THE EU 255 TFEU PANEL AND THE PROVINCIAL JUDICIAL SELECTION COMMITTEES IN CHINA: A STUDY ON COMPARATIVE JUDICIAL APPOINTMENTS, MARKET INTEGRATION, AND JUDICIAL PROFESSIONALIZATION

A Dissertation

Presented to the Faculty of the Graduate School

of Cornell University

In Partial Fulfillment of the Requirements for the Degree of

Doctor of the Science of Law (J.S.D)

by

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December 2018

THE EU 255 TFEU PANEL AND THE PJSCS IN CHINA: A STUDY ON COMPARATIVE JUDICIAL APPOINTMENTS, MARKET INTEGRATION, AND JUDICIAL PROFESSIONALIZATION

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Cornell University 2018

This study focuses on the political logic of the professionally transformed procedures of judicial selection, especially the establishment and operation of special expert advisory panels, as well as its implications on the relationship between judicial professionalization and market integration. In the past decade, there has been a worldwide trend towards the de-politicization and professionalization of the judicial appointment procedure, which has led to renewed debates on this issue.[1] Despite of these largely normative debates, the actual motivations as well as real effects and political implications of this trend are still unclear. This study seeks to bridge this gap by presenting a comparison between the establishment and operation of the 255 TFEU advisory panel ("255 TFEU panel") in the European Union and the Provincial Judicial Selection Commissions ("the PJSCs") in China. Specifically, drawing from experiences and knowledge from China and the European Union, this study argues that both the EU and China have adopted similar programs of judicial

[1] See, e.g., Carlo Guarnier, Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government, Vol 24, Issue 1-2 Legal Studies (March 2004), pp. 169-187; M Fabri, P M Langbroek and H Pauliat (eds) The Administration of Justice in Europe: Towards the Development of Quality Standards (Bologna: Research Institute on Judicial Systems (IRSIG-CNR), 2003); E Rekosh, Emerging Lessons from Reform Effort in Eastern Europe and Eurasia, in OFFICE OF DEMOCRACY AND GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY (Washington: USAID, 2001) pp 53–71.

professionalization in the current decade due to their common economic pursuit of market integration. Moreover, it is argued that the distinctive paradigms of market integration of the EU and China, i.e., the "courts-driven" and "rules-based" EU model, and the "state-centered" and "centrally-planned" Chinese model, have shaped the very nature, existence and political importance of the 255 TFEU panel and the PJSCs. Upon comparing the similarities and differences in the operation and functioning of the two expert bodies under the context of market integration, it's argued that the different models of market integration of the EU and China have produced different implications for the strategical structural location and roles of the judicial power in the two systems, which in turn explains the different effects and political significance of the 255 TFEU panel and the PJSCs. By doing so, this study seeks to offer a new analytical framework for understanding the relationship of judicial professionalization to market integration, as well as present a welcome addition to the discourse on judicial professionalization and appointments.

ACKNOWLEDGMENTS

I am grateful to the guidance and support of my doctoral committee: Professors Mitchel Lasser, Aziz Rana, Xingzhong Yu, at Cornell Law School. Each of the members of my committee has provided me with extremely helpful professional and personal skills and they all taught me a great deal about legal research and life in general. I would like to especially thank Professor Mitchel Lasser, the chairman of my committee, whose generous efforts and encouragement have made me who I am today. I am also indebted to my family and friends, without whose support, I wouldn't have been able to finish this project.

TABLE OF CONTENTS

Part I: Introduction:

> *It is an old truism of public administration that shifts in organization and jurisdiction are never simply technical.*[2]

This study is about how a regime's institutional solutions for the integration of its internal market affects the relative power, role and functions of courts, taking the professionalization of the selection procedure of judges as a starting point. In this respect, this project is not so much of an empirical observation on the relative merits and disadvantages of specific institutional arrangements of judicial appointments as a more in-depth reflection upon the political and structural foundations of the judicial power. Whereas discussions on the role and performance of the judicial power are abundant, in recent years they tend to assume that the judicial workforce must be professionalized.[3]

Unlike many of the existing studies, this project chooses to go beyond existing normative debates and view this trend critically by focusing on a specific project of judicial professionalization, i.e., the establishment and operationalization of expert supervisory bodies, and by inquiring more deeply into the real changes that they have resulted in the selection and appointment procedures of judges. This study provides a detailed comparative analysis on changes in the performance and outcomes of similar professional mechanics adopted in the European Union and China since 2010, i.e., the adoption of the article 255 TFEU panel and the provincial judicial selection committees. The study argues that differences embodied in the functioning of, and results from, these two expert bodies with respect to judicial appointments can be attributed to the broader role and strategic structural location of the judicial power in the two systems, both of which are committed to pursuing an internal market

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[2] Martin Shapiro, Political Jurisprudence, 52 Ky. LJ. 318 (1964) 319-345, at pp 321.

