WANG Chenguang

Law-making functions of the Chinese courts: Judicial activism in a county of rapid social changes

©Higher Education Press and Springer-Verlag 2006

Abstract The judicial production of law and the legislative production of law make a striking distinction between the two legal traditions. Despite of these differences, judges in both legal traditions in adjudicating cases have a common task, which is the application of legal rules to the facts of cases pending for judgments. The tension between the certainty and the “discretion” is universal for any legal system and, to a certain extent, it poses a hard dilemma for the rhetoric of rule of law. In the transitional countries such as China where rapid social changes and transformations take place, the judiciary and judges can not escape from taking more active roles in interpreting or even law making process. It arouses much controversy, particularly in continental legal traditions, for the judiciary is deemed to perform a mechanical role in adjudicating cases. This article intends to analyze the needs for judicial law-making function in China and its reasons. It reveals that judicial interpretation constitutes an important source of law despite its ambiguous legislative position. The article argues that judicial activism is inevitable against the transitional nature of current Chinese society.
Keywords Continental law tradition, legislative power, separation of state functions, stare decisis, structure of legal rules, judicial interpretation, judicial law-making function, judicial discretion, judicial activism,

It is commonly held that the legal rules in the common law have been developed by the judiciary and legal rules in the civil law are devised and formulated by legal writers (legislators). The judicial production of law and the legislative production of law make a striking distinction between the two legal traditions, although this oversimplified version can be misleading. Despite the fact that the traditional theory of common law denies the law-making function of the judiciary, the progressive idea of judicial law making has been generally acknowledged. A respectable common law judge, Lord Denning, describes the function of judges in common law systems in the following way: “In theory the judges do not make law. They only expound it. But as no one knows what the law is until the judges expound it, it follows that they make it.” In contrast, “in a code system, codes and auxiliary statutes are ‘the law.’ In theory, the courts merely ‘apply’ and ‘interpret’ the law.” “As a general proposition … the civil-law world does not regard judicial

2 Both René David and John Henry Merryman have provided sophisticated and detailed analysis of this distinction. They pointed out that in the common law countries there have been increasing number of statutes and in the civil law countries there are precedents as well. But there are entirely different sets of ideas and assumption associated with the codes and precedents in these two respective legal traditions. In the common law, although statutes proliferate in modern times, they make no pretense of completeness and the judges are not compelled to find bases for deciding given cases within the codes as in the civil law jurisdictions. As to precedents, although civil law judges also make and use them, they reject the doctrine of stare decisis and intend to make judicial decisions fit into the formal syllogism of scholastic logic. It matters little what is the form of legal rules and whether there are precedents. The gist of the difference between the common and civil law traditions are the set of ideas, assumptions, traditional notions of legal rules and techniques of “interpretation” of legal rules. Nevertheless, the distinction of judicial and legislative production of law remains the basic distinction between the two legal traditions. See René David, supra and John Henry Merryman, The Civil Law Tradition, Stanford University Press, 1985.
3 Denning, Supra.
pronouncements as binding on subsequent cases.”

In the absence of the doctrine and practice of *stare decisis*, “[t]he net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one.” Disregarding the exaggeration and oversimplification of this view, judges in the two legal traditions do function differently in their adjudication work.

Despite these differences, judges in both legal traditions in adjudicating cases have a common task, which is the application of legal rules to the facts of cases pending for their judgments, no matter this process is called “expounding” or “interpreting” the law. Lord Denning points out that “[t]he truth is that the law is often uncertain and it is continually being changed, or perhaps I should say developed, by the judges.” The tension between certainty and “discretion” is universal for every legal system and, to a certain extent, it poses a hard dilemma for the concept of rule of law.

No doubt, civil law judges face the same challenges created by codified rules and ever-changing societies. To solve this problem, they are bound to have judicial discretion in applying legal rules and to adopt evolutional approaches towards the rules. In the transitional countries where rapid social changes and transformations take place, the judiciary and judges play a more active role in interpreting or even in the law-making process. In China, a country undergoing unprecedented social changes, the active role of the judiciary and judges in adapting existing rules into the new social environment is bound to take place, which arouses much controversy since the judiciary is deemed to perform a mechanical role in adjudicating cases.

This article intends to examine the mechanism of judicial interpretation and the role of reported cases in the Chinese legal system. It tries first to explain the structure of Chinese law and the status of judicial interpretation; then it summarizes forms of judicial interpretation, and finally discusses judicial discretion for individual justice and judicial activism in Chinese scenarios.

---

Although judicial activism might not be a proper term to describe the active role of Chinese judiciary\(^8\), it does reveal that judicial discretion and active role of the judiciary are inevitable in concretizing legal rules of general nature and in substantiating such rules with more detailed and precise specifications in the process of adjudicating individual cases and making legal rules compatible with social development. To a certain extent, the judiciary enjoys a somewhat creative function of rule making. This practice is apparently more prominent in current China where rapid social and economic changes are taking place.

1 Sources of Chinese law

The Chinese legal system follows the continental legal tradition. All legal rules are codified and promulgated by the legislature or governmental branches with legal authorization for rule making. Ever since Shang Dynasty (1600 B.C.), China has adopted the practice and tradition of codification.\(^9\) Since the Spring and Autumn Period (770–476 B.C.), codes became publicized.\(^10\) Despite changes of dynasties, the same patterns of codes and codification were adopted. Towards the end of the last dynasty (Qing Dynasty, 1616–1911 A.D.), realizing that its ancient systems including the legal system are obstacles in the process of modernization, Qing Court adopted the reformists’ ideas and started to reform the old legal system by introducing western legal codes modeled on statutes primarily from Germany and Japan and by restructuring the courts based on the western pattern.\(^11\) After the establishment of the People’s Republic of China (PRC), although the contents of statutes of the past Kuomintang government were abolished in a resolute manner,

---

8 Many Chinese scholars believe that the term Judicial Activism will provide legitimate excuses for the judiciary to step over the legal boundary of its function and to behave arbitrarily. In the process of building the rule of law in China, most of the people feel that this term may give the courts too much discretion and power beyond law. Therefore, they decline to use this term.


11 Peerenboom, supra, p. 43.
the format and the tradition of codification have been succeeded. It is clear that in both traditional time and contemporary periods, codification has long been the tradition in Chinese legal system.

It is true that in most countries following the continental legal tradition, legislatures enjoy the power of law making and the judges are simply operators of a machine designed and built by legislators.12 Nevertheless, as argued previously, Chinese courts have to exercise their adjudicative functions with wider latitude or discretion while applying rules of general nature to concrete and novel cases. In the process of applying rules to concrete cases, interpretation and even creative interpretation of existing rules is indispensable.

