NUS Law Working Paper 2019/031

NUS Centre for Asian Legal Studies Working Paper 19/12

Judicial Independence in Dominant Party States: Singapore's Possibilities for China

Lance ANG
Wang Jiangyu

lawawpl@nus.edu.Lsg
lawwjy@nus.edu.sg

[November 2019]

Judicial Independence in Dominant Party States: Singapore's Possibilities for China

Lance ANG*
National University of Singapore, Singapore
lawawpl@nus.edu.sg

Jiangyu WANG†
National University of Singapore, Singapore
lawwjy@nus.edu.sg

Abstract

Courts in China are often criticized for lacking 'independence' from the Chinese party-state. Entrenched perceptions of interference in the judiciary by the political branches of government have continued to fuel public resentment in recent years, risking the legitimacy of the party-state. Such criticisms, however, often fail to appreciate the complex political reality in China and the evolving role of Chinese courts following China's incremental legal reforms since the reform era. What does 'judicial independence' mean in the context of a socialist rule of law state such as China? More importantly, can we identify the touchstone of 'independence' that should be intrinsic in any judicial institution? In recognition of the resilience of the Chinese party-state in the foreseeable future, the authors contend that widening the scope of judicial independence, as conceptualized herein, in line with China's ongoing judicial reforms provides a better tool for promoting economic development and good governance and enhancing the state's legitimacy in a dominant party state. In this regard, insights are drawn from Singapore, which presents two broad lessons for China: first, a rule of law framework can be established in which the state in a non-Western liberal democracy respects the autonomy of the courts and the judiciary strictly enforces the law enacted by the state within its institutional limits; second, judicial pragmatism in the exercise of judicial power enables the courts to ensure that governmental power is exercised in accordance with the principle of legality, which ensures good governance in a polity governed by a strong state. Contrary to claims that such reforms may serve as an apology for power in China, it is hoped that such reforms may lay the foundation for normative constitutionalism in the future.

During his 'South China Tour Speech' in 1992, former Chinese leader Deng Xiaoping famously stated that China needs to learn from Singapore and that it shall 'do better'.[1] Following Deng's visit to Singapore in 1978, Singapore – a tiny city-state governed by a dominant party since independence in 1965 and known for its economic success and good governance – has attracted a disproportionate amount of interest as a role model for China in

* Research Associate, Centre for Asian Legal Studies, Faculty of Law, National University of Singapore.
† Director, Asian Law Institute and Associate Professor, Faculty of Law, National University of Singapore.
Prior versions of this article were presented at the workshop on 'Political Parties, Partisanship, and the Constitution' at the Bonavero Institute of Human Rights, University of Oxford in 2019, the conference on 'Judicial Cooperation and Judicial Reform in China' at the City University of Hong Kong in 2019, and the conference on 'Judicial Reform and Political Development in China' at the National University of Singapore (NUS) in 2013. The authors wish to thank the anonymous reviewers, fellow academic colleagues, Dr Ewan Smith, and Professor Arun Thiruvengadam, as well as the participants in the said workshops for their helpful comments and the Centre for Asian Legal Studies at the NUS Faculty of Law for its support and funding.

1 In 1978, former Singapore Prime Minister Lee Kuan Yew told Deng: 'Whatever we have done, you can do better because we are the descendants of the landless peasants of south China. You have the scholars, you have the scientists, you have the specialists. Whatever we do, you will do better': Sun Xi, 'New era of mutual learning for China and Singapore' (Global-is-Asian, 1 Aug 2018) <https://lkyspp.nus.edu.sg/gia/article/new-era-of-mutual-learning-for-china-and-singapore> accessed 17 Jul 2019.

its development,[2] with both countries exchanging lessons in governance and strengthening legal and judicial cooperation as 'old friends'.[3] The Chinese Communist Party ('CCP', 'party', or 'party-state') found in Singapore an appealing model that successfully combines dominant party leadership and a clean and incorruptible governance with a state-driven capitalist economy, underpinned by Confucianist 'Asian values' to legitimize its leadership in the march towards realizing the newly proclaimed 'China dream'.[4] More recently, Chinese President Xi Jinping emphasized the need to continue learning from Singapore,[5] along with visits by close to fifty thousand officials to Singapore to study the 'Singapore model' since Deng's visit in 1978.[6] China has drawn important lessons from Singapore's approach to governance,[7] as well as its model of state-driven capitalism.[8] However, what is often overlooked by China about Singapore's model of governance, despite – or perhaps because of – its contrast with a Western liberal democracy, is its use of democratic institutions and the rule of law through the safeguarding of judicial independence to ensure good governance and political accountability.[9]

Ever since Deng declared his ambitious platform to modernize China's legal system in the 1970s, China's progress towards the rule of law has been debated and evaluated by jurists and reformers alike.[10] Whilst the CCP has acknowledged that the legal system is still a work in progress,[11] critics have argued that the willingness and ability of the Chinese judiciary to adjudicate independently in respect of important socio-political matters is circumscribed in

---

2 Ezra F Vogel, *Deng Xiaoping and the Transformation of China* (Harvard University Press 2011) 287–291; Kean Fan Lim & Niv Horesh, 'The "Singapore Fever" in China: Policy Mobility and Mutation' (2016) 228 The China Quarterly 992, 1001; Mark R Thompson, 'From Japan's "Prussian Path" to China's "Singapore Model": Learning Authoritarian Developmentalism' in Toby Carroll & Darryl SL Jarvis (eds), *Asia after the Developmental State: Disembedding Autonomy* (Cambridge University Press 2017) 163; Yang Kai & Stephan Ortmann, 'From Sweden to Singapore: The Relevance of Foreign Models for China's Rise' (2018) 236 The China Quarterly 946, 947; Hong Liu & Ting-Yan Wang, 'China and the "Singapore Model": Perspectives from Mid-level Cadres and Implications for Transnational Knowledge Transfer' (2018) 236 The China Quarterly 988, 988. Whilst the foregoing works, as with others cited in this article, have provided broad characterizations of Singapore and China (and their respective institutions) in respect of their respective expository purposes, such characterizations do not necessarily reflect the views of the authors for the purpose of this article.

3 Opening Address by Singapore Senior Minister of State for Law and Health Edwin Tong at the China-Singapore International Commercial Dispute Resolution Conference (Beijing, China, 24 Jan 2019) <www.gov.sg/~/sgpcmedia/media_releases/minlaw/speech/S-20190124-1/attachment/SMS%20Speech%20China%20Singapore%20International%20Commercial%20Dispute%20Resolution%20Conference%20240119%20.pdf> accessed 9 Jul 2019; Ministry of Social and Family Development, '3rd Singapore-China Social Governance Forum On "Governance In A Diverse Society"' (Press release, Ministry of Social and Family Development, 17 May 2016) <www.msf.gov.sg/media-room/Pages/3rd-Singapore-China-Social-Governance-Forum-on-'Governance-in-a-Diverse-Society'.aspx> accessed 9 Jul 2019.

4 Stephan Ormann & Mark R Thompson, 'Introduction: The "Singapore Model" and China's Neo-Authoritarian Dream' (2018) 236 The China Quarterly 930, 934.

5 Liu & Wang (n 2) 1003.

6 Opening Address by Deputy Prime Minister Teo Chee Hean at the Fifth Singapore-China Forum on Leadership' (China Executive Leadership Academy Jinggangshan, Jiangxi, 10 Apr 2015) para 4 <www.psd.gov.sg/press-room/speeches/opening-address-by-deputy-prime-minister-teo-chee-hean-at-the-fifth-singapore-china-forum-on-leadership> accessed 9 Jul 2019.

7 Liu & Wang (n 2) 1002–1003.

8 Tan Cheng-Han, Dan W Puchniak & Umakanth Varottil, 'State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform' (2015) 28 Columbia Journal of Asian Law 61, 62–63.

9 Pei Minxin, 'The Real Singapore Model' *Straits Times* (31 Mar 2015) <www.straitstimes.com/opinion/the-real-singapore-model> accessed 9 Jul 2019; Mark R Thompson & Stephan Ortmann, 'Mis-modelling Singapore: China's Challenges in Learning from the City-state' (2018) 236 The China Quarterly 1014, 1022.

10 Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press 2002) 1.

11 State Council Information Office, 'New Progress in the Legal Protection of Human Rights in China' (White Paper, 15 Dec 2017) <http://english.scio.gov.cn/2017-12/15/content_50111031_0.htm> accessed 11 Jul 2019.

varying degrees by, amongst others, the party's influence through political-legal committees, supervision by the legislative body (the National People's Congress (NPC)), the procuracy and adjudicative committees, interference by local governments, and corruption and other forms of social pressure from litigants and the wider public.[12] For example, Chief Justice Zhou Qiang's speech to legal officials in 2017 is often cited to reiterate the CCP's stance on this matter: 'We should resolutely resist erroneous influence from the West: "constitutional democracy," "separation of powers" and "independence of the judiciary".'[13] In so doing, they have often failed to acknowledge the incremental improvements made to increase the independence of the judiciary since the start of legal reforms in the reform era,[14] as seen by the recent white paper issued by the Supreme People's Court (SPC).[15] In this regard, despite resistance to political reforms, the party-state has focused its attention on economic and legal reforms, with political liberalization remaining mostly anathema to the party with the important exception of enhancing the independence of the judiciary.[16]

Instead of revisiting the discussion of the state of judicial independence in China, which has been discussed extensively elsewhere,[17] the authors adopt an institutional approach and examine the issue from the perspective of the role the Chinese judiciary plays and should play *vis-à-vis* the state within a non-Western liberal[18] constitutional framework on a comparative basis. In this light, this article explores Singapore's experience with respect to judicial independence, with a view towards drawing broad insights for China's own reforms. A city-state with a geographical size less than that of Hong Kong, Singapore provides a useful vantage point because of the broad similarities in its developmental path with China in tailoring reforms to suit its circumstances in respect of its priorities in securing political and social stability to facilitate its remarkable economic development, and ensure a strong and effective government anchored by neo-Confucianist cultural norms, which has led to the state's evolution along a different path from the standard Western liberal democratic model.[19] While it is acknowledged

---

[12] See generally Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Randall Peerenboom (ed) *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010); Ling Li, 'Corruption in China's Courts' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010).

[13] Michael Forsythe, 'China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince' *New York Times* (18 Jan 2017) <www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html> accessed 9 Jul 2019.

[14] See generally Peerenboom (n 12).

[15] Supreme People's Court, 'Court Reform in China' (White Paper, 14 Mar 2017) <http://english.court.gov.cn/2017-03/14/content_28552928.htm> accessed 11 Jul 2019.

[16] Benjamin Kang Lim, 'Tiananmen 30 years on: A China that's averse to political reforms – for now', *Straits Times* (4 Jun 2019) <https://www.straitstimes.com/asia/east-asia/a-china-thats-averse-to-political-reforms-for-now> accessed 9 Jul 2019.

[17] See eg Lin Feng, 'The Future of Judicial Independence in China' in HP Lee & Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press 2017).

[18] A 'liberal' state may be broadly described as a polity which prioritizes individual autonomy and a neutral government, which does not construct its own conception of the public good that is commonly associated with the West. For the purpose of this article, a 'non-Western liberal' state is one which may be distinguished from a 'liberal' state when viewed with reference to the latter. See Li-ann Thio, 'Constitutionalism in Illiberal Polities' in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 134.

[19] Singapore Parliament, Parliamentary Elections, 27 Aug 2008, Singapore Parliament Reports, vol 84, col 3406 (Prime Minister Lee Hsien Loong); Speech by K Shanmugam, Minister for Home Affairs and Minister for Law at the inaugural forum 'A Free Press for a Global Society' (Columbia University, 4 Nov 2010) <www.mlaw.gov.sg/news/speeches/speech-by-minister-for-home-affairs-and-minister-for-law-k-shanmugam-at-the-inaugural-forum-a.html> accessed 9 Jul 2019; Hualing Fu, 'Building Judicial Integrity in China' (2016) 39 Hastings International and Comparative Law Review 167, 172; Thio Li-ann, 'Between Apology and Apogee, Autochthony: The 'Rule of Law' Beyond the Rules of Law in Singapore' (2012)

that the Singapore model has been criticized by legal scholars from a liberal standpoint,[20] the authors argue that it is particularly instructive in examining how the rule of law and judicial independence can be sustained in a non-Western liberal dominant party state, which challenges common notions that suggest otherwise.[21] In this regard, theories about judicial independence are often discussed in an abstract decontextualized manner based on *a priori* assumptions, especially in the case of China.[22] It is apposite, however, to examine the underlying historical factors and institutional context in which the judiciary is situated, which may be self-reinforcing over time because of switching costs and institutional dependencies.[23] Judicial independence varies significantly between China and Singapore, which may be accounted for by the differences in their starting conditions. Singapore had a basic rule of law framework around the time it became independent in 1965, while legal reforms in China only began years after the economic transition took off in 1979, thirty years after the state was founded.[24]

At a time of an Asian renaissance and the apparent retreat from Western liberalism[25] when China is seeking to put forward its model of development as an alternative to Western liberalism,[26] an examination of the Singapore model is particularly apposite and has arguably more to teach China than Western models, several of which are suffering from constitutional crises of their own.[27] In doing so, the authors hope to contribute to the increasing interest in Asian models of constitutionalism and governance, including the Singapore model[28] not least from the Chinese party-state itself. At the outset, notwithstanding certain broad similarities between both states, there exist vast political, historical, socio-economic, and geographical differences between Singapore and China. Therefore, this article does not purport to make a normative argument that the Singapore model should serve as a model for China, nor is it intended to prescribe specific judicial reforms for China, not least because each model is so closely intertwined with its history and unique political circumstances. Nevertheless, insofar as the Singapore model is studied by China and is one it seeks to draw lessons from, it is necessary to understand what the key elements of the Singapore model are and their implications for China. On this basis, this article explores the extent to which broad lessons

---

Singapore Journal of Legal Studies 269, 272. Some have termed this the 'East Asian Model' of development: Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford University Press 2008) 61.