[3] For example, The European Commission for Efficiency of Justice (CEPEJ) issued a "Checklist for Promoting the Quality of Justice and the Courts" in August 2008, aiming at enlightening "policy makers and judicial practitioners responsible for the administration of justice to improve the legislations, policies and practices aimed at raising the quality of the judicial systems, at the national system, court and individual judge levels", available at: http://www.courtexcellence.com/~/media/Microsites/Files/ICCE/ChecklistforPromoting.ashx. Similarly, the European Commission also published "Quality of Public Administration: A Toolbox for Practitioners" in 2017, advocating "mutual understanding and trust in justice systems- their quality, independence and efficiency" across the EU. For discussions on the rise of judicial professionalism in Europe, see, e.g., Baas (2000) and Bell (2006).

integration during this period of time.

A major argument of this study is that these mechanisms of professionalization are deeply associated with the demands for market integration, and the manner in which a particular system achieves market integration, in turn, affects the relative power position, role and functions of the courts; this is so, regardless of the necessity and importance of the professionalization issue to the judiciary in an occupational sense. In other words, why similar bodies are operationalized and functioning differently in the EU and China can be attributed to the strategic placement of courts in pursuing market integration. Specifically, in pursuing internal/domestic market integration, the EU provides a "courts-driven", "rules-based" model, whereas China presents a "state-sponsored", "centrally-planed" model.

Moving forward from the normative debate on judicial professionalization, this introductory party briefly describes the idea of market integration being a major impetus for professionalization projects in the EU and China. By assuming that "law must be understood not as an independent organism but an integral part of the social system" and as such, the actual impacts and significance of professionalization practices, in particular, the expert bodies tasked with overseeing judicial appointments, must be analyzed in relation to the "distribution of power and rewards among various elements in a given society",[4] it draws our attention to the strategic structural roles played by the judiciary in pursuing market integration. It also introduces the comparative framework of this study, elaborates on the focuses, perspectives, theoretical significance and limitations of such a comparison, and then briefly outlines the organization of this study.

1. Uncovering the Underlying Political and Structural Dimensions of Judicial Professionalization

To assess the wide-spread and seemingly inevitable trend of judicial professionalization, it is necessary to go beyond the normative dimension of this issue by carefully examining the changing roles and performance of the judiciary. With respect to the normative discourse on judicial professionalization, i.e., the rise of judicial autonomy and expertise, it is widely agreed that professionalization matters (1) from an "ethical" point of view, where judges must behave in an unbiased, disinterested and non-prejudicial manner while making judgments solely on legal merits (Holmes 2003; Shepard 2014), as pointed out by Soeharno (2016:19), "if a judge takes an oath, we do not know to which God he wears or as to what he fears

[4] Martin Shapiro, Political Jurisprudence, 52 Ky. L.J. (1963), at pp 294-5.

when violating his conscience. This may lead to a call for a professionalism of these former tacit elements: of judicial intuitions, judicial moral evaluations or a judicial conscience"; (2) in the context of rule of law and democracy, classical political theories hold that "the general liberty of the people can never be endangered" by the courts, "so long as the judiciary remains truly distinct from both the legislature and the executive"[5], i.e., courts must be politically self-restrained and insulated from political influences of the legislative and executive branches (Montesquieu 1752; Hamilton 1788); and (3) in terms of the quality and efficiency of the "justice-delivered", judges must have the pre-requisite legal knowledge, expertise and skills, as well as sufficient practical experiences so as to perform their duties efficiently and competently (Joy 2000).[6]

Moreover, the concept of judicial professionalism is contextualized by a number of studies, reflecting upon a variation of factors that have affected how it has developed under different political and social conditions, and these factors include, e.g., how courts balance judicial professionalism and "the need to serve the state's political goals" in China (Chen and Xu, 2012), how the judicial behavior of a supreme court is conditioned by the "interactions between law, professionalism and politics in Brazil (Oliveira, 2008), as well as the attitudinal reactions of appellate judges to merits-based selection system in the U.S. (Scheb, 1988), demonstrating the complexity, multiplicity as well as the political and social embeddedness of this concept.

Also, the widespread judicial reforms through professionalization in the world today give rise to many more theoretical debates on the relevance and importance of judicial professionalism, and concerns are expressed by scholars from a variety of

[5] Hamilton, The Federalist Papers, No. 78.

