

---

## Introduction

Despite the consolidation of Communist power and the encouragement of President Xi Jinping’s cult of personality (Economy, 2019; Hernandez, 2018; Hernandez & Carlsen, 2017), the People’s Republic of China (PRC) has also moved to expand judicial autonomy during Xi’s term in office. As recently as 2016, *The New York Times* claimed that “China Grants Courts Greater Autonomy on Limited Matters” (Johnson, 2016), while *The Wall Street Journal* noted in 2014 that “China Tries to Hold On to Judges by Offering Freer Hand” (Chin, 2014) and *The Economist* opined that “Judges are Often Impotent in China’s Courtrooms. That Might Be Changing” (*The Economist*, 2014).

In the years leading up to these headlines (2012–2014), I conducted nearly 15 months of in-China fieldwork, during which I also documented significant variation between urban court systems in China (Shanghai, Shenzhen, and Chengdu) regarding critical elements of personal judicial autonomy and the implementation of judicial selection and promotion mechanisms (Brinks & Blass, 2018; Peerenboom, 2010). Competitive promotion systems for mid-ranking judges in some case study localities featured enhanced transparency, competition, and the routinization of judicial promotion procedures that departed from previous systems of direct nomination and appointment by local Party leaders. Local variation regarding these judicial promotion mechanisms also tracks with other differences regarding these courts’ compliance with transparency mandates, judicial opinion writing, and the use of mediation in courts. In an otherwise formally unitary political system, why would court systems in some large urban localities have employed more autonomous judges, while other urban courts have moved more slowly with similar reforms?

The extant literatures on comparative courts and Chinese judicial politics do not explain this local variation in judicial autonomy between similarly developed localities in a single-county authoritarian setting. This is not to say, however, that recent scholarly work has not significantly advanced our understanding of China’s court system in the late

post-Mao reform era. Ng and He, for instance, provide a rich account of court decision-making in China, examining a wide variety of courts, judicial actors, and possible factors influencing judicial work (Ng & He, 2017). Although the authors find substantial local variation in the ways that courts are embedded in their local contexts, especially between urban and rural courts, their findings do not say much about differences between urban localities, nor do the authors provide a research design aimed at the systematic explanation of specific patterns of local variation. Yuhua Wang's approach, by contrast, analyzes data at varying levels (a multilevel time-series and cross-sectional research design) to draw more verifiable conclusions regarding the political subtleties of court reform in China at the local level. Wang's "demand-side" theory argues that in localities where foreign-invested enterprises from outside the "China Circle" of Taiwan, Hong Kong, and Macao are significant players in the local economy, "local governments must tie their hands and build a strong court system" (Y. Wang, 2015, p. 43), thereby establishing a partial rule of law limited to economic and commercial affairs (i.e., allowing for instrumental use of law and courts in criminal and politically sensitive cases).

Although Wang's book provides many insights, including the suggestion that national leaders have an interest in using partial rule of law as economic infrastructure and that the nature of foreign investment can influence judicial outcomes, Wang's finding that foreign investors have tended to credibly lobby local governments of PRC for changes and increases in autonomy to the local courts might not necessarily apply throughout China. Companies tend to avoid court if possible, and concern regarding unfair courts and judges, for instance, is not mentioned by US company officials surveyed regarding the in-China business environment by the US-China Business Council between 2013 and 2019.<sup>1</sup> This is not to suggest that foreign companies face no business obstacles in Chinese courts, but these survey results seem to be inconsistent with a theory that judicial impartiality is a problem of such magnitude that foreign businesses would devote the substantial resources needed to move the needle on this topic at the local level in China.

State-centered, "top-down" approaches of court reform in China also present potential alternative theoretical explanations, especially considering the extent of state and Chinese Communist Party's (CCP) involvement in

<sup>1</sup> US-China Business Council Member Surveys regarding the business environment in China can be found for 2019 and several previous years at the following website: [www.uschina.org/reports/uscbc-2019-member-survey](http://www.uschina.org/reports/uscbc-2019-member-survey). Relevant PDF copies of surveys are on file with the author.

court politics in China, as well as the importance of reforms at the national level occurring in 2014–2016. Zhu Suli finds, for instance, that the CCP is “the major force mobilizing, promoting, and implementing reform within the judiciary” in contemporary China, an approach similar to that of Li (Ling Li, 2012; Zhu, 2010, pp. 52–53). However, state-centric perspectives can also neglect changes in the degree of state intervention in the law and the legal system’s own response to the state. In the context of headlines that opened this chapter, it also appears that central state- or party-centric explanations of judicial reform do not sufficiently account for the possibility that local dynamics can create pressure for national-level reform. Why would the PRC Party-State have partially augmented judicial autonomy in the reforms of 2014–2016 during an era of broader authoritarian consolidation?