20 See eg Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 391, 414; Chien-Chih Lin, 'Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Power in the Four Asian Tigers' (2017) 48 Georgetown Journal of International Law 1063, 1139.

21 See Mark Tushnet, 'Preserving Judicial Independence in Dominant Party States' (2015) 60 New York Law School Law Review 107, 109–111.

22 Donald C Clarke, 'Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?' in C Stephen Hsu (ed), *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (New York University Press 2003).

23 Mariana Prado & Michael Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59 University of Toronto Law Journal 341.

24 See generally Republic of Singapore, 'Report of the Constitutional Commission 1966' (Singapore Government Printer 1966); Weitseng Chen, 'Twins of Opposites: Why China Will Not Follow Taiwan's Model of Rule of Law Transition Toward Democracy' (2018) 66 American Journal of Comparative Law 481, 517.

25 Mark A Graber, Sanford Levinson & Mark Tushnet, 'Constitutional Democracy in Crisis?: Introduction' in Mark A Graber, Sanford Levinson & Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

26 习近平（Xi Jinping），'决胜全面建成小康社会，夺取新时代中国特色社会主义伟大胜利 [Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era]' 人民日报 *People's Daily* (28 October 2017) 2.

27 See generally Graber, Levinson & Tushnet (n 25).

28 See eg Tushnet (n 20); John Curtis Perry, *Singapore: Unlikely Power* (Oxford University Press 2017) 237 (drawing comparisons between the Chinese and Singapore models of governance).

may be drawn from Singapore for China to construct its *own* paradigm of state-judiciary relations in the context of its own particular circumstances as part of its ongoing judicial reforms as it continues its trajectory as part of the international community.

The rest of this article is structured as follows: Part I sets out the theoretical framework of judicial independence and its prospects in the Chinese context, followed by a discussion of judicial independence in Singapore; Part II provides a broad summary of the role of the judiciary in China; Part III gives an overview of the rule of law and the exercise of judicial power under the Singapore model, followed by Part IV, which examines the broad lessons that China may draw from Singapore; and Part V concludes.

I. JUDICIAL INDEPENDENCE, CHINA, AND THE SINGAPORE MODEL

The concept of judicial independence is complex, and reasonable people may disagree about what it means and if a given judiciary has sufficient independence.[29] An independent judiciary is recognized to be an indispensable component of the rule of law, even on a formal conception,[30] because of the legal limits it can place on the arbitrary exercise of power and its contribution toward public accountability and good governance by facilitating coordination and cooperation between different constitutional actors.[31]

A. *The Touchstone of Judicial Independence*

Judicial independence – which may be classified into personal, substantive, and collective independence[32] – is necessary because it ensures that the court may exercise its judicial power impartially. This article does not purport to attempt a survey of the vast literature on the subject of judicial independence and the means by which it can be secured, as discussed extensively in other works,[33] except for the following observations which inform and underlie the conceptual framework of this article.

1. *Judicial Independence and Fidelity to Law*

While contemporary constitutional systems amongst diverse states accept judicial independence as a norm, as reflected in many international normative documents,[34] there is no consensus on what it means in practice, the institutional means of safeguarding it, the kinds of

---

[29] Georg Vanberg, 'Establishing and Maintaining Judicial Independence' in Keith E Whittington, R Daniel Kelemen & Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 101.

[30] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon 1979) 215–218.

[31] Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1, 1, 5, 8.

[32] International Association of Judicial Independence and World Peace, 'Mount Scopus International Standards of Judicial Independence' (International Project of Judicial Independence 2018) <https://docs.wixstatic.com/ugd/a1a798_21e6dfdcb80a44d388ed136999ddf63d.pdf> accessed 9 Jul 2019.

[33] See eg Gretchen Helmke & Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 Annual Review of Political Science 345; James Melton & Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) 2 Journal of Law and Courts 187.

[34] See eg the Mt Scopus Standards which sets out the broad framework for judicial independence drawn from a variety of international instruments: International Association of Judicial Independence and World Peace (n 32).

considerations that judges may or ought take into account, or when particular influences become inappropriate.[35] That being said, what we might term a core definition of judicial independence is fidelity to law – that is, the willingness and ability of courts to adjudicate in accordance with law as applied to the facts of the case without undue regard to the views of governmental or private actors.[36] So long as the court exercises independent judgment which is not unduly fettered and does not abdicate its responsibility of adjudicating in respect of the legal issues at hand, judicial independence does not necessarily preclude cognizance of the legitimate policies of other branches of government.[37]

2. *Judicial Power and the Principle of Legality*

The corollary principle of judicial power is equally polysemic. While broadly defined as 'the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property',[38] different constitutional models allow for different degrees of checks and balances between the branches of government.[39] In a constitutional government, the starting point should be that the judiciary should be an apolitical institution and must be seen to be above politics; at the same time, the rule of law requires the courts to subject power to legal limits (ie the principle of legality). The need to observe the institutional boundaries of the separation of powers (to the extent that such a framework exists in the relevant polity), therefore, must be balanced with the courts' overriding need to subject the political branches to the rule of law. The expansion of judicial power in its engagement in political or policy-related matters (ie the judicialization of politics)[40] is inevitably shaped by locally and historically-specific social and political conditions. It is this conceptual distinction between judicial independence, on the one hand, and the extent to which an independent judiciary wishes to exercise its judicial power, on the other, which renders efforts to measure *de facto* judicial independence based on the frequency the court overturns government actions somewhat misconceived.[41] Rather, it is precisely the courts' independence that empowers them to determine when an issue of policy is within the competence of the other branches of government.[42]

3. *Judicial Accountability*

Judicial independence and power are thus not absolute values and need to be counterbalanced with judicial accountability. On the basis of the foregoing, judicial accountability is underlined by the twin requirements of (i) fidelity to law; and (ii) the principle of legality. As Vanberg observed, the institutional framework, such as the appointment and impeachment process, or

---

35 Vanberg (n 29).

36 Tom Bingham, *The Rule of Law* (Penguin 2011) 92.

37 Sundaresh Menon (Chief Justice of Singapore), 'Taming the Unruly Horse: The Treatment of Public Policy Arguments in the Courts' (Address at the High Court of Sabah and Sarawak in Kota Kinabalu, Malaysia, 19 Feb 2019) para 33 <https://www.supremecourt.gov.sg/Data/Editor/Documents/Public%20Policy%20Lecture%20-%2019Feb2019.pdf> accessed 18 Jul 2019.

38 *Huddart Parker Pty Ltd v Moorehead* (1909) 8 CLR 330.

39 Daniel Smilov, 'The Judiciary: The Least Dangerous Branch?' in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 860.

40 Ran Hirschl, 'The Judicialization of Politics' in Keith E Whittington, R Daniel Keleman & Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 120.

41 See eg John Ferejohn, Frances Rosenbluth & Charles R Shipan, 'Comparative Judicial Politics' in Carles Boix & Susan C Stokes (eds), *The Oxford Handbook of Comparative Politics* (Oxford University Press 2009) 745–746.

42 *R (Pro-LifeAlliance) v British Broadcasting Corp* [2003] UKHL 23, [2004] 1 AC 185 [76].

the possibility of legislative review of judicial decisions, may have the effect of circumscribing judicial independence in a strict sense, but they play an important role in ensuring judicial accountability.[43] As Justice Sandra Day O'Connor rightly noted:

> [T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the nation's law means and to declare what it demands.[44]

In this sense, the judiciary does not operate in a vacuum but derives its own legitimacy when it is seen to do justice as an impartial and accountable arbiter of disputes, and thus needs the acceptance or acquiescence of the state and the people in order to function effectively.[45] Whether judicial independence can exist is ultimately a matter of political will and depends on whether political actors perceive that the costs of undermining it outweigh the net costs it may impose in the long term.[46] It is the costs that the government may bear in terms of constraints on its power that explains why judiciaries are generally granted less autonomy in non-democratic constitutions than in democratic constitutions.[47]

B. *Prospects for Judicial Independence in China – A Matter of Political Will*

The prospects of implementing reforms toward realizing judicial independence would need to contend with the parameters of China's existing constitutional framework, which sets out a more limited concept of 'judicial independence' than what is conventionally accepted. The *Constitution of the People's Republic of China* ('PRC Constitution') defines the courts as the state's 'judicial' organs and mandates that they 'exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual'.[48] The provision is silent on whether interference by the people's congresses and the procuracy are permitted.[49] Crucially, the requirement for the courts to 'only answer to the law' was deleted in the 1982 PRC Constitution.[50]

1. *CCP Leadership and Party Sovereignty*

The PRC Constitution provides that the SPC is accountable to the NPC[51] and is ultimately subordinate to the leadership of the CCP[52] whose power is supreme.[53] In this regard, the

---

43 Vanberg (n 29) 101–102.

44 *Planned Parenthood v Casey* (1992) 505 US 833.

45 Stéphanie Balme & Michael W Dowdle, 'Introduction: Exploring for Constitutionalism in 21st Century China' in Stéphanie Balme & Michael W Dowdle (eds), *Building Constitutionalism in China* (Palgrave Macmillan 2009) 4.

46 Vanberg (n 29) 105–106.

47 Zachary Elkins & James Melton, 'The Content of Authoritarian Constitutions' in Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 156–157.

48 中华人民共和国宪法 [Constitution of the People's Republic of China] (adopted 4 Dec 1982) ('PRC Constitution'), arts 128, 131.

49 Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart 2012) 178–179.

50 Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Dependence in China' (2016) 64 American Journal of Comparative Law 37, 49.

51 PRC Constitution, art 128.

52 PRC Constitution, art 1.

53 Fu (n 19) 168–169.

codification of the party's supremacy over the state in the 2018 amendment to the PRC Constitution[54] – which may be interpreted to form the 'basic structure' of the PRC Constitution – has exposed an inherent contradiction in Xi Jinping's central political platform of 'governing the nation in accordance with the law' (*yifa zhiguo*).[55] Under this premise, the rule of law and party-rule-through-law are essentially identical.[56] The implications of privileging the party's supreme authority over judicial power are significant – party activities are effectively non-justiciable and are instead subject to self-regulation.[57] As the Chinese mantra goes, 'use law to govern the country, use internal regulations to govern the Party' (*yifa zhiguo yigui zhidang*).[58] Effectively, the rule of law is formally subordinated to the party's leadership. In the words of Schmitt, the party-state is the *de facto* sovereign 'who decides on the exception'.[59]

2. *Recent Judicial Reforms*

Nevertheless, despite China's 'turn against law' in the last decade,[60] the CCP's leadership under Xi since the Fourth Plenum of the CCP Central Committee in 2014 ('Fourth Plenum') has unveiled wide-ranging judicial reforms ostensibly aimed towards promoting greater accountability, independence, and professionalization of the judiciary, albeit without compromising the party's leadership.[61] Zhang and Ginsburg argue that the CCP is moving toward 'legality' in which the written law is enforced more rigorously. The reforms, they contend, aim to achieve greater institutional autonomy of the courts through greater empowerment against other state and party entities (apart from the party leadership); enhanced statutory interpretation authority; stronger enforcement powers; and higher levels of legal professionalism and proficiency amongst judges, even if they have concentrated the party's power and control in an unprecedented manner.[62] According to the recent SPC white paper on judicial reforms, it is the state's objective to 'improve the public credibility of the judiciary,

---

54 中华人民共和国宪法修正案 (2018) [Amendments to the Constitution of the People's Republic of China (2018)], adopted on 11 Mar 2018 at the First Session of the Thirteenth National People's Congress of the People's Republic of China, Amendment 36.

55 Delia Lin, 'The CCP's Exploitation of Confucianism and Legalism' in Willy Wo-Lap Lam (ed), *Routledge Handbook of the Chinese Communist Party* (Routledge 2017) 47.