[6] It is generally acknowledged that judicial candidates shall possess certain qualities regarding their temperament, intelligence, ethics, integrity, education and experience, and languages, etc. See, for example, according to the prescription of "the qualities required of a judge" of the Canadian Superior Courts Judges Association, "Judges must strive for the highest standards of integrity in both their professional and personal lives. They should be knowledgeable about the law, willing to undertake in-depth legal research, and able to write decisions that are clear and cogent. Their judgment should be sound and they should be able to make informed decisions that will stand up to close scrutiny. Judges should be fair and open-minded, and should appear to be fair and open-minded. They should be good listeners but should be able, when required, to ask questions that get to the heart of the issue before the court. They should be courteous in the courtroom but firm when it is necessary to rein in a rambling lawyer, a disrespectful litigant or an unruly spectator. Judges come to the bench after making a significant contribution to the legal profession and their communities. Many have been active in law societies and have done volunteer and charitable work. Others have been active in politics or won elected office. Judges who have served on a lower court are sometimes promoted to a higher court, such as a provincial court of appeal or the Supreme Court of Canada", available at: http://www.cscja-acjcs.ca/qualities_required-en.asp?l=5 (last visited May 30, 2018).

perspectives. For example, whether judges can in fact act in a neutral, non-political and professional way when ruling in favor of one party against another is already debated (Landes and Posner 1975; Ferejohn 1999; Ramseyer and Rasmusen 2003; Maravall 2003, etc.); also, the increasing degree of professionalism gives rise to questions concerning judges' professional behavior and responsibilities, as well as their lack of democratic legitimacy and accountabilities (Shedler 1999).[7]

However, beyond this recognition, it is not clear so far as to the actual extent, to which the widespread professionalization efforts have affected, if not necessarily improved, the judiciary, and beyond this, what kinds of political significance do they embody? Questions that can be raised include, are various reforms aiming at professionalizing the judiciary across the world today all about the same thing? What courses and manners are taken in terms of professionalizing the judicial workforce (e.g., through education and training, raising standards for judicial membership, and improving mechanisms of judicial self-governance, etc.)? What benefits and ramifications do these changes have for the judiciary (e.g., the professional quality of judges, and the efficiency of the judiciary, the strength and political influence of courts)? What kinds of forces are driving these changes to the judicial power (e.g., market actors, professionals v. states)? Do similar professionalization efforts adopted in different regimes lead to the same results (e.g., increased autonomy and professionalism, and higher professional quality of judicial staff)? What explains such contrasts between similar practices?

This paper tries to open the "black box" of judicial professionalization by offering a new interpretation of a specific professionalization program, i.e., the establishment of special expert advisory bodies to scrutinize the process of judicial selection and appointment, adopted by the EU and China in recent years. In reality, despite different political cultures and social conditions (e.g., unitary party-state v. quasi-federal supranational system, the relative role of courts), China and the EU both adopted such mechanics, i.e., the article 255 TFEU advisory panel (hereinafter "the 255 TFEU panel", or "the 255 panel"), provided for by article 255 of the Lisbon Treaty, and the provincial judicial selection committees (hereinafter, the "PJSC"), prescribed recently by the draft amendment to the Judges' Law of China, as a means of professional quality-control and depoliticization.

Given the fact that these two expert bodies were adopted during a period in which

[7] As indicated by some scholars, judicial professionalism "must find a means of enhancing competence while balancing the competing precepts of independence and accountability". See, e.g., Armytage (1996), at pp.7.

the EU and China were both busy committing themselves to the construction of their own orders of the rule of law, the more direct, and obvious reason for their creations results from a series of reforms in response to the longstanding complaints of judicial autonomy and capacity being impinged upon due to particular political forces. But why do they decide to tackle these problems now, and why both in such a manner, especially considering that they are both civil-law systems? What are the more fundamental reasons for their creations? Furthermore, what differences are displayed in operationalizing these two expert bodies, and what explains such contrasts?

This study argues that to answer these questions, one needs to look at the broader political and social circumstances in China and the EU. Further reflections upon the creation of the article 255 TFEU panel and the provincial judicial selection committees reveal that as part of the mandates to professionalize the judicial workforce, which by nature can facilitate the unification of law and political centralization in the name of the rule of law, these measures are closely associated with the regimes' pursuit of a common internal market.[8] In the context of internal/domestic market integration, this study argues that the two expert bodies were adopted as a strategic effort to, 1) either tighten, or cripple, external pressures coming from different political forces; 2) either mobilize, or propel, the judicial communities, tasked with ensuring the uniform application of laws, to enhance their technical performance and efficiency; and 3) either strengthen, or shrink, a particular political function of the judicial power.

These similar professional mechanics of selecting and appointing judges, i.e., the establishment of expert bodies, however, have displayed a series of commonalities in terms of their composition, working manners, as well as their common guiding principles of professionalism, but they have also produced relatively different outcomes regarding their performance and roles. Specifically, these two expertise bodies differ in the following three respects: 1) the 255 panel is mainly composed of former EU judges and senior national judges and legal practitioners proposed by the President of the Court of Justice, with only one of its members appointed by the EP,[9] whereas the provincial judicial selection committees in China are composed of a

[8] The focus of this project is the impetuses behind the integration of an internal market, i.e., building a common/single market within the European Union, or domestic market integration in China. It is in contrast with "international market integration", a trend closely relating to globalization, but deserves a different set of analysis.