To take the Party’s official rationale – that it was seeking to root out corruption and limit local protectionism in the judiciary – at face value would obscure the full picture of court reform dynamics, especially those in urban China, which unfolded over the course of several years. Rather than a sudden epiphany, national judicial reforms beginning in 2014 were a partial acknowledgment that underlying factors, many of which can only be understood when examining local-level detail in China, have motivated the Party leadership’s outlook on the court system. As explained in more detail throughout this book, the economic reforms implemented under Deng Xiaoping (after 1978) ushered in an era of unprecedented construction, deregulation, and re-regulation of the private legal profession (including vastly expanding the number of lawyers who were employed to consult and represent inbound foreign investors and their joint venture partners), which have placed intense pressure on local courts and governments to staff the legal institutions so critical to China’s economic development over the past four decades (Alford, 1995; Blecher, 2003; S. Liu & Wu, 2016; Peerenboom, 2002; Stern & Li, 2016). In particular, the high-end legal service markets that have proliferated in urban China since 1992 offer judges potentially lucrative alternative careers (S. Liu & Wu, 2016), threatening court leaders’ abilities to retain well-qualified judges to staff their courts. When young, talented judges can easily quit their jobs and find high-paying local employment as lawyers, court leaders have sought to retain these judges by resorting to one of the only methods at their disposal for stemming judicial attrition: strategically reforming promotion mechanisms and increasing overall court transparency. More competitive and transparent promotion clarifies the path to career success for ordinary, mid-ranking judges, providing ordinary judges with greater assurance of upward career mobility.

Table 1.1. *Periodization of political–legal reform in post-Mao China, with focus on 1992–2016*

Years	General characteristics of political–legal reforms during the period
1966–1976	Cultural Revolution Decade; courts highly politicized, especially during early years of Cultural Revolution, but continue functioning; law schools largely shuttered and lawyers still almost entirely marginalized in the wake of the Anti-Rightist Campaign
1976–1992	Post-Mao leadership succession struggle; Deng Xiaoping develops a legal system for a variety of purposes, including support for economic liberalization and political control; pre-1989 gains in construction of the legal profession give way to foreign investment flight and domestic reform uncertainty; the state still possesses ownership over 98% of law firms in 1991
1992–2001	<b>Resumption and acceleration of liberalizing economic reforms and plans for WTO accession; foreign law firms’ presence in China legalized in 1992; only 22% of law firms are state-owned in 2002</b>
2001–2014	<b>Privatization and internationalization of legal profession continue in the aftermath of WTO accession; development of legal profession varies by locality (discussed in detail in Chapter 4); courts begin to implement reforms to judicial selection and promotion (discussed further in Chapter 5)</b>
2014–2016	<b>National judicial reforms separate civil service and court bureaucracies, allowing for increases in judicial remuneration, professionalism, and status across the country</b>
2016 and beyond	Broad judicial and legal retrenchment in the context of law-related political and economic paradigm shifts, both domestic and international (examined in more detail in Chapter 7)

Ultimately, court leaders’ decisions to reform promotion mechanisms produced the variation in judicial autonomy that I observed in my field-work (Kinkel, 2015).

Reflecting a broadly historical institutionalist perspective, Table 1.1 provides a basic periodization of these developments, with the 1992–2016 period in bold to highlight its significance to the main argument of this book.

Aside from highlighting that the period between 1992 and 2016 has been especially important in the development of the court and legal system in China, Table 1.1 indicates that a period of legal retrenchment has also occurred in the wake of 2016 reforms, a topic taken up in more detail in Chapter 7 of this book. Taken together, these developments have led over time to gradual, intertwined spatial differentiation of local legal service markets and expansions of personal judicial autonomy in urban China, demonstrating the value of closely studying legal reforms during the 1992–2016 period.