56 Susan Trevaskes, 'Weaponising the Rule of Law in China' in Flora Sapio et al (eds), *Justice: The China Experience* (Cambridge University Press 2017) 113–114.

57 Li (n 50) 49–51.

58 Carl Minzner, *End of an Era: How China's Authoritarian Revival is Undermining its Rise* (Oxford University Press 2018) 104.

59 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 1.

60 Carl F Minzner, 'China's Turn Against Law' (2011) 59 American Journal of Comparative Law 935.

61 中共中央关于全面推进依法治国若干重大问题的决定 [Decision of the Central Committee of the CCP on Some Major Issues Concerning Comprehensively Promoting the Rule of Law] (Fourth Plenum Decision), issued 23 Oct 2014 by the Fourth Plenary Session of the 18th Politburo of the Communist Party of China <http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html> accessed 11 Jul 2019. This was the first time in the CCP's history that an entire Plenum was devoted to discussions on the rule of law.

62 Taisu Zhang & Tom Ginsburg, 'Legality in Contemporary Chinese Politics' (17 Sep 2018, forthcoming in Virginia Journal of International Law) 3–5 <ssrn.com/abstract=3250948> accessed 9 Jul 2019. See also Fu (n 19) 179. From 2014 to 2017, a 'leading group' chaired by Xi Jinping adopted 31 programmes on judicial reform. See 周强 (Zhou Qiang) (President of the Supreme People's Court of China), '最高人民法院关于人民法院全面深化司法改革情况的报告 [Report of the Supreme People's Court on Comprehensively Deepening Judicial Reform in the People's Courts]' (delivered at the 30th Meeting of the 12th National People Congress Standing Committee, 1 Nov 2017) <www.court.gov.cn/zixun-xiangqing-66802.html> accessed 11 Jul 2019.

promote judicial impartiality, and build a fair, efficient and authoritative socialist judicial system'.[63]

The reforms have also sought to ensure that only 'quota judges' (*ru'e faguan*), namely those appointed as judges through examinations and interviews, as opposed to court administrators, clerks, or paralegals, will be authorized to decide cases and held accountable for the 'quality' of their adjudication.[64] To curtail local protectionism, the reforms aim to centralize the appointment of judges and court funding below the provincial level through a judge selection committee, which will select and recommend judges to the respective legislative bodies for formal appointment.[65] Further, in response to the longstanding problem of judgments being determined in closed-door discussions, often with the interference of the party or other internal and external sources, the reforms aim to ensure that the trial, or the formal court hearing, forms a key part of the criminal and civil justice process.[66]

While it is presently unclear whether such reforms would continue or be implemented successfully, one may argue that such reforms, if pursued progressively, may pave the way for the Chinese judiciary toward greater autonomy albeit within the parameters imposed by the party. Minzner argues, however, that these reforms are less about building up China's judicial institutions than about centralizing control of China's bureaucracies.[67] Such reforms are likely to remain uneven and incremental depending on whether the party sees it in its interests to grant the courts greater autonomy with respect to the nature of the cases involved. The direction and extent of reforms are also likely to be path dependent given the lack of a tradition of the rule of law and power-sharing by the party-state.[68] Ultimately, whether greater judicial independence can be achieved is a matter of political will, which depends on whether the party-state sees that the benefits to its legitimacy outweigh the costs in doing so.

C. *The Case for Judicial Independence in China: A Question of Legitimacy*

Notwithstanding the theoretical arguments for judicial independence, something further is required in the case of China – not least because any reforms in this regard are more likely to succeed if it is in the interests of the party-state. North captures something close to the case to be made for greater judicial independence in China:

> Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules.[69]

Here, it is argued that the subject of judicial independence should be reoriented from a political issue tied to democratization to one concerning good governance, which itself is ultimately tied to the CCP's central concern – its legitimacy.

---

63 Supreme People's Court (n 15) Preface.

64 ibid, Parts V, IX.

65 ibid, Part II.

66 Fourth Plenum Decision (n 61), quoted from Sarah Biddulph et al, 'Criminal Justice Reform in the Xi Jinping Era'(2017) 2 China Law and Society Review 63, 77.

67 Minzner (n 58) 105. See also Qianfan Zhang, 'Judicial Reform in China; An Overview' in John Garrick & Yan Chang Bennett (eds), in *China's Socialist Rule of Law Reforms Under Xi Jinping* (Routledge 2016) 29.

68 In contrast to the Legalist school, the Confucians advocated a system of rule by morality instead of law: Francis Fukuyama, *Political Order and Political Decay* (Farrar, Straus and Giroux 2014) 354–359, 375.

69 Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 16.

Legitimacy, which broadly refers to the common acceptance of a regime's authority,[70] is widely acknowledged as the objective of the construction of law and legal institutions by authoritarian regimes. Moustafa and Ginsburg have identified several important functions performed by judicial institutions in authoritarian states, namely, political legitimation, social control, bureaucratic monitoring and control, credible commitment to investors, and delegation of controversial policy decisions to the courts.[71] There is broad agreement among Chinese scholars regarding the Chinese state's goal of legitimation in promoting the 'rule of law'.[72] On this basis, the arguments in favour of improving judicial independence in China may centre on the following aspects of legitimacy, which are particularly apt in the Chinese context.

1. *Institutional Legitimacy*

Continued public perceptions of a lack of independence of the Chinese courts risks undermining the institutional legitimacy of the judiciary, which itself risks political decay,[73] social instability, and even its sovereignty in the long term, as seen in the recent demonstrations in Hong Kong over the proposed extradition bill with China.[74] Studies have shown that there is an increased social demand for legality during this period of rapid change in the Chinese socio-economic environment, which has brought about increased wealth, social disintegration, and rights consciousness amongst the population, and an increase in civil and administrative litigation in recent years.[75] The recent judicial reforms, therefore, may be viewed as the state's response to the preceding period of rising public distrust of the judiciary, popularly termed as a crisis of losing judicial credibility (*sifa gongxinli*),[76] attributed in part to the public's perception of the party's control of the courts. The lack of public confidence in the administration of justice had potentially undermined the legitimacy of the party-state and posed broader challenges to the governance of Chinese society.[77] As described by a Chinese judge, the judiciary's lack of 'public credibility' was reflected in: (i) petitions to re-open cases which had been decided; (ii) petitions to higher-level governments concerning ongoing or decided cases; (iii) low execution rate of judgments; and (iv) resistance to the enforcement of court decisions by the losing parties.[78]

---

70 See Susan H Whiting, 'Authoritarian "Rule of Law" and Regime Legitimacy' (2017) 50 Comparative Political Studies 1907, 1912–1915.

71 Tamir Moustafa & Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg & Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 4–10.

72 Whiting (n 70) 1909.

73 Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press 1968) 20, 85–86.

74 'The rule of law in Hong Kong', *The Economist* (13 June 2019) <https://www.economist.com/leaders/2019/06/13/the-rule-of-law-in-hong-kong> accessed 20 Aug 2019.

75 Zhang & Ginsburg (n 62) 6, 54–58, fns 295–300.

76 徐昕 (Xu Xin), '化解中国司法公信力危机 [Addressing the Public Confidence Crisis in China's Judiciary]' (腾讯评论, 30 Jun 2013) <http://view.news.qq.com/a/20130630/001015_all.htm> accessed 11 Jul 2019; 蒋艳玲 (Jiang Yanling), '从法官角度浅谈当前我国司法公信力 [A Note on the Public Credibility of China's Judiciary from the Perspective of a Judge]' (中国法院网 [China Court Network], 21 May 2013) <https://www.chinacourt.org/article/detail/2013/05/id/960702.shtml> accessed 5 Aug 2019; 徐昕 (Xu Xin) et al, '中国司法改革年度报告(2010) [Annual Report on China's Judicial Reform (2010)]' (Institute For Advanced Judicial Studies 2011) <www.yadian.cc/files/reform2010.pdf> accessed 11 Jul 2019.

77 ibid.

78 Jiang (n 76). See the SPC's response to the crisis in 最高人民法院关于切实践行司法为民大力加强公正司法不断提高司法公信力的若干意见 [Several Opinions of the Supreme People's Court on Effectively Implementing the Principle of Judicial Work Serving the People, Energetically Strengthening Judicial

The success of the judicial reforms in China toward greater 'legality' in governance highlighted above would depend, in turn, on the perceived legitimacy of the law and legal institutions and public confidence in the fair and impartial administration of justice. If the Chinese party-state is indeed seeking to inculcate greater respect for legality in governance, such respect for and compliance with law can only be sustainable if a neutral institution exists to ensure that the law is enforced impartially, which is contingent on the judiciary functioning as an independent institution.[79] Such reforms, therefore, would remain ineffective unless the judiciary can function effectively as an integral mechanism of governance and is given sufficient autonomy to fulfil the legitimizing power of the law and create a culture of legality and compliance through the impersonal and impartial application of the law.[80]

2. *Economic Legitimacy*

It is widely acknowledged that judicial independence in the enforcement of property and contractual rights facilitates economic development as it signals 'credible commitments'[81] by the state to investors by raising the cost of political interference with economic activity.[82] While the Chinese economy has thrived despite the lack of enforcement of formal property and contractual rights through independent courts, which have instead been replaced by informal norms and institutions,[83] this is unlikely to be sustainable as China's economy slows and transitions into its next phase of growth.[84] As a recent World Bank report pointed out, as the Chinese economy exhausts its low-cost labour and grows in complexity in its transition from state-investment and export-led growth to an innovative consumption-oriented model, the institutional quality of the courts would need to evolve to meet the demands of the changing commercial environment to avoid the 'middle-income trap'.[85] The recent judicial reforms are, thus, reflective of the party's increasing recognition of the need to reform the courts along with its ongoing economic restructuring,[86] especially in view of the fact that the CCP derives economic legitimacy from its power base, which determines how much financial and other resources it can control and dispense.[87]

Impartiality, and Constantly Improving Judicial Credibility], 法发〔2013〕9 号 (issued by the Supreme People's Court and effective as of 6 Sep 2013), English translation available at <http://en.pkulaw.cn/display.aspx?cgid=58c58e1b0ffad168bdfb&lib=law>.

79 Chan Sek Keong, 'Securing and Maintaining the Independence of the Court in Judicial Proceedings' (2010) 22 Singapore Academy of Law Journal 229, 229–230.

80 World Bank, 'Governance and the Law' (The World Bank 2017) 54 <www.worldbank.org/en/publication/wdr2017> accessed 9 Jul 2019.

81 Douglass C North & Barry R Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' (1989) 49 Journal of Economic History 803, 808.

82 World Bank (n 80) 104.

83 Frank K Upham, 'Lessons from Chinese Growth: Rethinking the Role of Property Rights in Development' in Weitseng Chen (ed), *The Beijing Consensus? How China has Changed Western Ideas of Law and Economic Development* (Cambridge University Press 2017) 119; Michael Trebilcock & Jing Leng, 'The Role of Formal Contract Law and Enforcement in Economic Development' (2006) 92 Virginia Law Review 1517, 1556–1560.

84 Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers 2012) ch 15.

85 World Bank & Development Research Center of the State Council, the People's Republic of China, *China 2030: Building a Modern, Harmonious and Creative Society* (World Bank 2013) 20. See also Randall Peerenboom, 'Law and Development in Middle-Income Countries: Conclusion' in Randall Peerenboom & Tom Ginsburg (eds), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge University Press 2014) 335, 344, 350.

86 See Zhang & Ginsburg (n 62) 48–49.

87 Jiangyu Wang, 'The Political Logic of Securities Regulation in China' in Guanghua Yu (ed), *The Development of the Chinese Legal System: Change and Challenges* (Routledge 2011) 230.

The perception of China's rule of law, or lack thereof, also greatly influences China's international legitimacy and its integration with the world economy, another plank of CCP's mandate. A stronger rule of law in China may go some way toward mitigating the ideological differences and the lack of trust between China and the West, which have manifested in the deteriorating trade relations that is inhibiting China's continued development.[88]

3. *Political Legitimacy*

Economic development is dependent in part on the institutional quality of the state's public administration and the quality of its governance. Governance, as defined by the World Bank, is 'the process through which state and nonstate actors interact to design and implement policies within a given set of formal and informal rules that shape and are shaped by power'.[89] Rather than an end in itself, an independent judiciary – by applying the rules consistently, predictably, and transparently – is ultimately a requirement for the CCP's central plank of 'governing the nation in accordance with law'.[90] Judicial independence enhances the state's legitimacy by promoting sound public administration in ensuring that public powers are exercised within legal limits – a role most evident in the court's application of anti-corruption standards and exercise of judicial review.[91] Enabling the courts to play a third-party 'monitoring' role is particularly opportune at a time when the CCP initiated its anti-corruption drive in 2013 within the administrative apparatus and has sought to enhance party discipline.[92] Given the difficulty of regulating local governments across the country, the courts can also play an instrumental role in resolving the principal-agent problems associated with the increase in the bureaucratic and regulatory complexity of the state.[93]

The conferment of constitutional status on the anti-corruption body called the National Supervision Commission and the enactment of the *Supervision Law*,[94] however, have been described by some as an effort to circumvent the due process requirements of the courts, including the courts' power to exercise oversight over such matters.[95] Such an arrangement may serve the interests of the CCP elite in the short term, but the potential for such powers to be exercised arbitrarily may lead to a loss of credibility and accountability to their peers within the party and constituents over the long term.[96] As Mancur Olson argued, given the inherent uncertainty of succession in dictatorships, an independent judiciary makes commitments by self-interested rational autocrats to their supporters with respect to constraints on their power credible, thus serving their long-term interests and legitimacy.[97] According to the logic of

---

88 'A new kind of cold war – China v America', *The Economist* (16 May 2019) <www.economist.com/leaders/2019/05/16/a-new-kind-of-cold-war> accessed 9 Jul 2019.

