, and the judgments of the people's courts on the same issue are further integrated.

However, judicial interpretation is different from the guiding case. The judicial interpretation in China is derived from precedents but different from precedents. China belongs to civil law system where precedents cannot be the source of law. Judicial interpretation, to some extent, makes up for

²⁷ C. WELLMAN, *Moral Consensus and the Law*, in K. BAYERZ (ed.), *The Concept of Moral Consensus. The Case of Technological Intervention in Human Reproduction*, Kluwer Academic Publishers 1994, 112.

²⁸ W. HU, G. WU et al., *The Development and Perfection of Judicial Interpretation System in China*, in *Journal of Law Application* 12 (2014) 30.

the absence of the precedent system. However, once it is published, it has legal effect. It should be pointed out that though there are certain similarities between judicial interpretation of individual case and precedent system, they are fundamentally different in nature. Although judicial interpretation of individual case aims at individual cases, individual cases only serve as the cause of judicial interpretation since the contents of judicial interpretation are still general provisions. A precedent is a legally effective judgment on a specific case. It focuses on the current case, and the rules derived from the case judgment can serve as a basis for the trial of similar cases in the future. In practice, when the guiding case conflicts with the judgment rules contained in the 'minutes', the SPC abolishes the guiding principle of guiding case. There has been a conflict of stipulations on the guiding principle of shareholders' liquidation obligation between No. 9 Guiding Case issued by the SPC (which affirmed the liquidation obligation of minority shareholders) and the *Minutes of the National Courts' Civil and Commercial Trial Work Conference* issued by the SPC (minority shareholders who did not participate in the operation do not have the liquidation obligation). Facts have proven that cases are constantly changing and rules need to be adjusted and improved accordingly.

What needs to be made clear is that the role of the guiding cases in clarifying, concretizing and making up for the principles, ambiguities and loopholes of legal provisions is not law-making but law-interpreting²⁹. Therefore, the guiding case is the judge's law-interpreting rather than law-making. The courts practice the system of case guidance, which means to find out, publish, set up and promote the cases with unique value, give full play to the enlightening, guiding, demonstrating and regulating function of them, let the judges notice these cases in time and learn timely about the judgment method and legal thought and handle cases fairly and efficiently with reference to the practice of the guiding cases. Therefore, the fundamental reason for the construction of case guidance system is to meet the specific needs of fairly handling all kinds of cases, to adhere to the unity of principle and flexibility of law and the unity of equality and diversity, and to achieve the unity of judging scale and the justice of judicial cases. When handling with similar cases, judges who do not follow the guiding cases which ought to be

²⁹ Cf. L. ZHAO, *The Normative Significance of Commercial Guiding Cases*, in *Tribune of Political Science and Law* 3 (2018).

followed must provide a compelling reason³⁰; otherwise, it may be an unfair judgment concerning which the parties have the right to appeal or petition if the judge neither refers to the guiding case nor provides an explanation, leading to the result that the judgement diverges widely from the guiding case and apparently loses judicial justice.

4. Disputes Over Judicial Interpretations in China

Although the judicial interpretation system was expected to promote justice when it was first established, with the rapid transformation of Chinese society, the current political and social environment and legal system in China are completely different from those of China in the late 20th century. Since the SPC issued its first judicial interpretation in 1997, China's judicial interpretation system has developed for nearly 30 years. In the process, the judicial interpretation system has continued to evolve, showing many new characteristics and causing controversy over whether it really helps promote justice. The three most controversial issues are the expansive judicial law-making, the underlying political considerations, and the emerging judicial interpretation documents.

The original intention of the SPC to issue judicial interpretation is to supplement the loopholes or guide the trial work. However, in fact, some judicial interpretations issued by the SPC are not made during the specific process of trial cases. They are issued voluntarily to meet the needs of trial practice. That is to say, the judicial interpretation is also formulated where there is no superior law. The motivation of the judicial law-making of the SPC often comes from the sense of unfairness brought about by the application of laws in individual cases. This is the beginning of an opportunity to examine whether there are loopholes in laws. In the face of the injustice of individual case, judges try to re-examine the law and realize the justice of the individual case by means of legal interpretation and even legal continuation. The application of law (including legal interpretation and legal continuation) in the general legal methodology is a process from a general norm to an in-

³⁰ K. LARENZ, *Methodology of Jurisprudence*, tr. A. Chen, Commercial Press, Beijing 2003, 301.

dividual norm while the judicial law-making is a process from an individual case decision to a general norm.

It is true that in academia there is still debate as to whether judicial interpretation actually constitutes legislation, some representative views include ‘quasi-legislation theory’, ‘judicial legislation theory’, ‘customary law theory’, ‘authorized legislation theory’ and ‘alternate legislation theory’³¹. When a judicial interpretation is issued to fill the legislative loopholes, it can be interpreted by ‘quasi-legislation theory’, ‘judicial legislation theory’ and ‘alternate legislation theory’. When a judicial interpretation is issued to interpret the provisions of the superior law, it can be interpreted by ‘authorized legislation theory’. The judicial interpretation based on prior cases can be interpreted by ‘customary law theory’. However, in practice, there is not much controversy over the judicial interpretation as a source of law, because ‘whether a rule is a source of law depends on whether it is actually used by a judicial organ to handle a case, not on a theoretical definition.’³² From ‘judge-made law’ of individual cases to ‘judicial law-making’ as part of statutory law, there is a reasoning process from concrete to abstract, and this is precisely how judicial interpretations are formed.