### A New Theoretical Approach to Court Reform in China

In making this argument, this book draws upon historical institutionalist and social ecology approaches to explain change in China's urban legal system. The temporal parameters placed on this study illuminate changes in China's court system over time that involve historical institutional layering, or "incremental amendments to existing rules or the enactment of new rules without voiding others" (Tsai, 2016). To understand how layered institutions can produce local level variation, I also employ human ecology-based approaches to organizational change, which find that social forms of law can change through interaction and cooperative competition between interrelated actors (who cooperate under certain conditions despite individuals' self-interested pursuit of their own survival) (Hannan & Freeman, 1977; S. Liu & Emirbayer, 2016; S. Liu & Wu, 2016; Ng & He, 2017; Park & Burgess, 1969). In urban China, and likely throughout the country, court leaders' professional growth and survival has been intertwined with their courts' collectively assessed performance on quantitative indicators, which itself is tied to the retention of the mid-career judges who can decide cases quickly and accurately. The globally unprecedented growth of the Chinese legal profession in the past two decades has made it difficult to stem the attrition of mid-career, case-deciding judges (S. Liu & Wu, 2016; X. Liu, 2014), and urban court leaders' decisions to strategically reform judicial selection and promotion mechanisms can be seen as an interactive response aimed at preserving court leaders' hierarchical privilege and the basic organizational structure of their courts – all in an environment of competitive cooperation.

The development of local pockets of judicial autonomy in China, as documented in this book, shows that the impetus for greater legal and judicial autonomy, in a rapidly developing authoritarian context, can stem not

from the leadership's conscious realization that autonomous law is needed for development, nor from the social mobilization of professionals or other legal reformers, but rather from the more immediate concerns of legal actors who find themselves in a rapidly changing services market – a professional *ecology* that includes judges as well as lawyers. In this way, even an authoritarian regime has an interest (especially in a context of rapid economic globalization) in reforming its court system to attract foreign investment and, at a more basic level, to serve a dispute resolution function that grows increasingly more complex and labor intensive with each economic expansion.

This book challenges preexisting explanations presented in the comparative law and courts literature regarding the association between economic development and several aspects of legal reform, including constitutional authority, the degree of official corruption, and judicial autonomy (see, e.g., Moustafa, 2007; Trubek & Galanter, 1974). First, the argument of this book challenges a long-standing assumption that democracy is a prerequisite for the political empowerment of judges (Landes & Posner, 1975; Tate & Vallinder, 1995) and examines the various functional roles played by courts in authoritarian regimes, regarding which the role of facilitating trade and investment is particularly relevant here (Ginsburg & Moustafa, 2008; Moustafa, 2007). Moustafa's study of the Egyptian Constitutional Court addresses a common political-economic goal shared by many authoritarian and democratic regimes: facilitating trade and investment and infusing the state with new sources of capital. In Moustafa's analysis, the regime's pursuit of this goal in Egypt surprisingly led to the creation of an autonomous Supreme Constitutional Court with powers of judicial review that "was designed to assuage investor concerns and guarantee institutional constraints on executive actions..." (Moustafa, 2007, p. 5).

To address the shortcomings of existing theories of court reform in China and apply lessons learned from other cases of authoritarian judicial change, I emphasize qualitative methods such as conducting fine-grained, semi-structured interviews and analyzing written source materials to highlight the factors mediating the relationship between economic development and judicial autonomy in China's urban courts. Even the most systematic research on the emergence of judicial autonomy in China often relies on second-hand perceptions of judicial practice to measure the actual outcomes related to judges and courts (Michelson & Read, 2011; Y. Wang, 2015, p. 60). In this book, conversely, I use information taken directly from courts and judges themselves not only to identify the factors

responsible for local variation in Chinese judicial autonomy, but also to cast light on the broader dynamics of judicial autonomy in China and to contribute empirically and theoretically to emerging literature in comparative politics, China studies, and socio-legal research. These sources support the theory, based in the literature on social ecology (S. Liu, 2015), that the variation in outcomes between these three case studies is tied to revenues, remuneration, and labor markets for legal professionals in rapidly developing urban areas, i.e., factors of economic development that are most salient to the professional survival and growth of the judicial leadership tasked with reforming courts at the local level in China.