89 World Bank (n 80) 3.

90 Lin (n 55) 47.

91 See Sundaresh Menon, 'The Rule of Law: The Path to Exceptionalism' (2016) 28 Singapore Academy of Law Journal 413, 421, 425–426.

92 See generally Ling Li, 'Politics of Anticorruption in China: Paradigm Change of the Party's Disciplinary Regime 2012–2017' (2019) 28 Journal of Contemporary China 47.

93 Fu (n 19) 170–171; Zhang & Ginsburg (n 62) 22.

94 PRC Constitution, s 7 of ch 3; 中华人民共和国监察法 [Supervision Law of the People's Republic of China], adopted on 20 Mar 2018 by the National People's Congress Standing Committee.

95 Randall Peerenboom, 'The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?' (2014) 2 Chinese Journal of Comparative Law 188, 199; Jamie P Horsley, 'What's so controversial about China's new anti-corruption body? Digging into the National Supervision Commission' (Brookings, 30 May 2018) <www.brookings.edu/opinions/whats-so-controversial-about-chinas-new-anti-corruption-body/> accessed 9 Jul 2019.

96 See World Bank (n 80) 197.

97 Mancur Olson, 'Dictatorship, Democracy, and Development' (1993) 87 American Political Science Review 567, 571. See also Michael Albertus & Victor Menaldo, 'The Political Economy of Autocratic Constitutions'

collective action, it makes sense for self-interested political actors to cooperate and strike a bargain for the enforcement of legal limits on their powers through an independent judiciary.[98] This serves as 'political insurance'[99] for the CCP's elites, particularly in an authoritarian environment where intra-regime factional struggles are prevalent.

Such 'elite bargaining'[100] was most evident during China's post-Mao reforms which were initially motivated by the need for self-protection by the second-generation leaders after Mao Zedong. During the Cultural Revolution, many senior party leaders were purged by Mao in 'a degraded state system in which those who were politically sainted one day could, the next, be overthrown and dragged through the mud, with often horrendous consequences for their families and major supporters'.[101] When Deng took power, he vowed to establish a legal system to steer the country toward a different direction in which at least the political elites were protected by predictable rules. As Deng put it,[102]

> To ensure people's democracy, we must strengthen our legal system. Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention.

This was evident in the high-profile case of Bo Xilai in 2013, who until his conviction for bribe-taking, embezzlement of state funds, and abuse of power, was one of the top leaders of the CCP widely known for his disregard of the rule of law, and for 'using fear as a tool' to rule.[103] He was reported to have manipulated the judiciary, amongst other misfeasance, in his anti-crime (also known as '*da hei*' or 'strike black') campaign in Chongqing.[104] In a twist of irony, he said the following in his defence at trial:[105]

---

in Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 53. Similarly, Myerson argues that 'as a minimal constitutional structure, a strong leader needs a court or council where his active supporters can collectively judge his treatment of them' or otherwise forfeit their trust; a purely absolutist leader who is not subject to any third-party judgment 'would have very limited ability to make credible promises' to supporters and would lose support: Roger B Myerson, 'The Autocrat's Credibility Problem and Foundations of the Constitutional State' (2008) 102 American Political Science Review 125, 125, 135.

98 See World Bank (n 80) 196, 205.

99 ibid; Brad Epperly, 'Political Competition and De Facto Judicial Independence in Non-Democracies' (2017) 56 European Journal of Political Research 279, 289–290.

100 World Bank (n 80) 196–197.

101 Kenneth Lieberthal, *Governing China: From Revolution Through Reform* (WW Norton & Co 2004) 125.

102 邓小平 (Deng Xiaoping) (Paramount Leader, People's Republic of China), '解放思想，实事求是，团结一致向前看 [Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future]' (Speech delivered at the closing session of the Central Working Conference on 13 Dec 1978) <http://www.people.com.cn/GB/channel1/10/20000529/80792.html> accessed 9 Jul 2019.

103 Michael Wines, 'In Rise and Fall of China's Bo Xilai, an Arc of Ruthlessness', *New York Times* (6 May 2012) <www.nytimes.com/2012/05/07/world/asia/in-rise-and-fall-of-chinas-bo-xilai-a-ruthless-arc.html> accessed 19 Aug 2019.

104 Edward Wong, 'Ex-Official's Drive in China Leads to Torture Inquiry', *New York Times* (10 May 2012) <www.nytimes.com/2012/05/11/world/asia/torture-inquiry-in-anticrime-drive-of-deposed-chinese-leader.html> accessed 19 Aug 2019. For a detailed account of the illegal methods used by Bo in his '*da hei*' campaign, see 童志伟 (Tong Zhiwei), '重庆打黑型社会管理方式研究报告 [A Research Report on the Social Management Methods in the Form of Strike Black in Chongqing]' （洪范法律与经济研究网 [Hongfan Legal and Economic Studies Net], 12 February 2012 ） <http://hf.hongfan.org.cn/file/upload/2012/02/20/1330590858.pdf> accessed 25 Nov 2018.

105 '□□□□□、□□、□□□□□□□□□□□ [Transcripts of the Bo Xilai trial in the Jinan Intermediate People's Court]', 人民日报 *People's Daily* (26 Aug 2013) <http://politics.people.com.cn/n/2013/0823/c1001-

> It is my right to honestly voice my opinions in court. I hope the prosecutors do not take my stating of my own opinions as a vile action or as withdrawing my confession. The law of our country, aiming to prevent wrongful convictions, has established a system of checks and balances for the police, prosecution and judiciary, especially checks and balances between the prosecution and judiciary. The system also embraces the defence attorneys. All these are exactly for the purpose of preventing wrongful convictions. If the court only listens to the prosecutors, wrongful convictions would be inevitable.

There are thus economic and governance incentives for the CCP to invest further in independent judiciaries in view of the rapidly changing socio-economic landscape to the extent that it may buttress its legitimacy and authoritarian legality.[106] If anything, since reforms began in 1978, the CCP has shown its resilience, pragmatism, and capacity to adapt the legal system to changing circumstances.

D. *Judicial Independence in Singapore*

Apart from other civil law jurisdictions such as Taiwan and Japan that China may look to for its legal reforms, Singapore, notwithstanding its common law tradition, represents an interesting example of how the rule of law and judicial independence can be achieved within a non-Western liberal constitutional framework. As described by Singapore's current Chief Justice, Sundaresh Menon:

> [Singapore is] often caricatured as a study in contrasts: tiny yet prosperous; safe but over-regulated; western in outlook, yet steeped in notions of Confucianism; democratic, yet dominated throughout her existence by a single political party; free but communitarian; free but communitarian; and above all, pragmatic, not ideological.[107]

1. *Singapore's Legal Context*

Singapore, not China, was one of the first countries with the credibility to challenge liberal constitutionalism's orthodoxy about economic growth and constitutional government, and propose its own path of law and development.[108] Thio argues that Singapore's constitutional culture is anchored by the paramountcy accorded to stability and economic development, constructed within the context of a dominant party state.[109] China, like Singapore, has a strong and effective state, one based on democratic centralism to ensure a decisive decision-making

---

22678622-34.html> accessed 5 Aug 2019. Interestingly, the presiding judge of the collegiate panel that heard the case responded to Bo Xilai by saying that 'what you said reflects both the provisions of our country's law and the reality today'.

106 Zhang & Ginsburg (n 62) 7–9.

107 Sundaresh Menon, 'The Rule of Law: The Path to Exceptionalism' (2016) 28 Singapore Academy of Law Journal 413, 413. It is noted that other scholars have used the term 'authoritarian' and variants thereof to describe Singapore (eg Tushnet (n 20); cf Gordon Silverstein, 'Singapore's Constitutionalism: A Model, But of What Sort?' (2015) 100 Cornell Law Review 1, 22–23). In this article, however, the authors suggest that the term 'non-Western liberal' would be more apt, not least because Singapore is a constitutional democracy with an independent judiciary, which abides by the rule of law. See (n 18) for a description of a 'non-Western liberal' state.

108 Thio (n 19) 272.

109 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing 2012) 101–126. Under Singapore's Westminster system of parliamentary democracy, the Constitution of the Republic of Singapore ('Singapore Constitution'), as the supreme law in Singapore, may be amended by a two-thirds parliamentary majority in a dominant party state: Singapore Constitution, art 5.

process.[110] Both polities are also characterized (albeit not exclusively) by political constitutionalism insofar as political institutions play a role in regulating political power.[111] Notwithstanding the important role played by the judiciary, former Chief Justice of Singapore Chan Sek Keong has stated extra-judicially that courts are not envisaged as 'the first line of defence' against abuses of public power as 'control can and should come internally from Parliament and the Executive itself in upholding high standards of public administration and policy'.[112] *A fortiori*, in China, the principal authority to interpret the PRC Constitution rests with the NPC.[113] In this regard, in light of Xi's renewed emphasis of Confucian values,[114] it is interesting to recall Singapore's neo-Confucianist governing philosophy articulated in 1991 as an antithesis to Western liberalism:[115]

> Many Confucian ideals are relevant to Singapore … The concept of government by honourable men "君子"(*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.

Interestingly, in an empirical study of mid-level Chinese cadres who have studied the Singapore model, it was found that they were predominately interested in the practical aspects of Singapore's governance such as 'clean and efficient government' and the 'rule of law' rather than its political ideology, and believed that the former may be transferable to China, at least to the extent practicable.[116]

Importantly, unlike China, Singapore is a multi-party democracy which ensures formal legitimacy, even if it is distinct from a Western liberal democracy and is predicated on the need for a strong and stable 'good government'[117] that should be given a wide mandate to generate economic growth and ensure social stability.[118] Notwithstanding the divergences between China and Singapore, academic scholars have acknowledged the value in drawing insights from the Singapore model.[119] Ginsburg argues that while the Singapore model may or may not be readily transferable to China given the vast differences in scale and manageability, Singapore

---

[110] Fu Hualing & Jason Buhi, 'Diverging Trends in the Socialist Constitutionalism of the People's Republic of China and the Socialist Republic of Vietnam' in Fu Hualing et al (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018) 141.

[111] See generally Michael W Dowdle & Kevin YL Tan, 'Is Singapore's Constitution Best Considered a Legal Constitution or a Political Constitution?' in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge 2016). In contrast, legal constitutionalism does so principally through the law and courts: Adam Tomkins, *Public Law* (Oxford University Press 2003) 18–19.

[112] Chan Sek Keong, 'Judicial Review – From Angst to Empathy' (2010) 22 Singapore Academy of Law Journal 469, 480.

[113] PRC Constitution, art 67, which refers more specifically to the NPC Standing Committee.

[114] Lin (n 55) 47.

[115] Shared Values White Paper (Cmd 1 of 1991) (Singapore National Printers 1991) para 41.

[116] Liu & Wang (n 2) 1006.

[117] David Tan, 'Walking the Tightrope Between Legality and Legitimacy: Taking Rights Balancing Seriously' (2017) 29 Singapore Academy of Law Journal 743, 767–768.

[118] Kevin YL Tan, *The Constitution of Singapore: A Contextual Analysis* (Hart 2015) 3–6.