On the basis of the recognition that judicial interpretation is law-making, a more fatal problem is the expansion of judicial power. In practice, there is no substantial difference between judicial interpretation and legislative interpretation or even legislation itself. Judges tend to rely directly on judicial interpretation rather than the formal legal rules on which the interpretation is based to make judgment. Judicial interpretations appear in large numbers, vacating the law and even making more complex, which can be taken as counterproductive³³. It is inevitable that any legislative provision should possess certain abstractness and generality. There is an objective reason for the careless legislation, which is the deficiency of the legislative ability. Before the promulgation of the *Legislation Law* in 2000, there was almost no legislative interpretation, in sharp contrast to the prevailing judicial interpretation at present. Therefore, a large number of legislative matters are also stipulated in judicial interpretation, resulting in judicial interpretation exceeding

³¹ Cf. Q. ZHU, *The General Theory of Civil Law*², Peking University Press, Beijing 2016.

³² Y. ZHOU, *Jurisprudence*, Law Press, Beijing 2014, 71.

³³ R.K. HE, *Restoration of the Power of Judicial Interpretation and the Constitution's Application*, in *China Legal Science* 3 (2004) 5.

its power. Nowadays, China has ended the times of legal blank. The NPC and its Standing Committee has begun to transform itself into a veritable legislature. It is understandable that the SPC had exercised the power of interpretation for law continuation in the times of legal blank. However, at the moment, it is highly debatable whether the model of judicial interpretation essentially acting as legislation while not being subject to the legislative process still conforms to the rule of law.

One important reason why judicial interpretations are considered reasonable is that they have the flexibility and efficiency that formal legislation does not have, and they are not as strongly politically biased as other administrative documents, but are still based on legal norms. This implies that, judicial interpretations should come from the needs of judicial practice itself, rather than to achieve a certain political goal. Only in this way can judicial interpretations truly help courts achieve justice in their decisions, rather than taking political factors into consideration in trials.

However, currently most judicial interpretations no longer follow the process of formulating abstract rules from specific cases, but directly rely on SPC to formulate abstract rules and guide courts to apply them in specific cases. Due to the complex motives behind SPC's law making, requirements from judicial practice may not be the core element considered. For example, the promulgation of judicial interpretations of bankruptcy laws is largely aimed at catering to the World Bank's business environment evaluation indicators, with the aim of improving China's ranking. However, in the process of rule transplantation, the issue of 'box-ticking' has led to the neglect of China's actual situation. Although fragmented transplantation can help improve rankings, it is not really helpful in solving practical problems³⁴. Interestingly, the implementation of this pattern did not encounter resistance, but was supported by courts. For SPC, as it can obtain bottom-up practical feedback through the guidance case system, it seems unnecessary for judicial interpretations to follow the same path; for lower courts, they no longer need to struggle with how to fairly interpret legal provisions, but only need to make judgments based on the perspective of judicial interpretations, even if they are sometimes based on considerations other than justice; for court

³⁴ J. CHEN, *On the Super Priority Mode of DIP Financing: Function and Structure*, in *Politics and Law* 9 (2021) 64.

leaders, issuing judicial interpretations that cater to political needs may also have a positive impact on their personal political career³⁵.

The potential consequence of this pattern is that judicial interpretation may violate the law and Constitution while catering to political needs. For instance, before the enactment of the *Eighth Amendment to the Criminal Law*, SPC had already defined drunk driving as a criminal act in judicial interpretations³⁶. This practice was based on political considerations to maintain social stability (*'weiwu'*), but such political embeddedness obviously violated the principle of legality in criminal law³⁷. Another example is that, according to the *Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases of Personal Injury Compensation*, disability compensation, death compensation, and living expenses of dependents for urban and rural residents need to be compensated according to different standards, which clearly violates the constitutional right to equality of citizens. It was not until 2022 that SPC revised this interpretation to uniformly adopt the standard calculation for urban residents³⁸. These examples illustrate that although the original intention of the judicial interpretation system was to more efficiently solve judicial practice problems and promote justice, there has been a tendency towards institutional alienation in its development, even going against justice.

Another manifestation of the alienation of the judicial interpretation system is the phenomenon of disorderly expansion and systemic chaos generated by what Chinese scholars term 'judicial interpretation documents'³⁹ (*sifa jieshi xing wenjian*). Under Article 6, Paragraph 1 of the 2021 revised *Provisions of the Supreme People's Court on Judicial Interpretation Work*, judicial interpretation is confined to five official forms: 'interpretation', 'regulation', 'rule', 'approval', and 'decision'. Yet in practice the SPC routinely issues nor-

³⁵ R. PEERENBOOM, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in R. PEERENBOOM (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, Cambridge 2009, 79-80.

³⁶ Cf. *Notice of the Supreme People's Court on Issuing the Guiding Opinions on the Application of Laws to the Crime of Drunk Driving and Related Typical Cases* (2009).

³⁷ K.H. NG, X. HE, *Embedded Courts: Judicial Decision-Making in China*, Cambridge University Press, Cambridge 2017, 122.

³⁸ 'The End of "Same Life, Different Prices"', <https://news.qq.com/rain/a/20220507A04M0W00>.