[9] See, Recommendation concerning the Composition of the panel provided for in Article 255 TFEU, Brussels, 2 February 2010 [5932/10], available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205932%202010%20INIT (last visited on July 3, 2018).

higher proportion of governmental representatives and officials[10]; 2) although working in similar manners, i.e., reviewing candidates' dossiers and interviews, the criteria they rely on to evaluate the professional competence and quality of judicial candidates have subtle, but significant, differences; the 255 panel, *inter alia*, reviews publications of candidates as well as national nomination procedures, whereas the PJSCs heavily emphasizes "trial performance" (e.g., case settlement rates, misjudged cases), along with other factors (e.g., legal knowledge), in its evaluations; 3) while both bodies' opinions seem to have affected the substantive results of judicial appointments to certain limited but positive degrees, their long-term influence and political significance vary greatly; 4) the two bodies are operationalized under different political and social conditions, with the 255 panel facing growing pressures from anti-EU and populist movements across Western society, and the PJSCs adopted during a time of tightened political control and centralization.

To explain these differences requires us to dig deeper into the political and structural dimensions of the issues at hand; having clarified the relationship between the imperative of market integration and judicial professionalization, this project links the developments of the two expert supervisory bodies to the different settings in which a regime pursues market integration. Specifically, the EU and China represent different models of market integration: the EU adopts a "courts-driven", "rules-based" approach, whereas China always pursues a "state-centered", and "centrally-planned" approach. Within such different settings, courts occupy different strategical structural locations and are tasked with different political functions.

In the EU, since market integration ultimately rests on a series of bargains between member states, there are no unitary central decision-makers at the EU level; as a result, a characteristic feature of the EU's approach to market integration is that it's "courts-driven" and "rules-based".[11] That is to say, courts become the primary actor, keeping the European project in the direction of further market integration through the means of legal integration, i.e., "the prime mover in legal integration" (Garrett, 1995: 171). Even people, who understand the EU merely as a set of "standard"[12] inter-state

[10] China Is About to Amend Judges' Law While Clarifying the Establishment of Judicial Selection Committees ("我国拟修改法官法 明确设立法官遴选委员会"), XINHUA NETWORK 2017-12-22, available at: http://www.xinhuanet.com/2017-12/22/c_1122153493.htm (last visited May 19, 2018).

[11] There are disagreements about why the states delegate the adjudication power to the CJEU. Some argue that the CJEU serves as an agency of national interests by enforcing collective agreements, whereas others think it has emerged into an autonomous political actor with its own agenda and power that are beyond the control of member states.

[12] The intergovernmentalists are against the idea of treating the EU as a sui generis theory. See, Andrew Moravcsik, The Choice for Europe (1998), at p. 4.

bargaining activities in pursuit of certain collective goods of nation states by highly institutionalized means (Moravcsik 1993; Keohane 1984; Garrett, 1992), tend to recognize such "courts-driven" and "rules-based" nature of European integration, "[n]o other international organization enjoys such reliably effective supremacy of its law over the laws of member governments, with a recognized Court of Justice to adjudicate disputes" (Keohane & Hoffmann: 11). Also, the pro-integration attitude of the CJEU has also been widely noticed by scholars and politicians at large,[13] and is vividly reflected in its landmark decisions, e.g. *Da Costa, Van Gend, Costa v. ENEL*.

As for China, it is a unitary party-state embedded in a vast, and multi-layered system, yet with a highly centralized authority retaining control over national affairs at all levels through a complex set of mechanisms of centralization and decentralization. Hence, it also adopts a "state-centered", "centrally-planned" approach to integrating its domestic market, whereas Chinese courts are tasked with a relatively marginal role in this process. As scholars have demonstrated, legal reforms for decades have led to remarkable progress in China, to the extent that law has gained "unprecedented importance" in Chinese society, with courts being restored to operation and much more professionalized;[14] even so, in the political context of China, law and rules remain "a major instrument of governance", and courts are created for "marketizing economy".[15] As such, legislative and judicial actions essentially reflect the party-state's policies and changes thereof, and what's different from before is that policies are implemented through specialized professional activities, rather than direct translations.[16]

Obviously, and viewed from a political and institutional lens, how specific professionalization programs have been turned into different institutional arrangements while generating different political impacts can be explained by placing them into the specific political and institutional settings, where courts play different roles and undertake different functions in the process of market integration. As such, a more in-depth comparison between the 255 panel and the PJSCs requires one to look into these different scenarios, where market integration is driven by different forces

[13] See, e.g., Martin Shapiro, The European Court of Justice, in THE EVOLUTION OF EU LAW 323 (1999); Paul Craig, The Jurisdiction of Community Courts Reconsidered, 36 TEX. INT'L L. J. 555 (2001); Burley and Mattli (1993); Alec Stone Sweet and Daniel Kelemen, Assessing the Transformation of Europe: A View from Political Science (2013); J.H.H. Weiler, A Quiet Revolution (1994), etc.