[119] Tom Ginsburg, 'Judicial Independence in East Asia' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2009) 250; Daniel A Bell, 'Introduction' in Daniel A Bell & Chenyang Li (eds), *The East Asian Challenge for Democracy: Political Meritocracy in Comparative Perspective* (Cambridge University Press 2013) 4 (drawing comparisons between Singapore and China's models of 'political meritocracy'); Kwai Hang Ng & Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press 2017) 201; Pan Wei, 'Toward a Consultative Rule of Law Regime in China' in Suisheng Zhao (ed) *Debating Political Reform in China: Rule of Law vs. Democratization* (ME Sharpe 2006) 40.

is important to consider because it provides a plausible model of a high quality judiciary that has avoided 'judicializing' politics.[120]

If there is anything of value that China can learn from Singapore, it would be how the state may reinvent its ambivalent relationship with law and the judiciary. In this respect, even though some have argued that the *Constitution of the Republic of Singapore* ('Singapore Constitution') is 'a charter of state power and authority' which does not fetter the state's ability to govern,[121] it is notable that its drafters had ensured that judicial power was carved out of the panoply of state power and exercised by an independent branch of government to ensure legal accountability and good governance on the part of the state.[122] This important role accorded to the Singapore judiciary is seen in the recent passing of the 'fake news bill', which provides the executive with broad latitude to issue directions to curb the spread of false statements of fact in the public interest, but at the same time provides for independent judicial oversight by way of appeal.[123] Thus, the law can be both a critical instrument of state power and a limitation thereof. In the words of former Prime Minister Lee Kuan Yew,

> For the acid test of any legal system is not the greatness or the grandeur of its ideal concepts, but whether in fact *it is able to produce order and justice in the relationships between man and man and between man and the State*.[124]

2. *Legal Safeguards for Judicial Independence*

The legal foundations for judicial independence found its genesis in Singapore's post-independence constitution,[125] and has been affirmed on several occasions by the Singapore courts since as a sacrosanct principle.[126] The judiciary is vested with exclusive judicial power as a separate branch of government distinct from the executive and legislature by the Singapore Constitution, which provides for numerous safeguards for judicial independence.[127]

To ensure a non-politicized appointment process, the President, who is restricted from being a member of any political party,[128] has a veto right on the appointment of Supreme Court judges,[129] many of whom are well-respected legal practitioners.[130] The Singapore Constitution restricts parliamentary discussion of Supreme Court judges except when fulfilling the

---

120 Ginsburg (n 119) 250.

121 Kevin Tan, 'State and Institution Building Through the Singapore Constitution 1965–2005' in Li-ann Thio & Kevin YL Tan (eds) *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge-Cavendish 2009) 52.

122 Report of the Constitutional Commission 1966 (n 24) para 83. See also Singapore Parliament, Constitutional (Amendment) Bill, 22 Dec 1965, Singapore Parliament Reports, vol 24, cols 448–449 (Prime Minister Lee Kuan Yew).

123 Protection from Online Falsehoods and Manipulation Act 2019 (No 18 of 2019), ss 17, 29, 35, 44.

124 'Singapore Prime Minister, Mr Lee Kuan Yew's Speech to the University of Singapore Law Society Annual Dinner' (Rosee d'Or, 18 Jan 1962), transcript at <www.nas.gov.sg/archivesonline/data/pdfdoc/lky19620118.pdf> accessed 9 Jul 2019 (emphasis added).

125 Kevin YL Tan, 'The Singapore Judiciary, Independence, Impartiality and Integrity' in HP Lee & Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press 2017) 285–287.

126 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163, [2012] 4 SLR 947 [17]; *Re Singh Kalpanath* [1992] SGHC 64, [1992] 1 SLR(R) 595 [86]; *Au Wai Pang v Attorney-General* [2015] SGCA 61, [2016] 1 SLR 992 [36]–[37].

127 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163, [2012] 4 SLR 947 [17].

128 Singapore Constitution, art 19(2)(f).

129 ibid art 95.

130 Kevin YL Tan, 'As Efficient as the Best Businesses: Singapore's Judicial System' in Jiunn-rong Yeh & Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press 2014) 228, 234.

requirements of a substantive motion,[131] and judges are immune from suit for exercises of judicial responsibilities.[132] It provides for security of tenure for Supreme Court judges until the age of 65, who may be re-appointed thereafter and whose office cannot be abolished while in office.[133] They also enjoy security of remuneration, which cannot be altered to the judge's disadvantage after appointment,[134] and are reputed to be amongst the most highly paid in the world.[135] The Singapore Constitution separately provides for the appointment by the President of judicial commissioners, senior judges, and judges of the International Commercial Court for a specified period to facilitate the disposal of cases.[136]Judges may not be removed from office except by the President on the recommendation of a tribunal comprising at least five persons who hold or have held office as a Supreme Court judge (or the equivalent in any part of the Commonwealth) 'on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office'.[137] The executive provides generous funding to the judiciary with S$426.40 million budgeted for the 2018 financial year[138] and the judiciary's administration is subject to the oversight of the Chief Justice.[139]

As in most common law countries, the Singapore Constitution does not provide for similar safeguards for the lower judiciary.[140] District Judges and Magistrates of the State Courts are officers of the legal service and are appointed by the President on the recommendation of the Chief Justice.[141] They are subject to the oversight of the Legal Service Commission, which is an independent constitutional body headed by the Chief Justice, which may, amongst others, dismiss and exercise disciplinary control over legal service officers.[142] Legal service officers may be posted to either the judicial or legal branch, the latter of which consists of the Attorney-General's Chambers and the legal service departments of government ministries and statutory boards, during the course of their careers.[143] While this arrangement has been debated in Parliament, with some arguing for stronger separation between the judicial branch and the legal branch, the existing arrangement was justified on the basis that it is in Singapore's interest for legal service officers to be exposed to different fields of legal work.[144] Notwithstanding critics

---

131 Singapore Constitution, art 99.

132 Government Proceedings Act (Cap 121, Rev Ed 1985), s 6(3).

133 Singapore Constitution, arts 95(2)–(3), 98(1).

134 Singapore Constitution, art 98(6)–(8). As stated in the Judges' Remuneration (Annual Pensionable Salary) Order (Cap 147, 1994 Rev Ed Sing) O 1, the annual pensionable salaries of Supreme Court judges are as follows: the Chief Justice ($347,400), a Judge of Appeal ($253,200), and a Supreme Court judge ($234,600).

135 Tan (n 130) 262.

136 Singapore Constitution, art 95(4).

137 ibid art 98(2)–(5).

138 Ministry of Finance, 'Revenue and Expenditure Estimates' (19 Feb 2018) 37 <www.singaporebudget.gov.sg/data/budget_2018/download/15%20Judicature%202018.pdf> accessed 9 Jul 2019.

139 Sundaresh Menon (Chief Justice of Singapore), 'Inspiring Confidence in the Courts through Independence, Integrity and Competence' (Welcome address delivered at the 5th Roundtable Meeting of the Asia-Pacific Judicial Reform Forum, 31 Oct 2013) para 17 <www.apjrf.com/'Inspiring%20Confidence%20in%20the%20Courts%20through%20Independence,%20Integrity%20and%20Competence'%20-%20Welcome%20Address%20by%20Chief%20Justice%20Menon.pdf> accessed 9 Jul 2019.

140 Tan (n 125) 295.

141 State Courts Act (Cap 321, Rev Ed 2007), ss 9–10.

142 Singapore Constitution, art 111.

143 'Structure of the Singapore Legal Service' (Legal Service Commission) <www.lsc.gov.sg/structure/structure-of-legal-service> accessed 9 Jul 2019.

144 Singapore Parliament, Constitution of the Republic of Singapore (Amendment) Bill, 16 Jul 2007, Singapore Parliament Reports, vol 83, cols 1080–1082 (Professor Jayakumar). When a transfer of a State Court judge 30 years ago was alleged to have been the result of executive interference, a Commission of Inquiry was constituted which revealed that the transfer had been ordered by the Chief Justice on his own accord and not as a result of any instructions from the executive: Report of the Commission of Inquiry into Allegations of

who may be skeptical about the apparent success of the government in court,[145] the Singapore judiciary has been held in high regard in many independent international rankings. The World Justice Project Rule of Law Index 2019 ranked Singapore's rule of law at 13 out of 126 countries worldwide, notably ahead of the United States,[146] while Singapore's judicial independence is ranked 19 out of 140 countries worldwide in the World Economic Forum Global Competitiveness Report 2018.[147]

II. JUDICIAL POWER IN CHINA: STRUGGLING FOR INDEPENDENCE OR SOMETHING ELSE?

An independent judiciary was not conceived of during China's imperial history except during the Republican period (1912–1949); instead, the law was seen not as an independent discipline, but as part of the function of administration.[148] After the founding of the People's Republic of China in 1949, all legal apparatus was destroyed during the Cultural Revolution from 1966 to 1976, and the reconstruction of legal institutions only started in the late 1970s during the reform era.[149]

A. *The Contemporary Role of the Chinese Judiciary*

Criticisms of China's lack of judicial independence often obscure the complexity of the evolving role of Chinese courts in the context of China's incremental legal reforms since the reform era. While Chinese courts have been described as minor actors in the overall functioning of the state,[150] they are vested with the responsibility under the PRC Constitution to exercise judicial power,[151] and handled an average of 17.8 million cases annually from 2013 to 2017.[152] As the highest court, the SPC is responsible for adjudication, formulating judicial

---

Executive Interference in the Subordinate Courts (Cmd 12 of 1986, presented to Parliament on 17 Jul 1986) (Singapore National Printers 1986).

145 International Bar Association, 'Prosperity versus individual rights? Human rights, democracy and the rule of law in Singapore' (Jul 2008) <https://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Singapore.aspx> accessed 19 Aug 2019. See however Ministry of Law, 'Response to IBA Human Rights Institute's Report' (Press release, 9 Jul 2008) <www.mlaw.gov.sg/news/press-releases/response-to-iba-human-rights-institute-s-report.html> accessed 9 Jul 2019.

146 World Justice Project, 'Rule of Law Index 2019' (2019) 16 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced.pdf> accessed 9 Jul 2019.

147 World Economic Forum, 'The Global Competitiveness Report 2018' (2018) 513 <www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf> accessed 9 Jul 2019.

148 John King Fairbank, *The United States and China*, 4 ed (Harvard University Press 1983) 122.

149 See Jiangyu Wang, 'China: Legal Reform in an Emerging Socialist Market Economy' in E Ann Black & Gary F Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press 2011) 31.

150 Benjamin L Liebman, 'China's Courts: Restricted Reform' (2007) 27 Columbia Journal of Asian Law 1, 4.

151 PRC Constitution, art 131.

152 周强 (Zhou Qiang) (President, Supreme People's Court of China), '最高人民法院工作报告 [Supreme People's Court Work Report to the National People's Congress]' (delivered at the 1st Meeting of the 13th National People's Congress, 9 Mar 2018) <www.court.gov.cn/zixun-xiangqing-87832.html> accessed 11 Jul 2019.

interpretations, and supervising and guiding the judicial work of the lower courts,[153] and has issued at least 112 of such 'guiding cases'.[154]

The SPC, as with other Chinese courts, has been described as substantially a 'political entity' that is subsumed within the party-state's leadership.[155] Judges are required under the 2010 *Code of Conduct* to be loyal to the party, the PRC Constitution, and the law.[156] While the *Judges Law* provides for safeguards, such as certain restrictions on removal, it also states that judges are appointed on the basis of, inter alia, their 'political integrity'.[157] It has been argued that the party assumes a paternalistic role with respect to the courts, which are dependent on the party for resources and compelling compliance with its decisions from litigants of a 'higher rank'.[158] The party's leadership also manifests itself through the mechanism of party political-legal committees, which instruct courts on implementing 'judicial policies' to ensure that the work of the courts is aligned with the party's political objectives and priorities.[159]

Despite being embedded in the institutional design of the party-state,[160] the courts exhibit a reasonable degree of operational independence in a majority of routine cases, with China's judicial reforms strengthening the personal and collective independence of the judiciary over time.[161] Instead of a monolithic unit, the Chinese judiciary has been described as a heterogeneous and fragmented institution, and lower courts are subject to different forms and degrees of vertical and horizontal control depending on where they are situated.[162] The recent

---

153 Supreme People's Court (n 15) 61–65.

154 See 最高人民法院关于案例指导工作的规定 [Provisions of the Supreme People's Court Concerning Work on Case Guidance], 法发〔2010〕51 号 (passed by the Adjudication Committee of the Supreme People's Court on 15 Nov 2010, issued on and effective as of 26 Nov 2010), English translation available at <http://cgc.law.stanford.edu/guidingcases-rules/20101126-english/> accessed 20 Jul 2019; 〈最高人民法院关于案例指导工作的规定〉实施细则 [Detailed Implementing Rules on the 'Provisions of the Supreme People's Court Concerning Work on Case Guidance'], 法发〔2015〕130 号 (passed by the Adjudication Committee of the Supreme People's Court on 27 Apr 2015, issued on and effective as of 13 May 2015), English translation available at <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> accessed 20 Jul 2019; 'Chinese Common Law: Guiding Cases and Judicial Reform' (2016) 129 Harvard Law Review 2213. See also '最高人民法院发布第 18 批指导性案例 [The Supreme People's Court Issues the 18th Batch of Guiding Cases]' (Press release of the Supreme People's Court, 27 Jun 2018) <www.court.gov.cn/zixun-xiangqing-104242.html> accessed 11 Jul 2019.