³⁹ Y. NIE, *The Dilemma and Way Out of the Review of Judicial Interpretation Documents*, in *Chinese Journal of Law* 6 (2024) 60.

mative documents that fall outside these categories while being functionally indistinguishable from them – sharing their form, their subject matter, and their practical authority over trial work nationwide. These are the documents at issue. Their names frequently mimic official forms, adopting labels such as ‘rule’ or ‘decision’, making it easy for lower courts to mistake them for genuine judicial interpretations. Their content guides adjudication in the same way judicial interpretations do. And yet their legal nature remains formally unresolved. The result is predictable: courts treat them as binding, cite them in judgments, and effectively transform them into ‘invisible’ judicial interpretations operating in the grey area of the Chinese legal system.

Why does the SPC resort to this informal channel rather than issuing formal judicial interpretations directly? Three structural reasons account for the practice. *First*, procedural convenience. Formal judicial interpretations must pass through the SPC’s Judicial Committee for discussion and approval, entailing a longer drafting cycle and higher standards of textual precision. Judicial interpretation documents, by contrast, can be authorised by a responsible leader and take effect immediately, offering the same regulatory reach with a fraction of the procedural cost. *Second*, enhanced institutional control. Judicial interpretations, as formal sources of law, derive their authority from the legislative delegation traced above; their binding force is legal in character. Judicial interpretation documents, by contrast, operate through a purely hierarchical logic of ‘command-obedience’ within the court system⁴⁰: they bind lower courts not because of what they are called, but simply because they emanate from the SPC⁴¹. This makes them a more direct and unmediated instrument of institutional leadership than formal judicial interpretations, which must work within the constraints of the statutory framework that authorises them. *Third*, immunity from constitutional review. China’s System of Recording and Review (*Beian Shencha*) requires that normative documents be filed with the Standing Committee of the NPC, subjecting them to a degree of legality supervision. Formal judicial interpretations fall within this system. Judicial interpretation documents, owing to their uncertain legal status and sheer volume, do not – leaving them entirely

⁴⁰ Cf. F. LIU, *Power Expansion and Governance Mechanism of Documents of Judicial Interpretation Nature*, in *Law Science* 4 (2024) 9.

⁴¹ Cf. T. HUANG, *The Judicial Documents of Chinese Supreme People’s Court: Status, Problems and Prospects*, in *Legal Forum* 4 (2012) 124.

beyond the reach of the only oversight mechanism available in the absence of a constitutional court⁴².

These three features combine to generate three compounding deficits that strike at the foundations of the judicial interpretation system. The *legitimacy deficit* arises because judicial interpretation documents lack the traceable chain of legislative delegation – from the 1955 NPC Resolution through to the *Legislation Law* – that anchors the authority of formal judicial interpretations. Practitioners and litigants cannot reliably determine which SPC documents carry legal force and which do not, undermining the basic predictability that any rule-based system must provide. The *accountability deficit* follows directly: because these documents fall outside the Recording and Review system, no institutional mechanism exists to challenge their constitutionality or legality. The SPC can thus shape the outcome of litigation across the entire national court system without any ex ante legislative scrutiny – a more severe accountability gap than that associated with formal judicial interpretations, which are at least subject to NPC filing. The *systemic coherence deficit* is the cumulative result: as judicial interpretation documents multiply alongside formal judicial interpretations, lower court judges must navigate an increasingly fragmented and hierarchically ambiguous normative landscape. The practical consequence is not the greater flexibility that ostensibly justifies these documents, but greater unpredictability – precisely the opposite of what a justice-promoting system should deliver. Taken together, these three deficits explain why the judicial interpretation document phenomenon, more than the mere expansion of formal interpretive power, represents the most acute structural threat to the integrity of China's judicial interpretation system today.

5. Paradoxes of the Judicial Interpretation System in China

The surface causes of the phenomena described in the preceding section are not difficult to identify. Judges have grown accustomed to treating themselves as assembly-line operators rather than independent legal reasoners, with little incentive to cultivate their own adjudicative capacity. The wrong-

⁴² Cf. Y. NIE, *On Documents of Judicial Interpretation: Status of Legal Source, Normative Effect and Regulation Through the Rule of Law*, in *Law and Social Development* 4 (2020) 213.

ful-case investigation system compounds this tendency: faced with asymmetric accountability – where errors attract sanctions but caution carries no cost – judges rationally prefer to shelter behind judicial interpretations rather than exercise personal judgment. Structural pressures reinforce the same dynamic: local protectionism, the ideology of ‘harmonious justice’, and performance metrics tied to settlement rates all encourage judges to resolve disputes through avoidance rather than to develop legal rules through principled adjudication. The result is a self-reinforcing trap: the availability of judicial interpretation suppresses the development of judicial capacity, while underdeveloped judicial capacity generates ever-greater demand for judicial interpretation, ultimately eroding both the authority of the system and the professional quality of the bench⁴³.

Yet these surface causes are symptoms rather than sources. The deeper reason why the judicial interpretation system – designed to promote justice – tends instead to drift away from it lies in three structural paradoxes that are inherent to the system and irreducible to individual failings. Each paradox reflects a genuine tension between competing imperatives that China’s legal and political system has not yet found a stable way to resolve.