Judicial interpretation has two formats, i.e. one is to concretize rules with factual data within a particular social framework and the other is to change the scope or even the meaning of the rules to meet new situations or new social demands. The first one adopts formal logic (analysis of legal concepts or syllogism) on the theoretical foundation of legal positivism and analytical jurisprudence. Its conclusion is imbedded already in the meaning of the major premises (the rules to be applied). Therefore, this format is a mechanical application of rules compatible with the tradition of continental legal system. However, the second one either enlarges or narrows the scope of applicable rules, or adds to or deletes certain meanings from the rules. It is this mode of interpretation that causes so much concern and criticism, because it blurs the functions of legislature and judiciary, which are deemed to be separated in continental legal tradition.

Since the unprecedented social and economic changes are sweeping over China with astonishing speed and latitude, courts face more and more novel cases and legal issues that are not predefined or prescribed by existing rules. As a natural result, the second format of judicial interpretation has sufficient social supports and rich social soil for its existence. This phenomenon poses tough questions to the Chinese judicial power. Should the judiciary play a more creative or even rule-making function at the expense of the traditional judicial role? Is this role played by judges conducive to developing a sound legal system and

12 Merryman, Supra, p.36.
compatible with the rule of law China pledged to build? To answer these questions, it is necessary to understand first the hierarchy of laws and regulations in China.

Strictly and formally speaking, the primary and major legal source in China are written legal documents with the title of “law” (fa or falv), which are issued by the legislatures, including the National People’s Congress (NPC) and its Standing Committee at the central level. Other subordinate legal sources include local regulations\(^\text{13}\) enacted by local people’s congresses at the levels of province (22 provinces and 4 municipalities directly under the central government), autonomous regions (5 autonomous regions that have wider scope of legislative power), provincial capital cities (27 capital cities), large cities that have been approved by the State Council (18 large cities), special economic zones authorized by the State Council (4 special economic zones).\(^\text{14}\) From the central level down to the local level, there are five levels of people’s congresses (the levels of (i) the central, (ii) provincial, (iii) autonomous regions, (iv) provincial capitals and large cities, and (v) special economic zones).

Strictly speaking, the legislative power rests with the NPC and its Standing Committee, which is the highest state organ and enjoys the exclusive authority of the country. Local people’s congresses enjoy the legislative powers leftover and granted by the Constitution. Besides the people’s congresses, administrative organs also have the rule-making power granted by the Constitution and relevant laws. At the central level, administrative regulations are issued by the State Council\(^\text{15}\) and administrative rules issued by ministries, commissions and bureaus within the State Council.\(^\text{16}\) At the local levels, local administrative rules\(^\text{17}\) are issued by local governments at the

---


\(^\text{16}\) Art. 90, *The PRC Constitution.*

same levels as the people’s congresses mentioned above. The central and local governmental (administrative) organs enjoy a limited power of rule making, which has been delegated by the NPC. All these legal documents constitute a unified and voluminous hierarchy of Chinese law, along with the international treaties to which China is a signatory. This legislative structure is described as a system of monism with multiple levels. After more than 26 years of building the Chinese legal system, Chinese laws, regulations and rules have been proliferating.

“The result of all this is that the accepted theory of sources of law in the civil law tradition recognizes only statutes, regulations and customs as sources of law. The function of the judge within the tradition is to interpret and to apply ‘the law’ as it is technically defined in his jurisdiction. Both state positivism and the dogma of separation of powers require that the judge resort only to ‘the law’ in deciding cases.” Since China does not accept and apply the doctrine of separation of powers, it emphasizes on the “unitary state with multi-nationalities,” “the principle of democratic centralism” and “uniformity and integrity of the legal system,” which makes it closer and inclinable to state positivism. The paramount principles of unity, uniformity and centralism are crystallized in the people’s congress system. Under this system, people’s congresses are “the

19 Some scholars give more detailed analysis regarding the Chinese legislative structure, such that of monism with two levels, three sub-levels and four sub-branches. The monism refers to provinces, autonomous regions, special economic zones and special administrative regions. See Li Buyun, Basic Theory and System of Chinese Legislation, Chinese Legal Publishing House, 1997, p.107–108.
20 From 1979 to June 2004, there are 323 laws, 128 decisions and 10 legislative interpretations, promulgated by the National People’s Congress and its Standing Commission, 970 administrative regulations by the State Council, more than 10,000 local regulations by the local people’s congresses and their standing commissions, and 480 local regulations by the people’s congresses and their standing commissions of the autonomous regions. Statistics from http://www.csonline.com.cn.
22 Art 3 and 5, see the Preamble of The PRC Constitution.
state organs of authority” through which people are deemed to exercise their power and rights. Sitting on the top is the NPC as the highest state organ in the country.

Nevertheless, the people’s congresses cannot exercise single-handedly all state powers, particularly the powers that need professional qualifications and expertise, such as judicial power. To cope with the practical needs, other branches of the government have to be established. According to the PRC Constitution, China adopts the system of people’s congresses. The Constitution stipulates, “All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and by which they are supervised.”

First, this constitutional stipulation means that people’s congresses have a higher status in Chinese governmental hierarchy and they have the power to supervise judicial work. This supervisory power is limited to appointing judges, setting up judicial organs, making rules, hearing judicial reports and overseeing general performance judiciaries. Second, it also means that people’s congresses should create other organs for exercising other state powers such as administration, judiciary and prosecution. This is the so-called principle of separation or division of functions under the people’s congress. On the bases of the Constitution, the judicial power is given exclusively to the judiciary which has the professional expertise and independence in exercising the adjudicative power, therefore the people's congresses have no authority to take it back into their own hands.

It is clear that, under the political structure of people’s congress, the Chinese judiciary does possess a unique power of judicial interpretation that constitutes an indispensable part of the entire legal system. The Organic Law of the People’s Courts stipulates that the Supreme People’s Court provides interpretation on questions concerning specific application of laws and decrees in judicial proceedings. In this regard, Chinese judicial interpretation is different from both common law and civil law traditions, which have often been neglected by

---

23 Article 3, Constitution of the People’s Republic of China.
25 Art. 33, the Organic Law of the People’s Courts.
many, particularly those who are not familiar with Chinese legal system.