### *Similar Cases, Different Outcomes*

This study leverages subtle, significant local differences within China, a country of vast size and fragmentation (Lieberthal & Oksenberg, 1988; S. Liu, 2011b; Mertha, 2009), to generate new theories regarding the relationship between economic development and court reform in China. As such, this book adopts an inductive approach to hypothesis generation that explains fine-grained variation between three urban localities in China: Shanghai, Shenzhen, and Chengdu. Such an approach seeks to identify city-level variations in judicial selection mechanisms between these relatively similar, large, important urban centers in China, which then allows for the generation of theories to highlight the precise features of each case that contribute to the variation in outcomes observed in the courts. I narrowed the selection of cases to the specific urban court systems of Shanghai, Shenzhen, and Chengdu to focus directly on differences in judicial autonomy associated with levels of economic development suggested in previous research; accordingly, I selected cases based on variation in local models of reform-era economic development, which helps narrow the range of variation regarding social, economic, and cultural factors that could also serve as explanatory variables for the emergence of differing levels of judicial autonomy (see Tsai, 2007, pp. 152–166). For example, during the primary research period (2012–2014), all three case study cities featured resident populations (*changzhu renkou*) over 10,000,000, well-developed secondary and tertiary sectors, and comparable levels of state sector involvement in the local economy (Shanghai Bureau of Statistics, 2011; Shenzhen Bureau of Statistics, 2011; Chengdu Bureau of Statistics, 2011).

In recognition, however, that “Local idiosyncrasies ... and situated knowledge of the ever-changing political context are all part of the

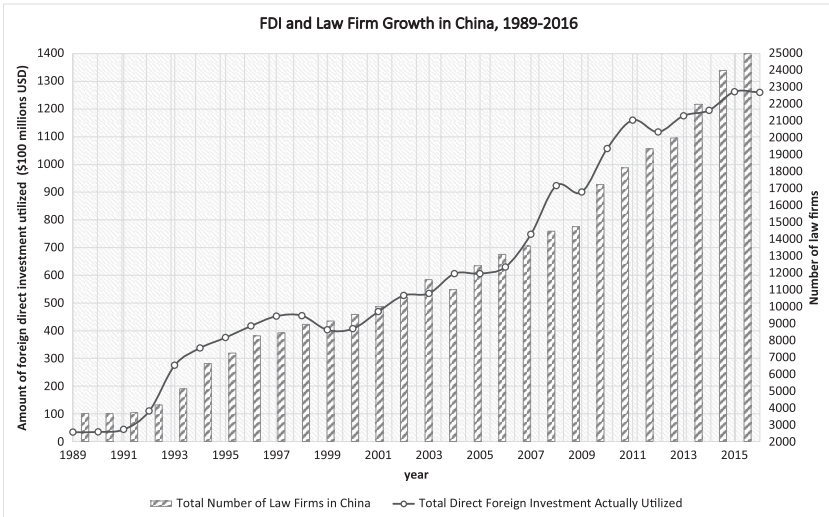
decision-making processes in legal and regulatory governance” (Valverde, 2009, p. 142), these three large urban centers also differ on several factors related to economic development and judicial politics, including the development of private markets for legal services. Geographically speaking, Shanghai, Shenzhen, and Chengdu span coastal and interior geographies of mainland China, which contributes as well to the variation in the local legal profession observed in each case study locality. Especially after 2001, Shanghai and Shenzhen have resembled “high-end” legal services markets, whereas Chengdu has been more characteristic of a “battle-ground” market (S. Liu, 2011a, 2011b); this important typological distinction appears to be associated with more pronounced pressure for judicial reforms in Shanghai and Shenzhen relative to Chengdu, a point that is the focus of Chapters 4 and 5 of this book.