The first is the paradox of legal certainty and legal flexibility. Gustav Radbruch identified certainty as one of the three foundational pillars of law, alongside justice and purposiveness⁴⁴. In institutional terms, certainty requires a clear separation between the legislative power to make rules and the judicial power to apply them: under China’s constitutional order, only the NPC and its Standing Committee hold legislative power, and the SPC is formally confined to applying, not creating, law. Yet this commitment to certainty generates its own pathologies. Written law in a civil law system requires strict procedures to amend and, in the interests of systematicity, cannot accommodate the granular detail of social life. Two risks follow. The first is temporal lag: statutory rules inevitably trail behind the pace of social and economic change. The second is what might be called the problem of violent abstraction: the very process of translating social practice into general legal

⁴³ Cf. Y. HU, *The Judicial Interpretation in China: Its Origins, Current State and Future Development*, in *Tribune of Political Science and Law* 3 (2015) 42.

⁴⁴ J.R. MAXEINER, *Some Realism about Legal Certainty in the Globalization of the Rule of Law*, in *Houston Journal of International Law* 31 (2008) 30-31.

rules involves a necessary loss of information, producing norms that are too remote from the realities they purport to govern. For a country undergoing the speed and scale of transformation that China has experienced since the 1980s, both risks are acute⁴⁵.

The obvious response is to enhance legal flexibility, and this can be pursued through two channels: legislative or judicial. Some jurisdictions have developed expedited legislative procedures that compress the parliamentary process to its minimum essentials when urgency demands. The United Kingdom offers instructive examples: the *Prevention of Terrorism (Temporary Provisions) Act 1974*, responding to the Birmingham pub bombings, completed all stages in both Houses in seventeen hours; the *Imprisonment (Temporary Provisions) Act 1980* passed in thirteen hours and twenty minutes⁴⁶. But rapid legislation of this kind is not a viable option for China. It lacks a constitutional foundation in either the *Legislation Law* or the Constitution itself, and the quality risks are severe: speed without capacity produces law that creates new problems faster than it resolves old ones. The COVID-19 pandemic illustrates the point. Facing urgent pressure to restrict wildlife consumption in February 2020, the Standing Committee of the NPC resorted to a legislative decision – the *Decision on Comprehensive Prohibition of Illegal Wildlife Trade* – that, in its haste, extended the consumption ban to artificially bred terrestrial animals, directly contradicting the existing classification framework of the *Wildlife Protection Law*⁴⁷.

Rapid legislation, moreover, addresses only half of the problem. Even if more rules were produced faster, the deeper question – how to ensure that rules are applied uniformly and intelligently across a vast and varied court system – would remain unanswered. Legislators operate at a distance from adjudicative practice; their knowledge of what courts actually need is processed and abstracted before it reaches the statute book⁴⁸. The consequence is a legal system that is simultaneously enormous and underused: a significant proportion of China's statutory provisions have never been cited in litigation. What China's courts need is not more rules but better

⁴⁵ K. SHEN, "Democratization" of Judicial Interpretation and the Supreme Court's Political Function, in *Social Sciences in China* 29.4 (2008) 36.

⁴⁶ M. ZANDER, *The Law-Making Process*, Cambridge University Press, Cambridge 2004, 98.

⁴⁷ Y. ZHAO, *On Speedy Legislation*, in *Local Legislation Journal* 5 (2021) 23.

⁴⁸ A. PECZENIK, *On Law and Reason*, Springer, New York 2008, 18.

rules of application – and those can only be developed through the judicial channel. This is why expanding judicial interpretive power is not merely tolerated but functionally necessary in the Chinese context, at least until legislative capacity and constitutional doctrine develop to the point where alternatives become feasible. The paradox, then, is precisely this: legal certainty demands that judicial power be confined, but the very deficiencies that make legal certainty unattainable make it impossible to confine judicial power without sacrificing the practical justice that the system is meant to deliver. The core challenge for China's judicial interpretation system going forward is to find institutional mechanisms that enlarge judicial flexibility without allowing judicial power to expand indefinitely and without supervision.

The second is the paradox of political commitment and judicial independence. Expanding judicial interpretive power is not only a response to legal uncertainty – it is also a strategy for enlarging judicial autonomy. A court that authoritatively interprets the law occupies a more independent institutional position than one that merely waits for legislative instruction. The SPC has pursued this logic deliberately. Its promotion of the guiding case system since 2010 is a case in point: the selection and publication of guiding cases is conducted entirely within the court system, without input from other state organs⁴⁹, and the technical complexity of fact-comparison and legal reasoning that the system requires erects a professional barrier that makes external interference difficult⁵⁰. Where judicial interpretations, once abstracted from their specific context, can be read and second-guessed by non-lawyers, guiding cases retain an irreducible technical character that shields them from political intrusion.

Yet the structural position of Chinese courts makes genuine judicial independence a receding horizon. At the local level, courts are institutionally embedded in the very administrative apparatus from which they are supposed to be independent. Judges and prosecutors are appointed and removed by local people's congresses, their budgets are funded by local governments⁵¹, and

⁴⁹ C. XINGLIANG, *China's Guiding Case System: A Study on the Mechanisms of Rule Formation*, in Peking University Law Journal 1.2 (2014) 219.

⁵⁰ B. AHL, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, in The China Quarterly (2014) 121.

⁵¹ K.H. NG, X. HE, *Embedded Courts: Judicial Decision-Making in China* cit., 170.

local party committees exercise influence over judicial leadership appointments⁵². Under these conditions, the pressure to align judicial outcomes with local governmental interests is not merely informal but structurally reproduced⁵³. Courts become, as one scholar has observed, something more like accomplices of the government than independent arbiters subject only to the Constitution and the law⁵⁴. At the central level, the paradox does not disappear but takes a different form. The SPC is formally subordinate to the NPC and its Standing Committee, commands lower political status than the State Council, and operates under the direct leadership of the CCP's Political and Legal Committee – with the SPC president serving as a member of that body in his party capacity. Political considerations are therefore not an external contamination of an otherwise neutral judicial process; they are structurally inscribed in the institution itself.