155 Taisu Zhang, 'Disaggregating the Court: A Methodological Survey of Research on the Supreme People's Court of China' (2017) 2 China Law and Society Review 154, 155; 孟高飞 (Meng Gaofei)，'论党对地方法院组织领导的法治化变革 [On the Rule of Law Oriented Reform of Party Leadership in Local Courts]', (2017) 4 学术交流 [Academic Exchange] 89–95. Xi Jinping has emphasized repeatedly that China's legal system must maintain 'the Party's absolute leadership': '习近平就政法工作作出重要指示 [Xi Jinping Makes Important Instructions on Political-Legal Work]' (新华社 [Xinhua News], 22 Jan 2018) <www.gov.cn/xinwen/2018-01/22/content_5259394.htm> accessed 5 Aug 2019.

156 法官行为规范 [Judicial Code of Conduct], 法发 (2010) 54 号 (issued by the Supreme People's Court and effective as of 6 Dec 2010), art 1.

157 中华人民共和国法官法 [Judges Law of the People's Republic of China], adopted on 28 Feb 1995 by the National People's Congress Standing Committee, amended most recently on 23 Apr 2019, arts 11 & 14.

158 Li (n 50) 49–51.

159 ibid. See also Meng (n 155).

160 Li (n 50) 37.

161 See generally Peerenboom (n 12).

162 Ng & He (n 119) 3–20. The authors distinguish Chinese courts into 'work-units' and 'firm-units' depending on each court's immediate institutional environment, with the former prioritizing efficiency and output and the latter more likely to invoke the law as part of the decision-making process.

judicial reforms purport to prohibit unlawful interference in judicial decision-making[163] and it may be argued that the courts have become more institutionally independent in a horizontal, rather than, vertical sense.[164] Cohen argues that judicial independence is invoked to insulate 'judges from local influences including corruption, social connections, local protectionism, and other forces that divert local legal officials from following the central Party authorities' instructions'.[165]

In the Chinese context, contrary to orthodox understanding, judicial independence is seen to be consistent with party-state leadership. As Zhu explains, the CCP's leadership over the judiciary is an 'inescapable historical process' given its legacy as a revolutionary party which preceded the construction of the modern Chinese state, and most of the party's influences in the judiciary have been, or at least purported to be, in the public's interest as part of the development of the modern Chinese state. Instead of abstract discussions of judicial independence, he argues that more attention should be paid to the actual role of the party and its influence on the judiciary.[166] From this perspective, on the basis of the CCP's leadership, the courts have been used as agents by the national and local governments to facilitate economic growth since the opening of China's economy in 1978. According to the SPC, the courts' role, through the adjudication of disputes, is to 'vigorously provide judicial safeguard for China's economic and social development'.[167] Along with the concurrent economic reforms toward an innovative economy, the Fourth Plenum called for more independent adjudication to protect economic-related rights.[168] A key component of judicial reform under Xi has also been to address the issue of local protectionism, where the courts favour litigants which are important to the local economy.[169]

It is with respect to issues concerning broader social stability where the courts have faced challenges especially in cases involving '*weiquan*' lawyers and human rights activists.[170] Due to what Liebman terms as the 'law-stability paradox', legal institutions are not trusted to resolve issues concerning social stability, which has led to the prophylactic use of extra-legal measures. Concerns about stability may also influence how judges interpret and apply the law.[171] Courts may also take into account public opinion where cases carry wider social implications.[172] Ironically, in China's authoritarian system, the courthouse has become a battleground between

---

[163] Fu (n 19) 178–179.

[164] Zhang & Ginsburg (n 62) 21

[165] Maurits Elen, 'Interview: Jerome Cohen' (The Diplomat, 1 Sep 2016) <https://thediplomat.com/2016/09/interview-jerome-cohen/> accessed 9 Jul 2019.

[166] Zhu Suli, 'The Party and the Courts' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010) 53.

[167] 王胜俊 (Wang Shengjun) (President, Supreme People's Court of China), '最高人民法院工作报告 [Supreme People's Court Work Report to the National People's Congress]' (delivered at the 1st Meeting of the 12th National People's Congress, 10 Mar 2013) <http://www.court.gov.cn/zixun-xiangqing-82552.html> accessed 11 Jul 2019.

[168] Jacques deLisle, 'Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping' (2017) 26 Journal of Contemporary China 68, 71, 75.

[169] ibid.

[170] '*Weiquan*' lawyers, or 'rights-protection' lawyers, refers to the small group of lawyers and legal scholars who assist Chinese citizens in asserting their legal rights, often against the government. See generally Fu Hualing & Richard Cullen, 'Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers' (2011) 205 The China Quarterly 40. See also Fu Hualing, 'Challenging Authoritarianism through Law: Potentials and Limits' (2011) 6 National Taiwan University Law Review 339.

[171] Benjamin Liebman, 'Legal Reform: China's Law-Stability Paradox' (2014) 143 Daedalus 96, 96, 100; Benjamin L Liebman, 'Authoritarian Justice in China: Is There a "Chinese Model"?' in Chen Weitseng (ed) *The Beijing Consensus? How China has Changed Western Ideas of Law and Economic Development* (Cambridge University Press 2017) 234–235.

[172] Ng & He (n 119) 21–22.

the government and its challengers, as litigation is used as a tool by citizens to advance legal reforms and the public interest in the name of the rule of law.[173] As a classic dual-state,[174] the courts have demonstrated a schizophrenic approach by adhering to the 'normative' law in the majority of ordinary civil and commercial cases, but deferring to the CCP's 'prerogative' in politically-sensitive cases where the law is of less relevance or silent.[175]

B. *Courts and Judicial Review*

As may be seen, the Chinese judiciary is constrained within the paradox of the 'socialist rule of law': the party-state, in accordance with the Fourth Plenum decision, has been steadfastly pushing the judiciary towards increased depoliticization, professionalism, integrity, and impartiality to serve in the people's interests,[176] but only to the extent that the prerogatives of the CCP and the national government are not challenged. Effectively, the judiciary is not the guardian of the law but serves as a conduit through which the CCP exercises its prerogative.[177] The courts do not have the power to review laws enacted by the NPC for their constitutionality but have limited powers of review under the 1990 *Administrative Litigation Law* (ALL), under which it may examine the legality of administrative acts, such as fines and licensing,[178] and more recently after the 2014 amendments, with respect to land use rights, natural resources, and eminent domain.[179] More importantly, the amendments prohibit political interference in administrative litigation; in this regard, while the courts have been generally effective in regulating administrative actions in the past, they have been cautious not to claim independence in doing so.[180] Further, the new Article 53 allows citizens to petition the court to review 'normative documents' (*guifanxing wenjian*) enacted by central ministries and local governments which are inconsistent with the law,[181] and Article 64 authorizes the courts to disregard a 'normative document' in cases brought under Article 53 if it is found to be illegal.[182]

---

173 Fu (n 170) 353–354.

174 On this concept, see generally Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press 2017).

175 Fu (n 19) 174, 181.

176 Xi Jinping, *The Governance of China* (Foreign Language Press 2014) 161.

177 Susan Trevaskes, 'Weaponising the Rule of Law in China' in Flora Sapio et al (eds), *Justice: The China Experience* (Cambridge University Press 2017) 114; Larry Catá Backer, 'Between the Judge and the Law: Judicial Independence and Authority with Chinese Characteristics' (2017) 33 Connecticut Journal of International Law 1, 29.

178 中华人民共和国行政诉讼法 [Administrative Litigation Law], adopted on 4 Apr 1989 by the National People's Congress; revised on 1 Nov 2014 and 27 June 2017 by the Standing Committee of the National People's Congress）('Administrative Litigation Law'), art 12. The concept of 'specific administrative acts' was removed and replaced with 'administrative acts' in the 2014 revision of the Administrative Litigation Law.

179 全国人民代表大会常务委员会关于修改《中华人民共和国行政诉讼法》的决定 [Decision of the Standing Committee of the National People's Congress on Amending the Administrative Litigation Law of the People's Republic of China], adopted on 1 Nov 2014 by the National People's Congress Standing Committee) <http://news.sina.com.cn/c/2014-11-01/211731080827.shtml> accessed 23 Jul 2019. The revision was likely intended to address some of China's most imperative socio-political problems.

180 Xin He, 'The Party's Leadership as a Living Constitution in China' in Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 156.

181 Normative documents refer to the regulatory or policy documents issued by governments that are not formal rules or regulations of general binding force, but still impose binding obligations on citizens.

182 Administrative Litigation Law (n 178), art 64.

Following the 2014 amendments to the ALL, the SPC issued its 'Judicial Interpretation on the Application of the Administrative Litigation Law'[183] to empower the courts to initiate a post-adjudication process of communication with the promulgating authority of an illegal normative document, and make 'judicial proposals' to the government for an amendment or even repeal of the document.[184] It is however not entirely clear whether the courts may impose an obligation on the government to respond to such proposals.[185] Recent developments concerning constitutional review have also made it increasingly possible for the judiciary to eventually acquire the power to review the constitutionality of legal enactments. The Report of the 19th CCP National Congress made 'law-based governance' part of Xi Jinping's political agenda in transforming China to a 'new era',[186] of which a priority is to 'advance constitutionality review'.[187] More significantly, this change has begun to be interpreted as an implicit authorization for judges to decide on the constitutionality of both legal enactments and the acts of government and state officials,[188] even though it is not entirely clear whether this is the CCP's official intent. If one may infer from China's recent judicial reforms, it is that the role of the judiciary is in flux, and the party-state faces a conundrum as to the nature of the role the judiciary should play within the evolving constitutional framework. This is where Singapore may offer some important insights.

III. JUDICIAL POWER AND THE RULE OF LAW UNDER THE SINGAPORE MODEL

As a country borne out of a tumultuous period following its separation from the Federation of Malaysia in 1965, Singapore's success may be attributed to the government's pragmatic commitment to the rule of law resting on a strong judiciary to ensure law and order, to attract foreign investment to drive Singapore's economic growth, and to promote good governance and eradicate corruption.[189] The rule of law in Singapore is applied with 'hard-nosed

---

[183] 最高人民法院关于适用《中华人民共和国行政诉讼法》的解释 [Judicial Interpretations of the Supreme People's Court of China on the Application of the Administrative Litigation Law of the People's Republic of China], 法释（2008）1号, adopted on 13 Nov 2017 and effective as of 8 Feb 2018 <http://www.court.gov.cn/zixun-xiangqing-80342.html> accessed 5 Aug 2019.

[184] ibid, arts 148, 149.

[185] Wei Cui et al, 'Judicial Review of Government Actions in China' (31 May 2018) 19 <https://ssrn.com/abstract=3228175> accessed 11 Jul 2019.

[186] 习近平（Xi Jinping）, '决胜全面建成小康社会夺取新时代中国特色社会主义伟大胜利 [Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era]', report delivered at the 19th National Congress of the Communist Party of China, 18 Oct 2017, Part VI: 4, <www.chinadaily.com.cn/interface/flipboard/1142846/2017-11-06/cd_34188086.html> accessed 23 Jul 2019.

[187] ibid. See also '全国人大常委会已开始对合宪性审查进行研究部署 [The National People's Congress Standing Committee Has Already Started Work on How to Implement Constitutionality Review]' (法制日报 [Legal Daily], 16 Jan 2018) <http://www.xinhuanet.com/legal/2018-01/16/c_1122263379.htm> accessed 23 Jul 2019. While it is not the first time that constitutional review has entered into the legal discourse in China, this was the first time this issue was discussed in CCP's 'highest-level' document.

[188] '推进合宪性审查 完善宪法监督制度 [Promoting Constitutionality Review, Perfecting the System of Constitutional Compliance]' (中国青年报 [China Youth Daily], 24 Oct 2017) <http://cpc.people.com.cn/19th/n1/2017/1024/c414305-29605827.html> accessed 23 Jul 2019.

[189] K Shanmugam, 'The Rule of Law in Singapore' [2012] Singapore Journal of Legal Studies 357; Menon (n 107) 417–420.

practicality' to suit its own circumstances, which 'is designed to enable strong and effective government', where '[l]aws can be passed and policies implemented quickly'.[190] For example, as an exception to due process, judicial review is circumscribed with respect to national security matters, which are considered unsuitable for adjudication.[191]

A. *Rule of Law, Economic Development, and Good Governance*

In the economic realm, even Singapore's harshest critics would acknowledge its success in its rule of law as instrumental towards its emergence as a modern economic miracle, with Singapore's gross domestic product per capita rising from approximately US$516 during its independence in 1965 to about US$57,000 today.[192] As Kevin Tan writes, Singapore's judiciary through its history 'has responded to the demands of the markets and business interests' and 'has been made "as efficient as the best businesses" by a government that has long understood the importance of the need for its legal system to provide the Weberian stability required for capitalist expansion and development'.[193] As one of the world's financial centres, the courts are conscious of the need to signal 'credible commitments' in the economic sphere by providing an impartial and efficient venue for dispute resolution.[194] To this end, the judiciary instituted reforms in the 1990s to clear its backlog of cases and improve the efficiency of case management,[195] and Singapore's legal framework is today regarded as the most efficient in the world in settling disputes.[196] Under the framework of business-friendly legislation, the Singapore courts have developed a strong corpus of jurisprudence for investor protection,[197] which has been arguably pivotal in helping it sustain the high level of foreign direct investment relative to its size till today.[198]

B. *The Judiciary as Co-Equal Partner and the Principle of Legality*

The Singapore judiciary has been generally conservative in its exercise of judicial review by maintaining a careful balance between according the executive and legislature broad latitude to act decisively in the public interest,[199] and, at the same time, subjecting their powers to legal limits under the overarching principle of legality.[200] This prevailing judicial philosophy is best encapsulated by the former Singapore Chief Justice who stated that in Singapore, judicial

---

190 Shanmugam (n 189) 358–360.

191 ibid 363.