[14] Stanley B. Lubman, New Developments in Law in the People's Republic of China, 1 NW.J.INT'L L. & BUS. 122, 127 (1979), at pp. 383.

[15] Lubman, I.d., at pp. 384.

[16] I.d.

and political actors. For example, the state has been playing a relatively stable dominant role in some scenarios (Jann 2003; Wang 1993; Hu, Tang, Yang, and Yan, 2017, etc.), whereas in others, the governing role of states is diminishing in face of the emergence of "informal markets and networks" [17], or "law-centered practices including the enactment of legislation, the promulgation of regulations, and the judgments of courts"[18], as well as the rise of private authority (Cutler et al. 1999; O'Brien et al. 2000; Hall and Briersteker 2002; Grande and Pauly 2005), such as "private transnational lawyers, accountants and expert systems of knowledge" and the so-called "organic intellectuals"[19], all of which constitute, supplement and supplant the traditional governing role of nation states today.

In short, different political forces are at play, horizontally and vertically, under different settings of market integration, and how they are related to each other fundamentally affects the relative role and political significance of the judiciary, which in turn determines the actual results of various professionalization efforts. However, existing studies on this front are still rare. This study, therefore, seeks to uncover this relatively hidden perspective of judicial professionalization and, in particular, the relation between market integration and the operationalization of the 255 panel in the EU and PJSCs in China. By doing so, it is hoped that this study will shed lights on the complexity and the relative diverse nature of the judicial power.

2. Market Integration and Judicial Professionalization

Since further progress towards the objective of market integration raises important issues regarding the institutional framework within which the integrated market is supported and implemented, both the EU and China have adopted a series of structural reforms in the form of constructing an order of rule of law. More specifically, the emerging issues of regional/local barriers and protectionism, market blockages, as well as the immobility of goods, services and labor across regional/provincial borders require a particular degree of centralized policymaking and legal unifications, which are crucial for the operationalization of a single, de-barriered internal/domestic market. In a word, the interface between the regional markets within each system requires both a high level of political centralization as well as a variety of technical arrangements, and that's why the integration of the European internal market and the Chinese domestic market are both accompanied by the construction of the rule

[17] See, Mark Bevir, Governance Beyond the State (2016).

[18] Young, Guttman, Qi, et al., Institutionalized Governance Processes Comparing Environmental Problem Solving in China and the United States, 31 Global Environmental Changes (2015) 163-173, at pp. 163.

[19] A. C. Cutler, Private Transnational Governance and the Crisis of Global Leadership (2008).

of law as a desirable mode of governance.

This study argues that judicial professionalization is integral to the governance strategy of the EU and China for achieving internal market integration, because professionalization occurring at a more centralized level can overcome conflicts about the proper authorities to govern relations that emerge from the inter-jurisdictional market activities, and it also serves to remove national/regional controls over market activities by replacing decentralized authorities with a unified professional identity. Specifically, the emergence and wide adoption of various reform programs aimed at "judicial professionalization" is closely associated with the economic imperative of integrating the internal/domestic market, for three reasons: 1) economic integration necessitates legal harmonization, or unification, which is aided by the degree of solidarity fostered in projects that pursue judicial professionalization; 2) responding to the rising demands for legal regulations and technicality in curbing state and local powers as well as in removing protective barriers and blockages that are increasingly "technical" in nature; and 3) fulfilling the symbolic requirements for legitimacy in the era of global convergence.

2.1 Market Integration and Legal Harmonization

First of all, market integration results in controversies over law and policies, which necessitates legal harmonization, and legal harmonization, in turn, calls for new authorities of dispute resolution established at a more centralized level to solve conflicts over new rules and regulations. Judicial power functions to ensure the uniform application of laws and rules within its jurisdiction through the interpretation and application of the law, and in the US context, also through judicial review of the legality of legislative and executive acts. In Marbury vs. Madison (1803), for example, the US Supreme Court established the principle of judicial review, hence conferring upon the courts the power and authority to strike down laws, statutes and executive actions that contravene the "supreme law of land".