The result is an institutional double movement that characterises the SPC's use of judicial interpretation. On the one hand, the SPC uses its interpretive power to expand judicial autonomy, claiming for the courts a normative space that formal legislative processes would otherwise deny them. On the other hand, the political conditions on which the SPC's institutional survival depends require that this autonomy be exercised in a manner that remains acceptable to the party-state. Political considerations must therefore be incorporated into judicial interpretations, not despite the SPC's interest in judicial independence, but as the price of it: the concession to political authority is the mechanism that makes the assertion of interpretive autonomy possible. This is why the judicial interpretation system simultaneously promotes and undermines judicial independence – it cannot do one without doing the other. Resolving this paradox would require not just institutional reform within the judiciary but a reconfiguration of the relationship between the courts and the political system that surrounds them.

The third is the paradox of centralisation and specialisation. Judicial local protectionism, as described above, is structurally produced by

⁵² Cf. R. PEERENBOOM, *Economic and Social Rights: The Role of Courts in China*, in J. GARRICK (ed.), *Law and Policy for China's Market Socialism*, Routledge, London 2012, 174.

⁵³ C.X. LONG, J. WANG, *Judicial Local Protectionism in China: An Empirical Study of IP Cases*, in *International Review of Law and Economics* 42 (2015) 54-56.

⁵⁴ J. LIU, *Judicial Interpretation in China*, in M. SINGH, N. KUMAR (eds.), *The Indian Yearbook of Comparative Law* 2018, Springer, Singapore 2019, 227.

the coincidence of judicial and administrative divisions. The reform agenda since 2013 has sought to break this coincidence by upgrading judicial power from a local resource to a central one⁵⁵. Two principal mechanisms have been deployed: the unified management of personnel and finances in sub-provincial courts and procuratorates, reducing their dependence on local party and government organs; and the establishment of circuit courts whose jurisdictions deliberately cross administrative boundaries⁵⁶ – the six circuits established since the 18th CCP National Congress, sitting in Shenyang, Shenzhen, Nanjing, Zhengzhou, Xi'an and Chongqing, are designed precisely to sever the structural link between judicial decision-making and local interest⁵⁷.

The judicial interpretation system serves centralisation in two complementary ways. By fixing the meaning of legal concepts and provisions, it narrows the discretionary space within which external interference can operate: local officials who seek to press courts toward a particular outcome find their leverage reduced when clear interpretive rules already determine what the law requires. And by concentrating the interpretive power exclusively in the SPC – provincial courts have no authority to issue binding interpretations even within their own jurisdictions – the system forecloses the possibility that local power holders could capture interpretive authority for parochial ends. Because judicial interpretations are more accessible to non-specialists than guiding cases, this centralised design is particularly important: the lower the technical barrier, the greater the need for centralised control.

But centralisation carries a cost that is internal to the judicial system itself, and that cost is the erosion of professional judgment. When the SPC supplies detailed interpretive guidance for every category of legal difficulty, the incentive for lower court judges to develop their own legal reasoning atrophies. Faced with hard questions, judges look upward rather than inward – seeking the SPC's position rather than reasoning through the prob-

⁵⁵ Cf. Central Committee of the Communist Party of China, *Decision on Several Major Problems regarding Comprehensively Deepening the Reform*.

⁵⁶ Y. YANG, *Forming a Dual Organizational Structure: Reflection and Construction on the Reform of Judicial Jurisdiction System across Administrative Regions*, in *Peking University Law Journal* 5 (2024) 1344.

⁵⁷ S. LAI et al., *Judicial Independence and Corporate Innovation: Evidence from the Establishment of Circuit Courts*, in *Journal of Corporate Finance* 80 (2023) 25.

lem themselves⁵⁸. The short-term consequence is a reduction in the risk of reversal on appeal, but the long-term consequence is the hollowing out of adjudicative capacity at the local level. Judges who are never required to think independently cannot develop the expertise that independent judgment demands; and because their expertise remains underdeveloped, the SPC cannot safely reduce its interpretive output, which further suppresses the development of local capacity. The vicious cycle is closed. The proliferation of judicial interpretation documents accelerates this dynamic: judges who wait for the SPC to issue guidance before accepting cases, or who refuse to engage with legal questions that have not yet attracted an official interpretation, exemplify the endpoint of a process in which centralisation has consumed the very specialisation it was meant to support. The paradox, at its core, is that the same institutional design that protects local judges from political interference also prevents them from becoming the kind of independent, professionally competent adjudicators who could render that protection unnecessary.

6. The Way Forward of Judicial Interpretation System in China

The above three paradoxes of judicial interpretation are deeply embedded in China's political and social environment, so it is difficult to fundamentally change them in the short term. However, it is entirely possible to mitigate the unfavorable consequences of these paradoxes through rational institutional design. In this way, over the long term, judicial interpretation may reach a new equilibrium in its co-evolution with the social and political environment. The key to institutional design lies in balancing the legal certainty and flexibility, political commitment and judicial independence, and centralization and specialization.