192 World Bank, 'GDP per capita (current US$)' <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2017&locations=MY-SG-Z4&start=1960> accessed 9 Jul 2019.

193 Tan (n 130) 228, 262.

194 ibid 258–259.

195 Waleed Haider Malik, *Judiciary Led Reforms in Singapore: Framework, Strategies and Lessons* (World Bank 2007) xxi–xxii.

196 World Economic Forum (n 147) 513.

197 World Bank, 'Doing Business 2018: Reforming to Create Jobs' (2018) 191 <www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full-Report.pdf> accessed 9 Jul 2019.

198 Shanmugam (n 189) 358.

199 See Sundaresh Menon (Chief Justice of Singapore), 'Executive Power: Rethinking the Modalities of Control' (Annual Bernstein Lecture in Comparative Law, Duke University School of Law, 1 Nov 2018) para 62 <www.supremecourt.gov.sg/docs/default-source/default-document-library/(bernstein-lecture-2018)-lecture-(final)-(amended-16-november-2018).pdf> accessed 11 Jul 2019.

200 See eg *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 37 [46].

independence means that judges should not adjudicate with parliamentary or executive approval in mind and should not be afraid of invalidating unconstitutional legislation or ultra vires executive acts for fear of a negative reaction, but at the same time respect Parliament's prerogative and interpret legislation in accordance with its purposes as intended by Parliament.[201] Where the executive has the people's welfare at heart, he argues, judicial review, if exercised properly, is for the executive's benefit as it enables the executive to comply with the law and act in the public's interest; where the executive respects the independence of the judiciary, it will accept its decisions and correct or modify its decisions to conform to the law or it can seek support from Parliament to amend the law.[202] Judicial review, he explained, deals with 'bad governance but not bad government. General elections deal with bad government' and is 'a function of socio-political attitudes in the particular community'.[203] Such a judicial philosophy is informed by the belief the courts serve as neutral umpires and 'equal partners in a common venture, which is to advance the best interests of the nation, but with differentiated responsibilities', and that 'judicial review is most effective when an environment of trust and respect prevails such that the other branches pay careful heed to the Judiciary's view'.[204]

The cases of *Chng Suan Tze v Minister for Home Affairs*[205] and *Tan Seet Eng v Attorney-General*[206] are instructive of this constitutional dialogue between the judiciary and the executive and legislature. *Chng Suan Tze* concerned the validity of preventive detention orders made by the executive under the *Internal Security Act*[207] of persons accused of a conspiracy to subvert the country and establish a Marxist state. The Court of Appeal departed from a previous precedent that national security issues are non-justiciable and preventive detention orders based on national security grounds depend simply on the President's 'subjective' satisfaction. Instead, it stated that 'the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.'[208] The court, thus, introduced an 'objective' standard of review, but ultimately invalidated the detention orders on technical grounds on the basis that the government had failed to provide evidence of the President's satisfaction.[209]

The judiciary, thus, kept the executive accountable for its failure to comply with the legal procedural requirements. In compliance with the decision, the detainees were released by the government but were re-arrested and served with new detention orders.[210] After the decision, Parliament passed constitutional and statutory amendments to limit the scope of judicial review over such detention orders to issues with respect to the compliance of the relevant procedural requirements, and to reinstate the 'subjective' standard of review.[211] This was on the basis, inter alia, that the courts should not play an interventionist role in national security matters for which the government is accountable.[212] When one of the re-arrested detainees subsequently

---

201 Chan (n 79) 242–243.
202 ibid 243–244.
203 ibid.
204 Menon (n 199) para 65.
205 *Chng Suan Tze v Minister for Home Affairs* [1988] SGCA 16, [1988] 2 SLR(R) 525.
206 *Tan Seet Eng v Attorney-General* [2015] SGCA 59, [2016] 1 SLR 779.
207 Internal Security Act (Cap 143, 1985 Rev Ed), s 8.
208 *Chng Suan Tze* (n 206) [86].
209 ibid [139]. The Court noted that under the 'objective' test, 'it has to be shown to the court that considerations of national security were involved', but '[t]hose responsible for national security are the sole judges of what action is necessary in the interests of national security': [88]–[89].
210 Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017) 75. See *Teo Soh Lung v Minister for Home Affairs* [1990] SGCA, [1990] 1 SLR(R) 347.
211 ibid; Singapore Constitution, art 149; Internal Security Act, ss 8A–8C.
212 Singapore Parliament, Constitution of the Republic of Singapore (Amendment) Bill, 25 Jan 1989, Singapore Parliament Reports, vol 52, cols 465–473 (Minister for Law (Prof S Jayakumar)).

challenged her detention, the Court of Appeal affirmed the amendments and found that the government had the necessary factual basis in issuing the detention order.[213]

In *Tan Seet Eng*, the appellant challenged his detention under a separate statute, the *Criminal Law (Temporary Provisions) Act* (CLTPA).[214] The Court of Appeal held that the CLTPA only permitted detention for activities of a sufficiently serious nature harmful to public order within Singapore. On the basis that the Minister's grounds for the appellant's detention failed to disclose how his activities had caused harm within Singapore, the Court ordered his release.[215] After the decision, the executive released a statement that it accepted the Court's judgment, and subsequently issued a new detention order with detailed grounds in compliance with the court's decision.[216] Notably, the Ministry of Home Affairs decided, on its own motion, to release three other detainees and explained that it found that its detention orders did not comply with the Court's decision.[217] More importantly, Parliament subsequently amended the CLTPA to codify the law as set out in the decision.[218]

The cases above demonstrate that the court serves as an impartial referee by playing 'a supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law'.[219] As the current Singapore Chief Justice has stated, its approach is informed by the belief that 'the court which is respected by the other branches of government can effectively shape the debate and ensure the legality of government actions by setting out its concerns openly and potentially obviating a binary clash between the Judiciary and the Executive'.[220] On the basis of the principle of legality, therefore, the courts have observed that the Attorney-General's prosecutorial powers,[221] the President's clemency powers,[222] and even the Prime Minister's discretion to call a by-election[223] are subject to legal limits.

C. *Judicial Independence in Singapore and Fidelity to Law*

Notwithstanding the absence of an express provision under the Singapore Constitution, the judiciary has claimed for itself the power to adjudicate on the constitutionality of laws and executive action, a claim which the government has respected,[224] but has exercised such

---

213 *Teo Soh Lung* (n 210) [20]–[21], [35], [43]–[44].

214 Criminal Law (Temporary Provisions) Act (Cap 67, Rev Ed 2000).

215 *Tan Seet Eng* (n 206) [137], [147]–[148].

216 Ministry of Home Affairs, 'MHA Statement on Detention of Dan Tan Seet Eng' (5 Dec 2015) https://www.mha.gov.sg/newsroom/press-release/news/mha-statement-on-detention-of-dan-tan-seet-eng> accessed 20 Jun 2019.

217 Ministry of Home Affairs, 'MHA Statement on Three Members of Match-fixing Syndicate Released from Detention and Placed on Police Supervision Orders' (18 Jan 2016) <https://www.mha.gov.sg/newsroom/press-release/news/mha-statement-on-three-members-of-match-fixing-syndicate-released-from-detention-and-placed-on-police-supervision-orders> accessed 20 Jun 2019.

218 Ministry of Home Affairs, 'Second Reading of the Criminal Law (Temporary Provisions) (Amendment) Bill - Speech by Mr K Shanmugam, Minister for Home Affairs and Minister for Law' (6 Feb 2018) <https://www.mha.gov.sg/NewsRoom/in-parliament/parliamentary-speeches/news/second-reading-of-the-criminal-law-(temporary-provisions)-(amendment)-bill---speech-by-mr-k-shanmugam-minister-for-home-affairs-and-minister-for-law> accessed 20 Jun 2019.

219 Chan (n 112) 471–472, 479–480.

220 Menon (n 107) 421.

221 *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2, [2012] 2 SLR 49.

222 *Yong Vui Kong v Attorney-General* [2011] SGCA 9, [2011] 2 SLR 1189.

223 *Vellama d/o Marie Muthu v Attorney-General* [2013] SGCA 39, [2013] 4 SLR 1.

224 Chan Sek Keong, 'The Courts and the Rule of Law in Singapore' [2012] Singapore Journal of Legal Studies 209, 216.

powers sparingly.[225] Singapore's judicial approach has been characterized as one driven by the values of stability and 'statist pragmatism' in its earlier phases which has evolved toward one driven by 'principled pragmatism'.[226] The role of the Singapore judiciary, as affirmed by the Court of Appeal, is 'to furnish an *independent, neutral and objective* forum for deciding, on the basis of objective rules and principles (*inter alia*), what rights parties have in a given situation'.[227] In view of its institutional limits and the constitutional prerogatives of the other branches of government, [228] judicial power includes deciding upon the legality of government actions,[229] but does not entail intruding into policy-related matters, which are to be decided and resolved by the political branches.[230] The Singapore judiciary has thus been careful not to 'judicialize' politics, which distinguishes it from its more outcome-oriented 'activist' counterparts elsewhere.[231]

Accordingly, to ensure that it does not exceed its mandate, the judiciary has employed several tools in its exercise of judicial review. It has observed that there is a 'presumption' of constitutionality and legality in relation to statutes enacted by Parliament and the exercise of executive powers respectively.[232] It has employed the doctrine of non-justiciability, under which they will decline to exercise judicial review over issues of a policy nature, unless there is a question of law involved.[233] It has also generally tended towards a conservative formalist reading of constitutional rights,[234] while subjecting legislative restrictions on constitutional rights to a relatively moderate form of judicial scrutiny.[235] In view of the wording in the Singapore Constitution and Singapore's political culture, the Court of Appeal has observed that it is Parliament which has the 'final say' on how the constitutional balance should be struck between free speech and reputation.[236] Legislative restrictions on free speech and assembly which Parliament deems 'necessary or expedient' to regulate public order are, thus, constitutionally permissible.[237] A careful distinction, therefore, is drawn between a question of policy or politics, which is beyond the courts' remit,[238] and deciding upon the legal limits of governmental powers, which is a question of law falling within the courts' judicial power.[239]

IV. SINGAPORE'S LESSONS FOR CHINA

---

[225] In one instance when the High Court struck down a provision of the Prevention of Corruption Act (Cap 241, Rev Ed 1993), it was overturned on appeal: *Public Prosecutor v Taw Cheng Kong* [1998] SGCA 37, [1998] 2 SLR(R) 489.

[226] Thio Li-ann, 'Principled Pragmatism and the "Third Wave" of Communitarian Judicial Review in Singapore' in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge 2017) 49.

[227] *Lim Meng Suang v Attorney-General* [2014] SGCA 53, [2015] 1 SLR 26 [7].

[228] Menon (n 199).

[229] *Tan Seet Eng* (n 206) [90].

[230] *Lim Meng Suang* (n 227) [7]–[8].

[231] Yap (n 210) 1–2.

[232] *Taw Cheng Kong* (n 225); *Yong Vui Kong* (n 222).

[233] *Tan Seet Eng* (n 206) [102]–[106].

[234] *Yong Vui Kong v Public Prosecutor* [2010] SGCA 20, [2010] 3 SLR 489; *Rajeevan Edakalavan v Public* Prosecutor [1998] SGHC 2, [1998] 1 SLR(R) 10.

[235] Li-ann Thio, 'Protecting Rights' in Li-ann Thio & Kevin YL Tan (eds), *Evolution of a Revolution* (Routledge-Cavendish 2010). See *Public Prosecutor v Mazlan bin Maidun* [1992] SGCA 90, [1992] 3 SLR(R) 968; *Colin Chan v Public Prosecutor* [1994] SGHC 207, [1994] 3 SLR(R) 209.

[236] *Review Publishing Co Ltd v Lee Hsien Loong* [2009] SGCA 46, [2010] 1 SLR 52 [270]–[285].

[237] *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216, [2006] 1 SLR(R) 582.