Based on the above description, this constitutional stipulation is like a coin with two sides, namely the principle of supremacy of the people’s congress and the principle of separation of functions by different state organs. The two different sides do create confusion and contradictions. If there is any suspicion that judges, in interpreting legal rules in the process of adjudicating cases, offer new “interpretation” to current rules, some people’s congresses are inclined understandably to accuse judges of usurping legislative power. 26 Some provincial people’s congresses even passed local regulations on supervising individual court cases. 27 A recent example of a legislature’s improper interference with judicial work happened in Henan Province. In this case, a judge of Luoyang Intermediate Court declared a provincial rule that is contrary to a national law null and void. After learning the judgment, the Directors Meeting of the Standing Committee of Henan Provincial People’s Congress made a decision that this judgment was wrong and the judge should be removed. 28 Nevertheless, the Provincial High Court upheld the intermediate judgment in the appellate process and, due to the public criticisms and pressure, the Directors Meeting of the Standing Committee of Henan Provincial People’s Congress later revoked its decision and restored the judges back to the bench. Despite all these hardships, the independence of the judicial function is a well established state power exercised exclusively by Chinese judiciary.

2  Legal interpretation and judicial interpretation

As mentioned earlier, from the legislative perspective, legal

---

26 Chen Xingling, Limits of Judicial Interpretation in Criminal Practice—Existence of Judicial Law and its Rationality, presented at the Meeting on Legal Interpretation, Beijing, Jan. 1997. There are quite a number of articles in favor of this approach.

27 Sichuan Province and a few others have passed local regulations regarding legislature’s supervision over judicial cases.

sources in China refer exclusively to statutes and regulations. But from an operational perspective, statutes and regulations can never be automatically self-implemented but implemented by individuals, lawyers, judges, governmental and judicial organs. In the process of legal implementation, uncertainty of law caused by generality, vagueness, simple conceptualizations and unexpected or novel situations demands constantly active and creative interpretations by judges. In this regard, judicial interpretation forms a pivotal linkage between general legislation and specific justice in actual cases. In the sense of merging a motionless black-letter law with the buoyant social reality, legal interpretation is apparently the most dynamic catalyst for activating legal rules and regulating social behaviors. Although the Chinese legal system strictly follows the civil-law tradition that does not recognize the principle of *stare decisis* and binding effects of a judgment over later cases, judicial interpretation used here refers mainly to written documents by the Supreme People’s Court and the Supreme People’s Procuratorate. Most of them, although providing more detailed interpretation to national rules, adopt similar formats as legislations do, for example, they are also abstract and are generally applied by all courts and judges to their cases. It is by no means an unimportant component of legal hierarchy.

Nevertheless, the status of judicial interpretation in China is not clearly defined by law. According to the theory and the practice, judicial interpretation is one part of legal interpretation. Legal interpretation is a broader concept encompassing several categories including legislative interpretation, administrative interpretation and judicial interpretation. These are commonly called authoritative interpretations since they have legally binding effects. Another set of interpretations is called non-authoritative interpretations. They are interpretations rendered by scholars or individuals who do not have authentic power of providing legally binding interpretation of legal rules.

The Standing Committee of the NPC and the standing committees of local people’s congresses have the power to provide legislative interpretation. Both Article 67 of the PRC

---

Constitution and Article 42 of the PRC Law on Legislation stated, “[T]he Standing Committee of the NPC exercises the power of interpreting the Constitution and laws.” The narrow concept of legislative interpretation refers exclusively to the Standing Committee of the NPC on the bases that the NPC enjoys the exclusive power of legislation while other central and local state organs exercise limited legislative power within the boundary of the NPC’s authorization. The wider concept includes the interpretation by the standing committees of local people’s congresses. Article 4 of the Standing Committee of the NPC on Strengthening Legal Interpretation stipulates, “[T]he standing committees of local people’s congresses interpret respective local regulations enacted by them.”

The second category, administrative interpretation, consists of interpretations by administrative organs, which include the interpretations by the State Council, its ministries and commissions, local governments and their branches. Interpretation is conducted in the process of implementing laws and other legal rules by these organs. The Decision provides that [I]ssues of how to apply laws and regulations to real situations which are not covered by adjudicative and procuratorial work shall be interpreted by State Council and its subordinate organs; issues of how to apply local regulations to real situations shall be interpreted by responsible organs of local governments at the provincial level.

It may be argued that interpretation of administrative regulations and rules issued by the State Council are not administrative interpretations but legislative interpretations in nature since it makes these rules with delegated authority specified by the Constitution. It is quite common that many administrative regulations and rules contain provisions that grant the power of interpretation to particular organs that draft the regulations and rules. Most administrative interpretations are interpretations for specific issues arising from application of regulations to real situations. However, those issued by the State

30 Art. 4, Decision on Strengthening Legal Interpretation by the Standing Committee of the NPC, 10 June 1981.
31 Art. 3, supra.
Council are of general applicability and do not relate to any particular situation. In most cases, the State Council has the final authority in making such interpretations.\textsuperscript{33}

The third category is judicial interpretation, which is made by two supreme judicial organs—the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP). Their authority in interpreting laws and regulations is derived from the Organic Law of People’s Court,\textsuperscript{34} and the Decision of The Standing Committee of the National People’s Congress on Strengthening Legal Interpretation.\textsuperscript{35} According to these legal rules, the SPC and SPP are the only two authorized judicial organs to interpret law and regulations; other courts and procuratorates do not have such power to do so. Their authority is limited to interpretation of current laws and regulations. They should not, strictly speaking, provide interpretation exceeding the scope and meanings of the text of legal rules that they interpret.

Based on the legal practice at the central level of the past two and half decades, the Standing Committee of the NPC has rarely provided legislative interpretation.\textsuperscript{36} The State Council and its subordinate organs have neither rendered substantial administrative interpretation.\textsuperscript{37} The most common and pervasive interpretation is the judicial interpretation by the SPC and the SPP. The interpretation by SPC is more voluminous, comprehensive and pervasive, and, therefore, constitutes a significant part in the hierarchy of Chinese law.\textsuperscript{38} "According to

\textsuperscript{33} The PRC Constitution and legislation Law require the State Council to report its administrative regulations to the Standing Committee of the PRC within 30 days of their promulgation and the Standing Committee has the power to annul any improper regulations upon review. Other governmental organs, even other organizations, enterprises and citizens, may request the Standing Committee to review certain administrative and local regulations and rules. The Standing Committee shall relay the request to relevant special committees of the Standing Committee for review. But for administrative interpretations, there would be no such requirement for report and review.

\textsuperscript{34} Art. 33, The Organic Law of People’s Court.

\textsuperscript{35} Art. 2, the Decision of the Standing Committee of the National People’s Congress on Strengthening Legal Interpretation (1981) stipulates, “Issues of applying laws and regulations in court proceedings shall be interpreted by the Supreme People’s Court”.