From the perspective of market liberalization, the integration of an internal, or domestic, market requires regulatory measures for improving regional competition and market cost efficiency, vertically "unbundling" trade and business activities, like resource supplies and distribution, free movement of goods and services, as well as pricing, etc., thereby reducing the "horizontal concentration" of market activities.[20] To

[20] For market liberalization, see, for example, Toorai Jamasb and Michael Pollitt, Electricity Market Reform in the European Union: Review of Progress toward Liberalization and Integration (2005), available at: https://dspace.mit.edu/bitstream/handle/1721.1/45033/2005-003.pdf.

change the incentives and demands of market actors, therefore, increases the need for a unified set of binding rules to provide institutional guarantee for the effective implementation of supranational, or central, policy-making, i.e., policy changes are finalized by legal changes (Ehrenberg, 1994; Trebilcock and Howse, 1998; Goldstein and Martin, 2000). Moreover, from a legalistic point of view, the emergence and growth of transnational and inter-regional transactions, in turn, might give rise to the establishment of new norms and rules for regulating transactions (Stone Sweet, 2000). Cross-border transactions resulting from market liberalization and the removal of local controls call for inter-jurisdictional "re-regulations" (Cerny 1993; Simmons, 2001).

Existing studies have demonstrated that "the progress towards integration took the form of removal of trade barriers, encouragement- within limit- of arbitrage, harmonization of tax rates and other national regulations, increased transparency, monitoring of … price differences".[21] All of these require a considerable degree of convergence of rules, standards, and regulations, and to the extent that the segregation of an internal market was driven by the lack of any of the above factors, legal convergence under centralized efforts, i.e., the "upward" harmonization, or unification of law, might go hand-in-hand with economic and market integration.

Legal harmonization is extolled by some as the inevitable consequence of removing the fetters that restrict market competition but decried by others as the specter of capitalism and political coercion. Granted, a notable feature of such "upward" regulatory harmonization is the asymmetric nature of its political outcomes, rather than resulting in a uniformly "Pareto-superior" situation. For example, whereas "a more legalized trade regime" may "empower protectionists relative to free traders on issues relating to the conclusion of new agreements", it benefits "free traders relative to protectionists on issues of compliance to existing agreements";[22] also, in the case of "harmonized regulations" in the international financial market, some governments may resist harmonization "precisely because within their jurisdiction the costs exacted from such relations are higher than the benefits conferred", and it can be the case, in which "harmonization has been coerced", or as "the best available response to a changed regulatory environment over which smaller jurisdictions typically have little control".[23]

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[21] Pinelopi Koujianou Goldberg, Frank Verboven, Market Integration and Convergence to the Law of One price: Evidence from the European Car Market (2003), at pp. 2.

[22] Judith Goldstein and Lisa L. Martin, Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Tale, 54(3) International Organization 603-632 (2000), at pp. 604.

[23] It's always arguable whether the internationalization and globalization of market regulation is incentivized by market forces or politics, and who benefits most from it is closely examined by scholars.

Despite this, legal harmonization becomes a dominant means of market integration. Professionalization reforms are important in the sense that they lead to the standardization of interpretations and applications of law through the harmonization of the backgrounds, behaviors, and beliefs of judges. In this regard, professionalization reforms continue to be operated by supporters of regulatory harmonization (e.g., trade men, business groups and lobbyists, lawyers, and consumers, etc.), who consistently emphasize the need for initiatives that stress the legal and technical functions of courts, such as treaty/law interpretation, judicial reviews, and disputes/conflicts; by doing so, they successfully use the professional techniques of courts to replace fragmented legal systems with a much more centralized one, thereby transcending the limitations of national/regional controls over market activities. The harmonization of occupational requirements of judges across national/regional boundaries is aimed at ultimately facilitating the free flow of commodities, services, capital and labor. Specifically, according to the idea of professionalism, judges must have "highly specialized" knowledge "that can be acquired only by specialized formal education or a carefully supervised apprenticeship", and their competence is determined "not at will", but "only through compliance with a specified, and usually, exacting protocol", while satisfying "the profession's own criteria for entry to the profession".[24]

Through professionalization, judges are educated and trained in a way that they embrace a common set of values and ideas of law, and they acquire a sense of authority and privilege to interpret and apply law, since the services performed by judges are not allowed to be performed by others. Projects of professionalization, therefore, work both as a discourse, which disseminates the "*belief"* of the professional nature of judges, which "enables the group to claim professional status, with the opportunities for exclusion and other privileges", [25] and as a course of action that reinforces the special knowledge and autonomy of judges through its emphasis on professional performance and qualifications. And by way of professionalization, the functions and techniques of the courts are further legitimized and utilized to preserve the development of the newly constructed, harmonized rule systems.

It is against this backdrop that the programs of judicial professionalization continue to be operated. Under such circumstances, the law is harmonized through courts under the pressures for market integration, e.g., disputes might arise under the

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See, for example, Beth A. Simmons, The International Politics of Harmonization: The Case of Capital Market Regulation, 55 (3) International Organization (2001).