[238] *Lim Meng Suang* (n 227); *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] SGCA 56, [2014] 1 SLR 345.

[239] *Tan Seet Eng* (n 206) [90].

Given the contrasting differences between Singapore and China as discussed earlier, it would not be entirely reasonable to expect judicial independence to manifest in precisely the same manner within these two jurisdictions. China's case presents a conundrum concerning the dichotomy between two kinds of public powers: political and judicial. It raises several questions at the crux of the discussion and central to the concept of the rule of law itself: What is the role of the courts? What is the distinction between law and politics? Are both types of public powers indistinguishable in the Chinese context, or should they be kept separate in the distribution of jurisdiction? Ultimately, do we prefer a political or judicial official to act as the arbiter of legality?

Short of prescribing specific judicial reforms in China, it is argued that Singapore's example presents two broad possibilities for China: first, a rule of law framework can be established in which the state respects the autonomy of the courts and the judiciary strictly enforces the law enacted by the state; second, judicial pragmatism in the exercise of judicial power enables the courts to ensure that governmental power is exercised in accordance with the principle of legality but without subverting the prerogatives of the executive and legislature.

A. *Reconfiguring Judicial Independence in China: A Cornerstone of Legitimacy and Good Governance*

A key component of the success of the Singapore model, as seen, is that the rule of law enforced by an independent judiciary reinforces the state's legitimacy and facilitates economic development and good governance in a party governed by a strong state. In supporting the independence of the Singapore judiciary, then-Senior Minister Lee Kuan Yew explained to the Singapore Parliament in 1995 that:

> when the Government, including me, takes a matter to court or when the Government is taken by private individuals to court, then the court must adjudicate upon the issues strictly on their merits and in accordance with the law. To have it otherwise is to lose us our standing and to lose us our status as an investment and financial centre…The interpretation of documents, of contracts in accordance with the law is crucial. Our reputation for the rule of law has been and is a valuable economic asset, part of our capital, although an intangible one. It has brought to Singapore good returns from the MNCs, the OHQs, the banks, the financial institutions, and the flood of capital to buy up properties in Singapore. A country that has no rule of law, where the government acts capriciously is not a country wealthy men from other countries would sink money in real estate.[240]

This was affirmed by former Singapore Chief Justice Chan, who stated that the role of the judiciary 'remains unchanged regardless of whether the political system is dominated by one political party, that is, to resolve any justiciable disputes between the state and its citizens according to the law'.[241]

On this premise, the conception of 'judicial independence' may be reconfigured from that of a threat to the viability of the Chinese party-state to a cornerstone of its legitimacy and good governance, along with a paradigm shift in its understanding that compliance with its own laws is in the long-term interest of the Chinese party-state as a form of self-restraint and

[240] Singapore Parliament, Independence and Integrity of Singapore's Judiciary, 2 Nov 1995, Singapore Parliament Reports, vol 65, col 236 (Senior Minister (Mr Lee Kuan Yew)).

[241] Chan (n 112) 471.

accountability within its constructed framework of legality. Naturally, this engenders the necessity for the party-state to respect the authority of the judiciary to adjudicate independently so long as the courts carry out their mandate of interpreting and applying the laws according to their intent within their institutional limits. This does not necessarily preclude the legislature from amending the laws to overrule the courts, provided that such legislative overruling is applied generally and prospectively.[242] In turn, by ensuing that it conforms with the law, the Chinese state may reinforce its legitimacy and strengthen its governance framework along with its ongoing reforms.

It may be asked, however, whether an independent judiciary in China can co-exist with the absence of the separation of powers[243] given the supremacy of the NPC (or the party-state), which represents the will of the people under the socialist PRC Constitution.[244] In this regard, the issue of judicial independence and its feasibility should be distinguished from the separate but related issue of the extent of judicial power permissible in the Chinese context.[245] By way of analogy with the UK, de jure (if not de facto) judicial independence may co-exist with legislative supremacy even if judicial power is limited under the Diceyan conception of the rule of law in which Parliament (and by extension the party with the majority therein) is sovereign.[246]

Further, there is no single path toward achieving judicial independence that may be implemented in a broad variety of institutional arrangements. In the absence of the formal separation of powers as such in China, it calls for a more carefully defined institutional design which demarcates the institutional boundaries to mitigate the potential conflict of interests which may arise with the judiciary's proximity to the government bureaucracy, and to ensure a clearer 'separation of functions' as contemplated by the PRC Constitution. The institutional practices of civil law systems may serve as a point of reference where judges serve as civil servants as part of a professional judiciary with the judicial function restricted to a mechanical application of the law with a limited interpretive function, along with the establishment of constitutional and administrative courts which are not part of the ordinary judicial system but share proximate historical links with the legislature and executive's public administration, respectively.[247]

In a sense, allowing for a protective wall and ensuring functional independence of the judiciary – albeit subsumed within party-state leadership – may form a facet of the CCP's

---

[242] Shimon Shetreet, 'Judicial Independence and Judicial Review of Government Action: Necessary Institutional Characteristics and the Appropriate Scope of the Judicial Function' in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press 2010) 199.

[243] Arguably, the separation of powers in the Madisonian tradition has historically been somewhat a legal fiction even in polities defined by the principle. See Daryl J Levinson & Richard H Pildes, 'Separation of Parties, Not Powers' (2006) 119 Harvard Law Review 2311.

[244] See generally Larry Catá Backer, 'The Party as Polity, The Communist Party, and the Chinese Constitutional State: A Theory of State-Party Constitutionalism' (2009) 16 Journal of Chinese and Comparative Law 101.

[245] See discussion at Part I above.

[246] Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, 8 ed (Macmillan 1927) 402. See the Constitutional Reform Act 2005, which was passed by the UK Parliament to institutionalize the independence of the judiciary by establishing new lines of demarcation between the executive and the judiciary and creating the Supreme Court which was separate from Parliament. Even at a time when the English judiciary was not fully separate from the Crown, the autonomy of the courts was made clear in one of the earliest cases by the English court in 1607 on the basis of the fundamental distinction between executive and judicial power: *Prohibitions del Roy* (1607) 12 Co Rep 63; 77 ER 1342.

[247] This is the case in Europe: Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 818; John Bell, Sophie Boyron & Simon Whittaker, *Principles of French Law* (Oxford University Press 2008) 39–41; John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press 2007) 34–47.

source of China's party-state constitutionalism,[248] in which the judiciary is provided with sufficient decisional space and engages in constitutional dialogue with the other branches within the CCP's constitutional structure.[249] By engaging in constitutional dialogue with the other branches, the courts may serve as a legitimate participant in the institutional process by signalling their views to other constitutional actors. This allows the political branches the opportunity to reconsider the status quo by amending the law or rectifying legal ambiguities. In doing so, the judiciary acknowledges their constitutional prerogatives of law-making, which pre-empts criticism or retaliation from the political branches and enhances its legitimacy as a constitutional actor.[250] How the Chinese courts can negotiate this challenging process in the context of existing socialist predilections could determine their legitimacy and effectiveness during and beyond the current spate of reforms.[251]

B. *Reconceptualizing the Judicial Role in China: Fidelity to Law*

In the Chinese context, where the courts have a limited role in checking the powers of the other branches in view of the sovereignty of the NPC (or the party-state), judicial independence can only be meaningful in one context – the courts' fidelity to law. [252] Whilst the role of the judge in a Marxist-Leninist state differs from that in a common law or civil law state in its limited interpretive function, the judge can play an instrumental role in applying the law impartially as an administrative agent of law.[253] Judicial fidelity to law would then be the true reflection of judicial independence in China. On the basis of fidelity to the written law, Chinese judges should thus aim to apply the laws in accordance with their purpose as intended by the legislature and be careful not to 'judicialize' politics beyond its institutional limits.

Singapore's case illustrates that by playing a supportive non-confrontational role in applying the law independently and articulating clear rules by which the government should abide, the judiciary can enhance its legitimacy and effectively shape the debate and ensure the legality of government actions without subverting the role of the legislature and executive.[254] As opposed to a relationship of 'confrontation and containment informed by mutual distrust and self-preservation', the judiciary can work in 'partnership and cooperation' with the other branches of government in a common endeavour to promote sound administration and good and proper governance within a framework of governance and legality, to which the judiciary contributes by ensuring that they act in accordance with the rule of law.[255]

C. *Limitations to Reforms*

In light of the complexity of the politico-legal, cultural, and economic dynamics at play, more needs to be done to expand the scope of inquiry to the extent to which China may draw lessons from the Singapore model. As a first step, we have set out certain avenues of inquiry that may inform future discussions. First, one may ask whether judicial independence is appropriate in

---

[248] See generally Backer (n 244).
[249] See Zhu (n 166) 57.
[250] See Jaclyn L Neo, 'Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication' in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge 2017) 96–97. See also Menon (n 37) paras 53, 57.
[251] See Neo (n 250) 96–97.
[252] See Chan (n 79) 249.
[253] Backer (n 177) 29.
[254] Menon (n 107) 420–421.
[255] Menon (n 199) para 43.

China given the relatively weak state of the courts and scarce resources, and whether courts are the appropriate forum for resolving certain disputes, given the level of economic development, the court's status, the relationship of the judiciary to other political organs, and the competence and integrity of judges.[256] The vast differences in size, complexity, and level of development between China and Singapore means that the process of legal development is likely to be much more uneven, difficult, and protracted in China. As a developing legal system, judicial reforms in China have to be pursued incrementally alongside complementary institutional reforms in the judiciary and the wider legal system, taking into account its resource constraints and the scale and complexity of China's court system.[257] Enhancing judicial professionalism and accountability and eradicating judicial corruption may be more important priorities than judicial independence in the short term. Further, China's distinct Confucian norms which downplay adjudication and its civil law tradition may influence the role which judges may play, but they should not be overstated as impeding judicial independence per se.[258]

A further crucial question is whether judicial independence is possible without democracy. Existing research suggests that the extent of 'judicialization' is co-related with the level of democratization,[259] but a reasonable degree of judicial independence is nonetheless possible in an authoritarian state to the extent that it supports legitimacy by enhancing economic development and improving governance.[260] Given the slim possibility of China transitioning into a liberal democracy in the foreseeable future, it would be unrealistic to expect judges to play a more influential role. At the very least, however, China's judiciary should arguably be given sufficient independence to interpret and apply the laws enacted by the state on the basis of its constitutional responsibility and as an integral component of 'governing the nation in accordance with law'.

V. CONCLUDING OBSERVATIONS

It has been observed that '[in] framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself'.[261] In this respect, it would be reasonable to ask whether there will be any meaningful constraints on the state under China's socialist rule of law. This is far from clear and would require a fundamental shift in the constitutional order to reconfigure the institutional balance of power, as well as a normative commitment by the state to the rule of law as an intrinsic value. In the absence of such developments occurring in the near future, an independent judiciary is an essential component of the most minimal rule-of-law state to which China should aspire.[262] Judicial independence is not a mere institutional form; it is a necessary but insufficient good, and its success is

---

[256] Fu Yulin & Randall Peerenboom, 'A New Analytic Framework for Understanding and Promoting Judicial Independence in China' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010) 132–133.

[257] See Michael J Trebilock & Mariana Mota Prado, *Advanced Introduction to Law and Development* (Edward Elgar Publishing 2014) 62.

[258] See Roderick A MacDonald & Hoi Kong, 'Judicial Independence as a Constitutional Virtue' in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 846–852.

[259] Yap (n 210).

[260] Moustafa & Ginsburg (n 71) 4–10; Bernd Hayo & Stefan Voigt, 'Explaining De Facto Judicial Independence' (2007) 27 International Review of Law and Economics 269, 271.

[261] James Madison, 'The Federalist No 51' in Jacob E Cook (ed), *The Federalist* (Wesleyan University Press 1961) 347.

[262] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) 5–6.

predicated on a state of mind and a culture of legality, which is perhaps the most important lesson that can be learnt from Singapore's experience. Contrary to claims that such reforms may serve as an apology for power in China, it is hoped that such reforms may lay the foundation for normative constitutionalism in the future.

In deciding the appropriate role the courts should play, the distinction is one between standards and outcomes. The constitutional role of the courts is not to effect specific outcomes for particular situations – it is the legal standards to which political actors must adhere, as opposed to the outcome, that are the court's concern and responsibility.[263] This provides a foundation for the relationship between the government and courts which is premised on their common objective to improve the quality of governance.[264] Arguably, the judiciary should be entrusted with this function as it is essentially reactive, with 'neither Force nor Will, but merely judgment'[265] It is indeed the 'least dangerous' branch of government,[266] especially in a dominant party state.

[263] Sir John Laws, 'Concluding Comments: Judicial Review's Constitutional Home' in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press 2010) 441–443.

[264] ibid.

[265] Alexander Hamilton, 'The Federalist No 78' in Jacob E Cook (ed), *The Federalist* (Wesleyan University Press 1961) 523.

[266] ibid 522.