\textsuperscript{36} Cai and Liu, p.41. They mentioned only one interpretation provided by the Standing Committee of the NPC from 1979 to 1993, which relates to functions of state security organs after their establishment. A recent and most typical legislative interpretation is the Interpretation on Several Issues Regarding Implementation of the PRC Nationality Law in HKSAR.

\textsuperscript{37} Shen, On Legal Interpretation, China Legal Science 6, 1993, p.61.

\textsuperscript{38} Ibid., p.62.
statistics, since the founding of the PRC in 1949, the Supreme People’s Court had promulgated, either independently or jointly with the SPP, more than 3,000 documents on judicial interpretation.\(^39\) This includes some 1,000 documents issued after the Third Plenary Session of the Communist Party of China in 1978.\(^40\)

Among the different categories of legal interpretations, judicial interpretation, although coming last in the implementation process, is one of the most important forms of legal interpretation in most jurisdictions. Nevertheless, judicial interpretation has different natures in common law and civil law traditions. Since the most important legal source of common law is precedent, judicial interpretation by common law judges has a law-making function. “Most judges probably perceive their primary role to be that of loyalty to the law and to the principle of *stare decisis*. However, most judges in England and America acknowledge a secondary but more active role, which may be seen as one of ‘keeping the law up to date,’ or of ‘interstitial legislation,’ or simply as that of being a ‘lawmaker.’”\(^41\) To a great extent, common law has been sustained and developed by judgments made by judges. In contrast, judicial interpretation in civil law jurisdictions is to interpret existing and effective legal rules enacted by the legislature or governmental bodies that have delegated rule-making authority. Compared with common law practice, civil law judges are passive and restricted to the role of pure rule application and interpretation due to state positivism, the dogma of separation of powers and the hostile attitude towards judicial law making and intrusion into other branches of government.\(^42\)

Although judicial interpretation in common law systems are made for, and in the process of, adjudicating concrete cases or specific issues, the judgments, particularly judgments of

---

39 There are 3437 judicial interpretations collected by Chinalawinfo which is the legal database built by Law School of Peking University. See http://law.chinalawinfo.com/newlaw2002/chl/index.asp.

40 Wang Jingrong, *Judicial Interpretation by the SPC*, China Law, 3, 1996, p.64. (Note: Wang Jingrong is vice President of the SPC.)


appellate courts, have binding effects on later cases and their holdings are accepted as generally applicable rules or principles. In contrast, although it is also true that judicial interpretation in civil law is made for concrete cases or specific issues, the judgment “only has authority [and] legal force between those who were parties to the suit; it may not be invoked against third persons. On that score alone, of course, it is quite the opposite of a rule of law, a general provision applicable to everyone.”

Namely, the effect of judicial interpretation is much restricted in civil law jurisdiction. Although in modern times, many civil law countries publish cases and some scholars claim that, based on these cases, the jurisprudence that is constituted by individual judgments is a form of authority of law, there has never actually been any system of *stare decisis*.

Chinese judicial interpretation has, besides the civil law trademarks mentioned earlier, its own unique features. The most important and distinct one is that, generally speaking, judicial interpretations are not triggered by specific issues or concrete cases confronted by a court. On the contrary, they are made at the initiation of the SPC or SPP, as general rules to provide detailed analysis, clearer definitions or gap-filling rules for statutes either shortly after their promulgation or at any time the SPC or SPP feels that there is a need for interpretation. Therefore, the strictly labeled “judicial interpretation” is not a kind of judicial discretion for individualized justice in particular cases, but another form of legal rules with general nature. Of course, there is no denial that in contemplating judicial interpretations, the judges do have in mind more concrete scenario or cases. Even though some interpretations are induced by particular cases, the effect of such judicial interpretations are not limited to the specific cases that trigger the interpretations, but binding on all similar cases in future. Due to these distinct features, Chinese judicial interpretation has long been criticized for its quasi-law-making function. Furthermore, judicial interpretation is not made by one or two individual judges in their process of...

44 Ibid., p.92–103
adjudication, but by a particularly authorized body in the judiciary, the Judicial Committee of the Supreme People’s Court, or, in certain cases, by the judges in authorized positions.

Based on the aforementioned analysis, contrary to the conventional view that Chinese courts have served less as “law-making” institutions, its judicial interpretation is clearly a source of law, which can be cited by judges in their judgments. This was explicitly stated by Several Rules on Judicial Interpretation Work (hereinafter the “Rules”) issued by the SPC on 23 June 1997. Therefore, Chinese judicial interpretation is not simply a demonstration of “the tension between certainty” advocated by the rule of law and “discretion” exercised for individual justice in the western countries, but a reflection of the necessity of continuing judicial law-making power by the judiciary. (The issue of discretion for individual justice will be analyzed by Section VI later.) This function is not based on any doctrine and regime of separation of powers, but on the doctrine and regime of supremacy of the NPC, although in practice, the supremacy of the NPC still falls short of the role stipulated by the Constitution.

3 Forms of judicial interpretation

Before 23 June 1997, judicial interpretation in China took many titles such as “opinion,” “interpretation,” “explanation,” “regulation,” “decision,” “method,” “answer upon review,” “reply,” “notification,” “reply letter,” “letter,” “minutes,” and so on. The chaotic and confusing phenomena of forms of judicial

45 In practice, there are two kinds of variations. One is that judicial committees at the provincial courts also issue opinions for all courts under their supervision. The second is that divisions (such as civil law, criminal law, administrative law, etc.) within the SPC also provide opinions regarding adjudication of particular types of cases in their jurisdiction. These two phenomena will be analyzed later.

46 Judges in authorized positions usually include judges in leading positions, such as the president and vice presidents of the SPC, and sometimes division chiefs of divisions if they are also members of the Judicial Committee of the SPC. At the provincial level, presidents and vice presidents also play such roles to a certain extent.

47 Woo, supra.

48 Ibid.

49 Zhang Zhiming, On Systematic Construction of Legal Interpretation in China, presented at
interpretations caused much confusion and had been under constant criticism.\textsuperscript{50} In 23 June 1997, the SPC intended to systematize the formats of judicial interpretations. Article 9 of the Rules states that “the forms of judicial interpretation are classified into three categories, i.e. ‘interpretation,’ ‘rules’ and ‘answer.’”\textsuperscript{51} This is the first attempt to standardize names of judicial documents and to unify the loosely structured judicial interpretation. Its goodwill intention and positive impact should be acknowledged.