[24] Richard A. Posner, Professionalisms, 40 Ariz. L. Rev. 1 (1998), at pp. 2.

[25] Posner (1998), *i.d*.

harmonized legal settings, and the "statutory interpretation" function enables courts to manage these conflicts in a way that reinforces the "normative order", which "tend to reflect how interests and resources" are organized in these new settings (Stone Sweet, 2000) or "the implementation of certain judicial techniques expresses a court's 'regulating function', which is aimed at governing the relations between different legal systems within a global legal practice, specifically when the codified criteria regulating those relations are lacking or insufficient".[26]

2.2 Market Integration, Technicality and Demands for "De-Localization"

Second, experience from market liberalization around the world today has produced a consensus about the increasing demands for technical solutions in achieving market integration. Such demands are primarily generated from: 1) the rise of the more complex non-traditional, technical trade barriers, often in the form of non-tariff regulatory barriers (Thilmany, Barrett, 1997; Pelkmans, 1987; Chen 2004), as well as 2) the use of technical and rules-based limitations on the power and autonomy of states and sub-national authorities, aiming at removing national/local controls over economic activities (Stone Sweet, 2000; Slaughter and Mattli, 1993).

This offers a nuanced perspective of the process of integration, which stresses the rules-based, technical and functional aspects of market integration. On the one hand, among the most concerted efforts of those devoted to the case of market integration is the elimination of restrictions on trade among states/provinces, and this includes the removal of restrictions on the flow of goods and services, as well as capital and labor. However, whereas traditional strategies (e.g., treaty agreements, regulations) mainly tackled traditional barriers, i.e., tariffs and direct economic barriers, it has been estimated that over 100 types of nontariff measures are in place worldwide (Ndaysienga and Kinsey, 1994). Due to the increasing use of high-level technical, regulatory barriers in international/inter-regional trade, which "raise transactions and other costs, restrict trade, and influence consumer demand or patterns of international trade and investment",[27] policy-makers and businesses looking to expand into foreign markets are frequently called upon to deal with the complexity of these non-traditional barriers by adopting technical, legal solutions (Sykes, 1979).

On the other hand, market integration inevitably implies the need to constrain states/local powers. In order to fulfill the desire for the economic liberation shared by

[26] See, Elisa D'Alterio, From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?, International Journal of Constitutional Law, vol 9, issue 2 (2011), 394-424, at pp. 394.

[27] Thilmany, at pp. 2.

interest groups and politicians, policy-makers typically acquiesce in regulating state/local authorities in accordance with the technical, legal expressions in trade agreements as well as laws and regulations in other related areas of the law. As such, there is a trend towards curbing states/sub-national sovereignty and power in controlling markets through technical, rules-based activities and by harnessing their various specialized knowledge and backgrounds; such activities often are found to have captured the active and resourceful support of legal experts and technocratic bureaucrats alike for the harmonized legal regime that favors market integration. With its implications on privileges and autonomy, the concept of professionalism also means "de-politicization" of judicial decision-making. It, therefore, insulates the professional activities of judges based on their professional status from political interventions, thereby constraining the sovereignty and powers of traditional states/local authorities.

Consequently, a French exporter, for example, who previously was protected by tariffs made by its national government, now may refer to EU regulations and case laws in order not to lose a luxurious contract in competition with a German company. As observed by Garrett (1992: 534), "[t]he institutional structures underpinning the internal market are more constraining on the behavior of sovereign states than has been the case for other international regimes".

As market integration has increasingly relied on technical and legal means to undermine the existing protective efforts of states/local authorities, power and authorities are shifted to judicial bodies with technical competence at higher levels. Such a shift has led to various forms of empowerment of political bodies and actors in ways that cannot be seen under traditional contexts. In particular, the empowerment of judges as exercising their authoritative and technical roles in legal interpretations and applications is one of the most remarkable phenomena of centralized power and authorities, albeit to various degrees. To make such empowerment feasible, however, judges are trained and selected in a way that they are suitable for performing the tasks arising from the demands for technicality and legality in the context of market integration. Professionalism, therefore, is a measure by which courts and judges to acquire professional autonomy and influence, which is in part a consequence of conflicts and divergent views about control, generated from the "upward" power-shifting process of market integration.