Regulating the internal system of judicial interpretations. As mentioned earlier, for the current stage of China, the judicial interpretation system is still a necessary tool to respond to practical needs, so abandoning the judicial interpretation system in the short term is not feasible. However,

⁵⁸ F. XU, *Reflection and Improvement of China's Judicial Interpretation System*, in *Law Science Magazine* 5 (2016) 84.

considering the many problems that have arisen in the implementation of judicial interpretations, it is necessary to thoroughly sort out the nature and composition of judicial interpretations at the source to reduce the confusion and errors of courts in applying judicial interpretations.

First, it should be clarified that judicial interpretations have the legal source nature. Since the judicial interpretation system was established to help courts make more precise judgments on cases, it must be legally clarified as a source of law. Because only in this way can courts have sufficient reasons to cite the provisions of judicial interpretations in their judgments. More importantly, only when the law explicitly regards judicial interpretations as legal sources can a systematic review system be established for them.

Second, strict cleanup should be carried out for judicial interpretation nature documents, excluding them from the scope of judicial interpretations. In fact, the SPC's practice of making laws through judicial interpretations has already been widely criticized and questioned. If it continues to make laws through judicial interpretation documents in a more concealed and larger scale, the negative impact will be more obvious. The SPC should base itself on China's current political system and adhere to its legal authority, only through the means of judicial interpretations to formulate judicial rules. To achieve this, it is necessary to clearly distinguish the names of judicial interpretations and judicial interpretation documents, and clean up all the judicial interpretation documents that exceed their authority, prohibiting courts from treating them as the basis for judgments or reasons for argument in judgments⁵⁹.

Third, illegal judicial interpretations should be abolished. Although judicial interpretations as legal sources are equivalent to making laws, it is still necessary to distinguish judicial interpretations from formal legislation. In practice, judicial interpretations can be divided into two types: One is to clarify and refine existing legal rules or systems based on them; another is not based on existing legal rules or systems, but creates rules or systems out of thin air. Article 18 of the *Organic Law of the People's Court of the People's Republic of China* stipulates that 'the SPC may interpret issues pertaining to the specific application of law in judicial work.' Article 2 of the *Provisions of the Supreme People's Court on Judicial Interpretation* also stipulates that 'issues relating to the specific application of law by the people's court in

⁵⁹ Cf. F. LIU, *Power Expansion and Governance Mechanism of Documents of Judicial Interpretation Nature*, in *Law Science* 4 (2024) 13.

judicial work shall be subject to judicial interpretation by the SPC.' It can be seen that, judicial interpretation must be based on filling existing legal rules, rather than creating a legal rule, as the latter is the task of legislators. The second type of judicial interpretation is actually an expansion of SPC's power beyond the law, which violates justice⁶⁰.

The common purpose of the above measures is to achieve a balance between legal certainty and legal flexibility. The main problem with the current judicial interpretation system in China is the excessive sacrifice of legal certainty in order to improve legal flexibility. As discussed before, in order to address the issues of time lag and abstract content in formal legislations, it is understandable to make more radical attempts through the judicial interpretation system in its early stages, which can be seen as a necessary cost of institutional experiment. However, if the judicial power is allowed to exceed the authorization of the law in the long term, it may lead to SPC replacing the NPC and its Standing Committee as the substantive legislative center, while not subject to effective supervision. One potential consequence is that, the quality of judicial interpretations and judicial interpretation documents will significantly decrease, and even violate customs and general legal principles for the benefit of SPC itself. By excluding judicial interpretation documents and judicial interpretations that create new rules from the scope of judicial interpretations, it helps to improve legal flexibility while constraining the arbitrariness of SPC in formulating judicial interpretations.

Strengthening the importance of guiding cases and the interpretation review system. To strike a balance between political commitment and judicial independence, the SPC should increase the supply of guiding cases and gradually replace judicial interpretations with guiding cases. In reality, the number of guiding cases published by the SPC currently falls short of practical needs. As of February 2024, the SPC has only published 39 batches of guiding cases, totaling 224 cases, of which 158 guiding cases have been applied in the trial of 11,286 cases⁶¹. Compared to the vast number of cases in China each year, guiding cases are insufficient to meet the needs of lower

⁶⁰ In response to such judicial interpretations, the SPC has already begun a cleanup effort. Cf. 'The Supreme People's Court Has Abolished 103 Judicial Interpretations', https://www.gov.cn/xinwen/2019-07/18/content_5411136.htm.

⁶¹ Y. GUO, M. SUN, 2023 *Annual Judicial Application Reports of Supreme People's Court Guiding Cases*, in *China Journal of Applied Jurisprudence* 3 (2024) 179.

courts for citation and reference. To enhance the application coverage of guiding cases, consideration can be given to gradually expanding the selection and publication of guiding cases from the SPC to provincial and municipal courts. The main reason is that China is vast and there are significant differences in local conditions. Courts at all levels need to handle a large number of cases, and there is an objective need for courts in various regions to produce guiding cases⁶². In local courts, the guiding cases selected and determined can clarify legal provisions and unify the application of law within their jurisdiction. Although this cannot achieve the goal of nationwide consistency in the application of law, it can at least achieve a basic consistency in the application of law within a certain region.