The Rules direct that “interpretation” (jie shi) refers to a document that deals with the issue of how to implement a piece of law or how to apply legal rules into certain types of cases or problems.\textsuperscript{52} According to this definition, “interpretation” covers the most important part of judicial interpretation. Some of the former forms of “regulation,” “opinion,” “explanation” and “interpretation” fit into this category, which are further divided into two types. One is a comprehensive interpretation regarding how to implement a piece of law, such as Explanations on Certain Questions Concerning the Application of Foreign Economic Contract Law (1987), Opinions on Implementation of General Provisions of Civil Law (1988), Interpretation on Certain Issues of Implementation of Criminal Procedure Law (1996), Interpretations on Certain Issues of Implementation of Marriage Law (2001) and so on. This kind of comprehensive interpretation is usually issued shortly after the promulgation of particular laws for the purpose of providing detailed interpretation of most articles in the respective law. The detailed interpretations either further explain meanings of general terms and rules or describe specific situations under the jurisdiction of such rules. Quite often, judges regard them as the most convenient and effective rules for practical purposes. As the consequence, their impacts on adjudication are enormous. The other type is specific interpretation, regarding how to apply a particular rule(s) to certain types of cases or problems. Some of

\textsuperscript{50} Conference on Legal Interpretation, Beijing, Jan. 1997.
\textsuperscript{52} Supreme Peoples Court, \textit{Several Rules of Judicial Interpretation Work}, \textit{Gazette of the SPC} 3, June 23, 1997.

Art. 9, the \textit{Rules}
the former forms such as “regulations,” “explanation,” and “interpretation” fall into this type, such as Regulations on Several Issues of Guarantee in Contractual Disputes (1991), Interpretation on Several Issues of Compensation for Damage Caused by Railway Transportation (1994), the Interpretations on Certain Issues Concerning Application of Article 12 of the Criminal Law (1998), the Interpretations on Certain Issues Concerning Application of Laws in Adjudicating Criminal Cases of Infringement of Intellectual Property Rights (2004) and so on. These specific interpretations concern one article or certain parts of law or certain types of cases. As a general practice, each major statute promulgated by the NPC is usually followed shortly by a comprehensive interpretation issued by the SPC, and may provoke several specific interpretations, which are issued when the SPC feels that there is a social need or pressure for interpretation.

The Rules provide that norms and opinions concerning adjudicative proceedings issued according to the needs of adjudicative work shall use the form of “rules” (gui ding), such as Rules on Certain issues Regarding Implementation of Laws In Handling Reduction of Sentence and Parole (1997), Rules on Certain Issue of Adjudicating Disputes Over Certificate of Deposit (1997). They are mainly procedural rules relating to the operation of courts, but their impact on substantive rules cannot be underestimated, such as Rules on Determination of Crime Names in Implementing Criminal Law (1997), Certain Rules on Evidence in Civil Litigation by the SPC (2002). These rules are usually issued as general rules and guidance for judicial operation. Some of them are not interpretations but novel rules, such as the Rules on Evidence mentioned above.

The Rules stipulate that to respond to inquiries raised by high courts and military courts concerning application of these rules to concrete cases, they should use the form of “answer” (pi fu). This type of interpretation is triggered by questions raised by lower courts, such as Answer to Questions of How to Liquidate Joint Ventures in Adjudicating Disputes Involving Sino-Foreign Joint Ventures (1997). These answers, although being triggered by specific cases, are of general effect on future similar issues and cases as well. According to the Rules, lower courts have
right to raise inquiries and this right is confined to high courts and military courts, therefore other courts below the provincial level, do not have the privilege to lodge questions directly to the SPC but instead must bring them to high courts. In this regard, high courts serve as filters for selecting questions that are of general concern or importance. This filter function has apparently the effect of reducing the workload of the SPC, but it is achieved at the expense of denying an opportunity to others for judicial interpretation. Some scholars and judges suggest that participants in litigation, other governmental organs and other courts at lower levels should be given the right to apply for judicial interpretation.\(^{53}\)

The three forms stated above are the formal ones of judicial interpretation. In addition, other documents issued by the SPC also have semi or implausible effects of judicial interpretation, they include the follows:

(a) **Notifications (tong zhi ) or opinions (yi jian ).** For example, Notification on Refraining from Accepting and Approving Cases of Analogy by the SPC (1997), Notification on Issues of Freezing or Allocating Funds in Liquidation Account of Security or Future Exchanges (1998), Opinions on Bringing Adjudicative Functions Fully into Play and Providing Judicial Protection and Legal Services for Economic Development (2 Mar. 2000), and Opinions on Providing Judicial Protection for Building Socialist New Countryside by People’s Courts (5 Aug. 2006). They do not, strictly speaking, interpret any statutes or legal rules, but provide guidance or set up procedures for lower courts in certain fields of work. Thus, they are not strictly classified as judicial interpretation but, no doubt, their effect and importance are the same as judicial interpretation in the strict sense. For example, the aforementioned Opinions of 2000 require courts to provide particular protection to the rights emphasized by the Opinions.\(^{54}\) Through this type of influence, the Party and the Government can take a leading role by providing policies that can be incorporated into notifications and opinions. Compared with the effects of direct interference and

---


involvement of the Party in adjudicating cases, this type of role is apparently a positive improvement.\(^{55}\)

(b) Minutes of national judicial meetings (zuotanhui ji yaw) held by the SPC. Before the issuance of the Rules, the SPC issued several minutes of national judicial meetings. These included the Minutes of the National Judiciary Meeting on the Reduction of Sentencing and Parole (1989), Minutes on the National Meeting on Adjudication of Cases Involving Foreign or Hong Kong and Macao Factors in Coastal Areas (1989), Minutes of the National Judicial Meeting on Civil Adjudication (1993), and so on. These minutes are again not interpretations of any statutes or rules, but provide policies for adjudicative work and process. For example, Part Five of the Minutes on the National Judicial Meeting on Adjudication of Economic Cases (1993) raises and analyzes issues concerning the status of legal person’s, the nature of enterprises and the adjudication of technology contract cases, negotiable instruments and bankruptcy cases. In Part Three of the same Minutes, for the first time in any legal document, the general principles for solving conflicts among legal rules are specified.\(^{56}\) The Minutes of the Supreme People’s Court on Adjudication of Economic Crimes in 2003 provides new interpretations on the meaning of “officials” and relevant economic crimes against the new social background.