As noted above, this book aims to fuse temporal analysis with the examination of spatial difference in the forms of law and to avoid prioritizing legal geography at the expense of legal history (see Valverde, 2015). As such, the temporal periodization in Table 1.1 highlights the period between 1992 and 2016 because of its importance to the development of the court and legal system in China. After 1992, in the wake of China’s post-Tiananmen recommitment to liberalizing reforms and the subsequent return of substantial foreign investment, internationalization and privatization of legal professionals were rebooted in a wave of economic readjustments that raised the standards, salaries, and status of the legal profession as the speed and magnitude of law firm growth in China in the early twenty-first century reached levels previously unseen in the global history of the legal profession (S. Liu & Wu, 2016, p. 800). The dramatic increase in foreign direct investment (FDI) and law firms is summarized in Figure 1.1.

This book argues that economic development, buoyed by substantial foreign investment inflows during the post-Mao period and the large-scale expansion of the legal profession, has led to court change in urban China<sup>2</sup>: for instance, the legal profession was largely privatized by 2002 (Michelson, 2003, p. 66), and the expansion of China’s legal services market continued through sweeping nationwide judicial reforms in 2014–2016

<sup>2</sup> In this book, the main argument is largely agnostic on the causal mechanisms affecting economic development, FDI, and law firm growth; however, Chapter 7 details a likely causal pathway for FDI to impact law firm growth (which this book then claims influences judicial autonomy), as well as possible strategies for testing this pathway in future research.





**Figure 1.1** FDI and law firm growth. *Sources:* Cai and Yang (2005), Michelson (2003, p. 472), China Law Yearbook (various years), China Yearbook of Lawyers (various years), Stern (2010), Xinhua News Agency (2017).

that unhooked judges from the broader civil service hierarchy. Viewed from a broader perspective, these developments have contributed, at historically significant moments, to intertwined spatial differentiation of local legal service markets and expansion of personal judicial autonomy in urban China, demonstrating the importance of incorporating a temporal approach to the examination of these changes.

### Chapter Summaries

This introductory chapter has summarized both the general contours of local variation in judicial autonomy (the primary focus of the book), and it also poses important questions regarding the timing and scope of judicial personnel reforms at the national level, especially those occurring in 2014–2016 that separated the judiciary from the general PRC civil service bureaucracy. Chapter 2 presents the explanatory theory in fuller detail, demonstrating how a historical-institutionalist framework based on and informed by the insights of social ecology can illuminate the ramifications, for local courts and judicial selection mechanisms, of China's largely post-1978 efforts to construct a legal profession. Chapter 3 lays out the relevant background context of China's judicial system,

including specific details on the Case Quality Assessment System (CQAS, an employee performance evaluation system), and how formal and informal rules under the CQAS have interacted within the structure provided by a Guiding Opinion of the Supreme People's Court (SPC) to incentivize the actions of judges in the PRC.

Chapter 4 is a crucial cog of the book's main argument, documenting spatial and temporal variation in local markets for legal services that aligns with local reforms to judicial promotion mechanisms, the timing of which since the turn of the twenty-first century is consistent with an attempt by court leaders to prevent talented judges from leaving for careers in local law firms. This chapter adopts a macro-level perspective on service sector characteristics that interact with the incentives produced by the judicial evaluation system described in Chapter 3, which provide substantial pressure for the emergence of court institutions that provide judges with more professional careers. To document more precisely how institutional outcomes vary across my court system case studies, Chapter 5 focuses on variations in my outcome variable: personal judicial autonomy. My findings show that the particular patterns of local variation in judicial appointment and promotion in urban China have varied distinctly by case study locality, with promotion mechanisms in Shanghai much more open, competitive, and transparent than, for instance, those in Chengdu. Chapter 6 then examines and critiques a competing, top-down theory based on centralized CCP personnel reforms, showing that even though the Party and the central state have selectively emphasized the bureaucratic specialization and professionalization of China's urban court system, these efforts explain neither the case study variation that I observed during in-country fieldwork nor the timing and scope of the 2014–2016 nationwide judicial personnel reforms.

Chapter 7 devotes more sustained attention to the possibility that the local-level court changes documented in this book account for the much broader, highly publicized national-level judicial reforms launched in 2014. The conclusion also places these changes in a global context that includes international, law-related flare-ups since 2016 related to heightened trade tensions with several nations (including China's largest trading partner, the United States) and ongoing societal and political tensions in Hong Kong. Chapter 7 also considers whether the main findings of the book might apply to debates regarding the autonomy and decision-making of judges in political settings outside of China – authoritarian or otherwise.