At the current stage of China's development, the judicial interpretation system remains necessary. However, it is undeniable that the inherent paradox between political commitment and judicial independence within this system is difficult to resolve fundamentally. The reason for opting to gradually replace judicial interpretations with guiding cases lies in two aspects. Firstly, judicial interpretations and guiding cases partially overlap in their functions. Secondly, compared to judicial interpretations, guiding cases are more likely to block interference from other state organs, as the professionalism of guiding cases helps to strengthen the knowledge barriers within the court system. Furthermore, compared to abstract judicial interpretations, guiding cases are still specific cases that have been screened. This means that judges in lower courts can exercise discretion to determine the substantial similarity between the cases they are hearing and the guiding cases, and make their own judgment on whether to follow the approach of the guiding cases in their trial. In other words, guiding cases do not suffer from the problem of information loss due to 'violent abstraction,' and they help alleviate the issue of excessive intervention by higher courts, especially the SPC, in the judicial independence of lower courts.

After screening and streamlining, the number of judicial interpretations will theoretically be less than the number of guiding cases, and they can only clarify and refine based on existing legal rules. In the process of formulating these judicial interpretations, SPC inevitably needs to incorporate political considerations, as mentioned earlier, which is a necessary prerequisite for

⁶² F. XU, *Reflection and Improvement of China's Judicial Interpretation System*, in *Law Science Magazine* 5 (2016) 87.

ensuring the independence of SPC in China's political environment. However, such political considerations must be limited to the necessary scope. If the leaders of the court try to incorporate political factors into judicial interpretations for their own interests, it is difficult to be considered reasonable. To avoid such problems, strict legality and constitutionality review must be matched for judicial interpretation. In other words, the inclusion of political considerations in judicial interpretation must be limited to the extent that it does not violate the Constitution and laws. The review mechanism should include both *ex officio* review and application-based review, and citizens, procuratorates, judicial administrative departments and other relevant subjects should have the right to initiate the review process of judicial interpretations⁶³. The subject of the review should be the Legislative Affairs Commission of the Standing Committee of the NPC, as the SPC is elected by and responsible to the NPC, and the Legislative Affairs Commission is the standing legislative affairs body of the NPC. When it discovers that there are illegal or even unconstitutional situations in judicial interpretations, it should notify the SPC to modify or abolish the relevant judicial interpretations; if the SPC does not amend or abolish it, the examination authority may submit a motion to the Standing Committee of the NPC for amendment. Through such institutional design, it may help to avoid excessive sacrifice of professionalism and judicial independence by the SPC.

Some may argue that under China's political system, the Legislative Affairs Commission of the NPC and the SPC follow the same logic, so such reviews are unlikely to be effective. However, recent practice has shown that this model may be more conducive than its critics expect. China's new *Company Law* was issued in 2023 and came into effect on 1 July 2024. Article 88 provides that where a shareholder transfers equity interests in respect of which capital contributions have been subscribed but not yet paid, the transferee shall be liable for payment of such capital contributions; where the transferee fails to pay the capital contributions in full on time, the transferor shall be liable for supplementary payment of the transferee's unpaid capital contributions. However, the article does not stipulate whether transferees also need to bear supplementary liability in equity transfer disputes before the new company law comes into effect. For this reason, the SPC issued a judicial interpreta-

⁶³ Cf. Z. ZHU, *On Constitutional Review of Judicial Interpretations*, in Peking University Law Journal 2 (2024) 520.

tion in June 2024, stipulating that Article 88 of the *Company Law* also applies to equity transfer disputes before the new *Company Law* comes into effect. This has caused great controversy in practice, as it clearly violates the principle of prohibiting retrospective application. Many shareholders transferred their shares years ago, but now they have to bear supplementary liability due to the provisions of the judicial interpretation. Therefore, many shareholders applied to the Legislative Affairs Commission of the NPC for a review of the judicial interpretation. The Legislative Affairs Commission reported to the public on the review on December 22, 2024, and it believes that according to Article 104 of the *Legislative Law*, laws are in principle not retroactive, unless there are special provisions to better protect the interests of citizens, legal persons and other organizations. The provisions of Article 88 of the new *Company Law* do not meet the exceptional circumstances, so there is no reason for retroactivity. Therefore, the Legislative Affairs Commission promised in its report to urge the SPC to take appropriate measures to deal with the issue properly. Two days later, the SPC responded to this issue in the form of a reply, clarifying that Article 88 only applies to equity transfer disputes that occur after July 1 2024, and the provisions of the judicial interpretation no longer apply. This example shows that it is feasible to restrain the arbitrary expansion of judicial power through the interpretation review system.

Establishing informal mechanisms within the court system. Centralization is an inevitable trend for enhancing judicial independence in the Chinese context, and it is difficult to find an alternative in the short term. Faced with the paradox of judicial centralization and specialization, efforts must be made to improve the professional quality of judges, which means that judges' decisions should not be based on the mechanical application of legal provisions, but they must be given greater autonomy under the premise of sound rules. If judges are always treated as wards, they can never become proper judges. The SPC is the highest judicial organ. In addition to supervising the trial work of lower courts, it has also continuously strengthened its guidance and even leadership role over lower courts, which has inadvertently strengthened the administrative tendency in the relationship between the SPC and lower courts and weakened the trial ability of judges⁶⁴. This is

⁶⁴ Cf. W. DING, *Reflections on the Judicial De-localization Reform*, in Chinese Journal of Law 5 (2023) 112.

also why the phenomenon of the SPC expanding its powers in judicial interpretation is likely to lead to a vicious circle: on the one hand, this will cause judges to become reliant, preventing them from thinking independently and making their own judgements, and making it difficult for their judgement skills to improve substantially; on the other hand, because judges' judgement skills are unsatisfactory, the SPC is not confident enough to let go, fearing that the quality of trials will decline, and so it further interferes with and even controls the case hearings of lower courts. To mitigate this problem, in addition to setting higher entry barriers for the judge profession, consideration can also be given to establishing informal mechanisms to help judges resolve some difficult and important cases.