(c) Speeches by the president and vice-presidents issued by the SPC. In Issue No. 4, 1997 of the SPC Gazette, there are two speeches, one by a president and the other by a vice-president. In the Issue No.1, 1998, a speech by the president is published. These speeches do not only state the past work of the judiciary, but also provide policies and guidelines for its future work. Taking a speech of the president of the SPC as an example, the president stated the principles of how to determine and address wrong judgments and mentioned the immediate tasks of the

---

\(^{55}\) To understand the current function of the Party in judicial work in China, Michael W. Dowdle provides a persuasive analysis. Dowdle, Heretical Laments: China and the Fallacies of Rule of Law, Cultural Dynamics 11.3, 1999, p.292–300.

\(^{56}\) The Supreme Peoples Court, Minutes of the National Judicial Meeting on Adjudication of Economic Cases issued on 6 May 1993, Compilation of Judicial Interpretations issued by SPC 2, People’s Court Press, 1997.
judiciary in the coming year. In a speech in 1999, President Xiao Yang instructed courts to vigorously enforce creditor’s rights to state-owned enterprises and to safeguard their realization. He required the courts to consider the methods of transforming creditor’s rights into shareholder rights by assigning land-use rights and intangible assets, setting off debts by providing service, entrusting intermediate institutes to manage enforced property, and so on. In his speech in 2006, President Xiao emphasizes that justice delayed is justice denied. He openly criticizes a judge in a Lingao County Court in Hainan Province for delaying a case for 19 years and calls for speedy justice. These speeches are usually issued after announcements of new state or party policies. In this way, state and Party policies are quickly incorporated into judicial guidelines. There is little doubt that speeches by the leading judicial figures will be received by the entire judiciary as binding guidance or as norms for their work.

(d) Regulations and other forms of documents issued by the SPC, together with other governmental organs. Since some issues involve necessary cooperation with other governmental organs, the SPC needs to negotiate and coordinate with them for making policies or guidelines. In 1998, the SPC, together with the SPP, Ministry of Public Security, Ministry of State Security, Ministry of Justice and the Legislative Affairs Commission of the Standing Committee of the NPC, issued Regulations on Certain Issues of Implementation of Criminal Procedural Law. In 1999, the SPC in conjunction with the SPP, issued Interpretations of Several Issues on How to Apply Law in Adjudicating Cases of Organizing and Using Cults for Criminal Offenses. The SPC regards these as “judicial administrative documents of the nature of judicial interpretation.”

60 Regulations on Certain Issues of Implementation of Criminal Procedural Law by the SPC, the SPP, Ministry of Public Security, Ministry of State Security, Ministry of Justice and Legislative Affairs, Commission of the Standing Committee of the NPC, the SPC Gazette 1, 1998.
(c) **Answers through telephone, mail and other forms of communication by the research office or other chambers of the SPC to lower level courts.** These forms of documents are not considered judicial interpretations and, therefore, do no possess the authority of law but have *de facto* effects of reference for lower courts. Due to this “important value of reference,” these documents are also included in the Compilation of Judicial Interpretation of the SPC.

(f) **Example cases (an lì) by the judiciary.** China does not have the system of *stare decisis*, but like other civil law countries, the judiciary publishes some cases. Those publicized by the SPC Gazette are cases discussed and approved by the Judicial Committee of the SPC, and, therefore, are used as guidelines for adjudicative work nationwide. The published example cases function as examples that exemplify how to apply relevant legal rules and judicial interpretations in certain social contexts. Some cases even set up new principles and doctrines.

One example is the case of *Chen Xiuqin v. Wei Xilin and Tonight News* published by the SPC Gazette in 1990. The case involved the issue of how to protect the reputation of a deceased person. The General Provisions of the Civil law are silent on this issue. As a remedy, the Supreme Court, in its response to the question raised by the Tianjing High Court (the appellate court of the case) stated that Chen Xiuqin, who was the mother of the deceased, should have the right to bring a lawsuit. The scope of applicability of their response is formally limited to this case alone because it addresses this specific case. It is doubtful that it could be applied to any other person in similar cases. However, the idea entertained by this response is revealed by the publication of the case, which states “General Provisions of the Civil Law of the PRC stipulate that citizens have the right of reputation. The right of reputation of a citizen after his death shall be still protected by law.” In this way, the case establishes a principle that the right of reputation of a deceased person should be protected. In 1993, the SPC issued an interpretation that states, “When the reputation of a deceased is impaired, the close

---

relatives of the deceased may institute proceedings in a People’s Court. Close relatives include spouse, parents…”

Although this case provides a right of lawsuit for close relatives of a deceased, whether the relatives have separate claims is not clear. This issue is clarified by *Li Lin v. New Birth Journal and He Jianming* published in the Gazette, Issue No.1, 1998. In the case, the High Court of Beijing announces that “He Jianming’s act has damaged Li Siguang’s reputation and also brought certain spiritual anguish to the appellant, Li Ling, daughter of Li Siguang. Therefore He Jianming should bear civil liabilities arising from the infringement according to law.”

The new principle established by the case is that if a person suffers from infringement of his/her close relative’s reputation, the person shall have the right to compensation. These cases demonstrate clearly the process of development of principles concerning protection of the rights of a deceased person. The SPC has constantly used published cases to standardize the adjudicative practice and provide guidelines for lower courts. For instance, in April and June 1996, the SPC circulated nine economic cases and seven cases involving Hong Kong elements and maritime cases “for study and discussion” by lower court judges. This judicial creativeness in adjudicative function clearly reveals a trend of judicial activism.

Despite their importance in the exemplification and development of new principles, the Chinese judiciary never uses the word “precedent” but that of “example case” (*an li*). This careful wording reveals the ambivalence of the judiciary towards the function of publicized cases. On the one hand, they would like to borrow some experience from the common law system; on the other hand, they understand clearly that there are no supporting doctrines and techniques of *stare decisis* existing in both Chinese legal theory and practice. Generally speaking, significant differences exist between Chinese publicized cases and common law precedents. In 2005, the SPC showed its determination of making example case more influential by

---

64 *Li Lin v. New Birth Journal and He Jianming*, the SPC Gazette 1, 1998
65 *Compilation of Judicial Interpretations of the SPC*, 1, People’s Court Press, 1994, p.1584, 1591
issuing its Plans for the Second Five Years Judicial Reform. In the Plan, SPC calls for setting up a system of “guiding cases” (zhi dao xing an li) for directing adjudication of all courts. It also gives the authority of selecting “an li” to provincial high courts. It is predicted that example or guiding cases will play a more important role in judicial operation and in the structure of Chinese legal system.

In some cases, a blend of the aforementioned forms may be used to develop a new principle or to provide more detailed specifications for existing legal rules. For example, the principle of changing situations, which is to a certain extent equivalent to a common law doctrine of frustration of contract, was developed by notifications, minutes of national judicial meetings and publicized cases, and no single law or regulation specifies such a principle. The new Contract Law of 2000 does not mention this principle either. The legislative consideration is that the time for formalizing such a principle is not ripe yet. Whether this apparent legislative oversight of or indifference to existing judicial interpretation indicates a repeal of the relevant judicial interpretations is not clear. The commonly accepted view is that the omission of the existing judicial interpretation on the principle of changing situations by the later legislation does not automatically overrule the validity of the interpretation, provided the omission does not defeat the foundation of the interpretation according to the legislative purpose. In the case of the principle of changing situations, considerations of ripeness and the fear that unqualified judges may bend the principle for irregular practice, are the main reasons for not putting the principle into the law. Such an omission certainly does not rule out the possibility of applying the principle in due course.

The aforementioned forms of judicial documents do not fall into the strict category of judicial interpretation according to the Rules. Some of them either do not interpret any legal rules (the first five forms), or they are not formally recognized as legal sources due to the legal tradition of codification (last form). Since publicized cases are usually carried by the SPC or SPP Gazettes or their other publications and they explain legal rules or even set up new rules and principles, they are quasi-judicial interpretations bearing actually similar legal effects to judicial
interpretation. The only difference is that they cannot be directly
cited in any judgments, while the formal forms of judicial
interpretation are eligible to be cited.  

So far, this paper has mentioned different forms of judicial
interpretations by the SPC. In practice, people should not
overlook the role of normative documents produced by
lower-level courts as well, especially high courts at the
provincial level. The Constitution and other relevant laws, such
as the Organic Law of People’s Courts, authorize only the
Supreme People’s Court the power to issue judicial
interpretations. However, in practice, provincial high courts often
draft and issue their own de facto judicial interpretations
effective within respective provinces, autonomous regions and
cities. Most of these documents are named as minutes of a
meeting (hui yi jia yao) or minutes of a seminar (zuo tan ji yao )
on particular subjects. Many of them clearly state that they have
been discussed and adopted by the judicial committees of
respective high courts. Besides the minutes, they also publish
their own study materials for judges within their jurisdiction, in
which cases and speeches of responsible judges (presidents or
vice presidents, etc.) are often published. Nevertheless, these
documents issued by lower courts should not be called judicial
interpretations as clearly instructed by the SPC’s Notification on
Prohibiting Issuance of Judicial Interpretative Documents by
Local Courts at all Levels.

4 Judicial discretion for individual justice

Although judicial interpretation has the unique trait of general
rule-making in China, the judiciary does have judicial discretion
for rendering justice for individual cases in their normal
adjudicative process. The term of judicial discretion used in this

66 Article 14, the Rules on Judicial Interpretation, 1997.
67 There are quite a number of law journals and local legal dailies carrying local judicial
interpretations, such as Precedents and Analysis (anli yu yanjiu) and Adjudication Practice
in Shanghai (shanghai shenpan shijian). The former journal is published by Feifan Law
Firm at Zhuhai and the latter by the Shanghai High Court.
68 Notification on Prohibiting Issuance of Judicial Interpretative Documents by Local Courts
paper is based on what Dworkin calls “the discretion in weak sense,” namely the discretion within a general framework of “integrity of law” that is constructed by legal principles as well as legal rules.  

Judicial discretion in individual cases provides clear or detailed specifications of existing rules for particular situations. It also enlarges the jurisdiction of the judiciary over certain cases and introduces new procedures in certain areas, that is, forensic medical examination for determining medical accidents, verification of counterfeit notes by banks. Judicial discretion creates or promotes new concepts or principles of law, as well as increases the significance of individual cases. It may introduce a new mechanism for standardizing or systematizing adjudicative work.

Conditions for judicial discretion include public awareness of constraints of existing rules, popular willingness to accept changes, availability of academic doctrines, an aggressive outlook, high quality of presiding judges, publicity of such cases through the media, and so on. The overarching considerations of judges who actively exercise such judicial discretion provide a positive impetus to economic growth, protection for the weak and rule of law.

The judicial discretion discussed above does not include two other negative forms of discretion as mentioned by Margaret Woo’s paper, namely discretion for personal interest and discretion for political or ideological purposes at the expense of justice.

5 Judicial activism reflected in judicial interpretation and discretion

It has become a common phenomenon that the SPC often issues interpretations that go beyond the boundary of interpreting legal rules within the limits of particular cases. Such interpretations are of general applicability. In some cases, they

70 Woo, supra.
71 Scholars have different views towards this phenomenon. Some regard it as an
even create new rules, altering the existing landscape of the legal structure. The SPC states unequivocally “the judicial interpretations formulated and issued by the SPC have the effects of law.” Compared with the traditional concept of interpreting legal rules in a strict sense and the practice of other civil law countries, the increasing judicial activism in China is apparent in their judicial interpretation work. It is no wonder that many scholars criticize the SPC for its ultra vires role in law making. Other scholars admit that the increasing power of judicial interpretation will result in the invention of a new concept of “judicial law” to define and justify its rationality and necessity. This trend of active judicial interpretation may be described as judicial activism in China.

Why is there judicial activism in the PRC? The reasons commonly held by scholars and judges are as follows:

(a) Constant and rapid social changes left laws far behind the reality. Since China “entered into a stage of rapid social transformation due to the sustaining economic structure reform, … laws are lagging far behind the social development. In

---

unconstitutional practice that has transgressed the delegated power, others regard it as a legitimate practice within the accepted power delegated to them, as they have done no more than interpreting the laws promulgated by the National People’s Congress.

72 Article 4, the Rules
73 Most civil law countries do not have the broad power of formulating judicial interpretation for general issues of law except for concrete cases or issues in specific cases. Modern erosion to this strict statutory interpretation in the emergence of judicial review of the constitutionality of legislative action, which empower judiciary to review legislative acts (Merryman, 24). Although some civil law countries publish cases in a systematic way, “a line of uniformly decided cases will never, therefore, constitute anything more than a series of individual decisions to particular cases with no greater status than that.” (Jean Carbonnier, “Authorities in Civil Law: France”, from “The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions”, ed. by Joseph Dainow, Louisiana State University Press, 1974, p.96. The Swiss Civil Code is perhaps the most radical example of pushing a broader judicial interpretation power, which states “In the absence of applicable provisions of law, the judge “decides according to customary law and, in the absence of custom, according to the rules he would establish if she were performing a legislative function. He patterns his decision upon principles recognized in decided cases and doctrinal writings” (Carbonnier, 103). Nevertheless, except constitutional judicial review, most judicial review in other civil law countries are confined to specific interpretation for specific cases. In contrast, Chinese judicial interpretation has no power to provide judicial review of the constitutionality of legislative acts, but the power to make generally binding interpretations.

such situations, meaningful judicial operation cannot be carried out unless laws are interpreted actively” by the judiciary. For example, in 1985, the SPC and the SPP issued interpretations of Certain Issues of How to Apply Law to Cases of Economic Crime that stated, “Appropriation of public funds for personal use or illegal activities shall be punished as embezzlement.” This interpretation had no legal ground and was criticized until the Standing Committee of the NPC made a new regulation to specify this crime in 1998. The right of privacy is another fine example, which was created by judicial interpretation as a derivative right from the statutory right of reputation.