First, the cost for judges to collect information on similar cases should be reduced. Between different courts, judges need to pay a huge cost to collect information on similar cases. On the one hand, although China has launched many intelligent push platforms such as similar case searches, the lack of matching accuracy means that a large number of similar cases are pushed, and it takes a lot of time and effort to check each one and further eliminate them. On the other hand, even if a judge does get an accurate match for a similar case, the scope of information reflected in the judgment document is usually extremely limited due to considerations of risk avoidance, so it is difficult for the judge to extract useful information⁶⁵. By constructing an information transmission mechanism based on a digital platform, it can help reduce the difficulty of judges in dealing with difficult cases. Such digital platforms should overcome the shortcomings of existing platforms and provide more accurate and faster matching functions. An inherent flaw of digital platforms is that they are subject to relatively strict political restrictions as a semi-formal mechanism that usually requires an application and approval process. In contrast, the existence of informal mechanisms, such as judges' meetings and training courses, can also enhance the exchange of information between courts in different regions. However, at the same time, they are usually less restricted by the political system than formal information application mechanisms.

Second, trial resources within the court system should be integrated. When faced with complex and major cases, the trial capacity of a single

⁶⁵ Cf. H. HOU, *Oversight that Cannot be Seen: Informal Constraints for the Uniform Application of the Law*, in *Postgraduate Legal Studies* 3 (2022) 137-146.

judge or collegiate bench may not be sufficient to deal with them. However, by setting up informal institutions to integrate the trial resources within the court system, it is possible to help overcome the limitations of individual judges. Such informal institutions are generally set up within the court, breaking down the boundaries between the various trial divisions of the court and absorbing the internal operations of the court. They are set up to achieve a comprehensive, emergency, and phased work goal. The basic operating logic of these informal bodies is usually ‘project-based operation’, and their characteristic is the high degree of integration between decision-making and implementation⁶⁶, which provides favorable conditions for the resolution of difficult cases. In fact, the underlying logic of informal bodies is the ‘reproduction’ of judicial power, and the purpose of ‘reproduction’ is to obtain higher judicial independence and incident handling capabilities in a short period of time in a specific context through the adjustment of power structure. In China’s judicial practice, informal institutions represented by ‘leading groups’ and ‘working groups’ have already played an important role, but they are mainly used in party and government affairs, rather than professional affairs⁶⁷. By appropriately expanding the application scenarios of informal institutions, it can help overcome the problem of insufficient individual judicial capacity of judges, and in turn alleviate the paradox between judicial centralization and specialization.

7. Conclusion

This article analyses the role of China’s judicial interpretation system in promoting justice. As the source of law with Chinese characteristics, judicial interpretation has filled the legislative blank of the legal system, guided the trial work and solved the conflicts of judicial application as well as the specific identification standards during the process of legal system construction. In a country like China, where the socio-economic environment is undergoing rapid transformation, the types and number of social disputes are constantly

⁶⁶ Cf. W. ZHANG, ‘Hidden’ Governance: Informal Institutions and their Operating Mechanisms in the People’s Courts, in *Governance Studies* 6 (2019) 123-124.

⁶⁷ Cf. R. ZHANG, *How Does a Court Leading Group Operate*, in *Global Law Review* 5 (2022) 35.

increasing, which requires the judiciary to adopt a proactive stance and become more actively involved in legal interpretation and even judicial law-making. The positive role of the judicial interpretation system is reflected in its ability to adapt to the actual needs of China's social transformation, and it helps to achieve the effect of 'same case, same judgment' by clarifying and refining the standards of adjudication, which is considered to be the basic meaning of social justice. However, the evolution of the judicial interpretation system also carries the potential risk of being contrary to justice: the judicial interpretation system embodies the expansion of judicial power, and the SPC essentially exercises the function of legislative power without being subject to strict external constraints. In the process of formulating judicial interpretations, the SPC not only considers the needs of judicial practice from a professional perspective, but is also inevitably influenced by political factors. In recent years, the SPC has issued a large number of judicial interpretation documents, which has caused lower courts to confuse them with judicial interpretations, exacerbating the confusion and complexity of legal application.

Behind these disputes lie three paradoxes inherent in China's judicial system: the paradox of judicial certainty and flexibility, the paradox of political commitment and judicial independence, and the paradox of judicial centralization and specialization. They are intertwined with China's unique political and social environment, and therefore it is difficult to fundamentally resolve them in the short term. However, during the co-evolution of the judicial interpretation system and the social environment of China, the law can play a nudging role, to a certain extent alleviating the negative impact of the above paradoxes. This article proposes three feasible approaches to address the three major paradoxes: First, the judicial interpretation system should be more strictly regulated and cleaned up. On the basis of affirming the status of judicial interpretation as a legal source, judicial interpretation documents and judicial interpretations that create new rules should be excluded from the scope of judicial interpretation. Second, the promulgation of judicial interpretations should be carefully refined, and a specific legality and constitutionality review mechanism should be designed for judicial interpretations. In the long term, guiding cases should gradually replace the function of judicial interpretations. Third, informal mechanisms should be constructed within the court system to reduce the information collection costs of judges and integrate trial resources within the court system, thereby improving the trial capabilities of local judges.