(b) The long process of legislation forced the judiciary to act more actively. Chinese legislature has long adopted a principle of prudence that “No enactment should be made until the maturity of the situation is realized.” The enactment of the Company Law clearly reveals this doctrine, as it was made long after the Bankruptcy Law was passed. In practice, legislative acts may wait until the ripeness of a situation, but courts cannot turn off cases arising from novel situations, despite want of clear guidance. For instance, there were no laws and regulations governing stock exchanges in 1992. Nevertheless, disputes over stock exchanges occurred in Shenzhen and other coastal cities. Shenzhen courts accepted the cases and adjudicated according to the principles of seeking truth from facts, equality and reasonableness. These cases did not only solve pending disputes, but also provided useful experience and guidelines to legislatures and other courts. To a great extent, such judicial activism is a result of the sluggishness or incompetence of the legislature in making an active response to rapid social changes that characterize the current Chinese society.

(c) Lack of a sense of legality in the judiciary may also contribute to the blind growth of judicial activism. In some cases, judicial interpretations were made without careful examination

---

76 Chen Xingliang, Basic Doctrine of Legal Interpretation, Legal Science 5, 1995, p.12, and Zhang Jun, supra.
78 In an interview, Wang Hanbin, former vice-chairman of the NPC, insists on the criteria of ripeness for law making while denouncing the phrases “advanced” or “retarded legislation.” The interview is reported by www.chinanews.com.cn, 14 Dec. 1999.
of existing laws and the legal foundation for such interpretation. Before the issuance of the Rules, the chambers of the SPC published their own study materials that contained their responses and selected cases. The quantity and the quality certainly discredited the reputation of judicial interpretation.

(d) On some occasions, the disparity among local development also triggers local judicial activism. For example, the monetary standards for the crime of stealing set up by the SPC in 1984 are too low for some rich provinces; as a result, some provincial courts issued their own standards *ultra vires*.

Is judicial activism good or bad phenomenon? This question may not be answered in an either-or fashion. Judging from the aforementioned reasons, it may be concluded that judicial activism, demonstrated by judicial interpretation, to a great extent has had positive impacts on social development. Scholars who criticize the legislative role assumed by the judiciary still recognize that the “social effects are generally positive and therefore they are necessary moves.”

This view has been gaining more support among judges and scholars, but whether the judiciary should have this “law-making power” is always a subject for debate. Even scholars who support the trend refrain from open admission of the broader power of judicial interpretation when the issue of conflict between legislative power and judicial power is brought up. This is attributable to the fundamental system of people’s congress enshrined by the PRC Constitution, which asserts that the NPC is the highest state organ of the PRC and all other state organs are created by and are subordinate to the NPC. Therefore, the current constitutional theory and arrangement prohibits any theoretical ground for active judicial interpretation. If the NPC or its Standing Committee creates all the laws in China, how can a subordinate branch of the state step over the boundary set by the NPC? Even the so-called effect of law attributed to judicial interpretation by the SPC is very much arguable.

A few scholars have tried to argue for the rationality of judicial interpretation. They claim that a fear of excessive judicial

---

81 Zhang, Chen and Wang, *supra*.
82 Art. 2, 3 and 57, the *PRC Constitution*. 
activism or “judge made law” is unnecessary and groundless because of the following reasons:

Firstly, there are internal mechanisms of checks and censorship within the judiciary to control the quality of judicial interpretation, such as judicial committees and collegial panels.

Secondly, there are external constraints in the constitutional framework, which makes judicial interpretation subject to legislative review of the NPC. President Xiao Yang of the SPC has recently stated unequivocally that all judicial interpretations shall be sent to the NPC for review. In May, 2004, the legislative working body of the NPC, the Legislative Affairs Commission also set up a new office, Regulation Review and Record Office, in charge of taking record of regulations and reviewing possible conflicts among legal rules. Therefore, the judicial interpretation is fully compatible with the Chinese political structure.

Thirdly, the lack of a system of *stare decisis* in China renders the judicial interpretation of similar fashion to legislation. The judicial interpretation can not make new rules without current legal ground.

Despite the pros and cons, it is generally admitted that the increasing judicial activism has been prevalent in the Chinese legal system ever since the early 1980s. The Rules of 1997 were an effort by the SPC to consolidate this practice. Previously, a similar step was also taken by the SPP in 1996. Although they have standardized the documents of judicial interpretation,
formulated its procedure, stipulated its effects and application, there are still certain issues that deserve particular attention, such as:

(a) The legal grounds for their effects are not sufficient and persuasive enough due to the theoretical and constitutional constraints. Given the fact that judicial interpretation has been an important part of the hierarchy of Chinese law, it is necessary to grant it a formal status by the Constitution rather than by an isolated Decision of the Standing Committee of the NPC.89

(b) Other forms of judicial documents left out of formal judicial interpretation are not clear in nature and effects, which may cause confusion similar to that caused by the previous chaotic structure of judicial interpretation.

(c) Expertise and professional integrity need to be enhanced. “Despite tertiary education, some judges, especially at the county and municipal levels, were unfamiliar with laws passed in the past two years … Some of the 160,000 judges were poorly qualified and failed to follow proper procedures in trials.”90

(d) Techniques of Common Law Tradition such as distinguishing different cases and distinction of ratio from dictum need to be introduced for making guiding cases (anli) a real guidance or even legal grounds for future cases.

Facing the growing complexity and demand for sophisticated professionalism, the quality of judges is a major problem that may pervert the positive practice of judicial activism. All these issues show that the potential risks and the negative aspect of judicial activism coexist with its positive aspects. In this regard, judicial constraint is a necessary complement that serves to further judicial reform and enhance the quality of judges. When praising its achievements, we need not overlook the other side and the potential risks of judicial activism exemplified in the process of judicial interpretation.

89 Supra, No.10
90 Statement made by Judge Liang Baojian, reported by South China Morning Post, Oct. 4, 1995.