2.3 Political Legitimacy and Professionalization

Thirdly, the demands for technical performance of law and courts in market integration raises serious questions and challenges about the legitimacy of the

expanding involvement of judicial activities in the sphere of politics (Rasmussen, 1998; Tushnet, 2000), e.g., "in liberal democracies which have opted for written constitutions enforced by unelected courts, the power of judicial review is a form of political power which cannot be legitimized through democratic accountability and control" (Bickel 1986), professionalization reforms can be viewed as reactions to such threats that seek to erode the professional status and autonomy of judges achieved by adhering to rigorous professional standards and fulfilling their technical performances. Courts need sufficient legitimacy in the eyes of their constituents to evoke their acceptance to their decisions (Easton 1958; Tyler 1990; Dahl 1957). In fact, it is said that institutional legitimacy is "the most important political capital" for a court.[28]

Such legitimacy come primarily from two resources: the "outsiders", generally represented by the public at large, and the "insiders", i.e., judges and members of the legal profession. Despite all kinds of conceptual ambivalence, disagreements and vicissitudes, the most prevalent explanation of institutional legitimacy iscentered on the relationship between diffuse support, i.e., willingness to support the continued functioning of the institution despite disagreement with its outputs (Gibson 2008), sometimes called "reservoir of good will"[29] (Easton 1965), and the acceptance of and compliance with the substantive decisions of the institutions (Brady 1988; Caldeira and Gobson 1992; Durr, Gilmour, and Wolbrecht 1997; Mondak 1991, 1992; Mondak and Smithey 1997; Tanenhaus and Murphy 1981; Gibson 1995, 1998; Cann and Yates, 2007). Only courts with sufficient legitimacy in the eyes of the public can stand to lose in a swiping decline of public good will in case of an unpopular decision, because the public is strongly committed to the judgments of the courts,[30] although factors affecting "diffuse support" for courts vary across systems (Cann and Yates 2008).

Other theories on legitimacy of courts links it to the concept of professionalism, thereby placing legitimacy into a particular "equilibrium", i.e., a state in which the

[28] James L. Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns, American Political Science Review, vol. 102, issue 01 (Feb 2008) 59-75: 59.

[29] According to Easton, legitimacy is equated to a "reservoir of good will", which is defined as the "good will that insulates the institution from public backlash in the event it issues an unpopular decision", see Easton (1965); however, he distinguishes "specific support", i.e., short-term support for an institution's specific policy decisions, from "diffuse support", i.e., long-term good will for an institution, see Easton (1975).

[30] Similar ideas are shared by many scholars, e.g., Murphy and Tanenhaus, "People may believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their offices and still continue to support the court if they respect it as an institution that is generally impartial, just and competent", at p. 275 (1969).

actual behavior of judges as well as other members within the legal profession are mutually adjusted (Streeck and Schmitter 1985). It is difficult to identify the institutional legitimacy without taking into consideration the enormous multitude of self-interested actors as persons and collectivities with diverse motives and values interacting with each other in diverse and vicissitudinous ways. As such, judicial self-legitimation depends largely on how they represent the interests of members of the legal profession as an occupational community, and to the extent its membership derives its privilege and autonomy from beliefs in its professional knowledge and technical competence, efforts on professionalization always serve to facilitate judicial self-legitimation.

In this respect, professionalization reforms arise from the need for legitimacy in the eyes of both outsiders and insiders. In the era of global convergence, judges usually derive their legitimacy by acting as technical and "non-political" actors with solely professional tasks, due to the emphasis placed on values, like judicial independence, and the rule of law. A famous metaphor is that law functions as the "mask and shield" for lawyers and judges to exercise their political influences and preferences (Mattli and Burley 1993). And regardless of specific measures that reform efforts have taken on, e.g., judicial training, education, exams, etc., they usually strengthen the legitimacy of courts and judges by two means: 1) stressing the significance of legal knowledge and skills of judges as law interpreters, and hence their independent, technical, and "apolitical" status; and 2) admitting that judges carefully observe the "outer boundaries", or limitations, of professional behavior, which are bound within the technical sphere and shall not expand to the political ones. Also, since a profession is usually legally recognized, "it is granted a monopoly over specialized practices, with a delimited authority delegated by sovereign states".[31] Professionalization enhances this formal aspect of legitimacy for judge and courts. Overall, it is best conceptualized as a part of a wider range of a self-legitimation mechanism working in concert with judges.

3 Professionalization and Judicial Appointments: The Adoption of the "Judicial Councils" in the European Union and China

A crucial aspect of judicial professionalization focuses on its membership. As Freidson defines this, what distinguishes a profession from other kinds of labor is the fact that a profession is "a kind of occupation whose members control recruitment, training and the work they do", and such an occupational control is "limited to

[31] Lorna Weir and Michael J. Selgelid, Professionalization as a Governance Strategy for Synthetic Biology, Syst Synth Biol (2009), at 91.

particular, demarcated" and "specialized tasks" based on "the knowledge and skill involved in work".[32] Given the importance of preserving an "occupational control" of work for a profession, it's essential for a profession to exercise the power of control over their membership through specially designed standards and mechanisms of recruitment, evaluation, training and so on, rather than subject to the desire of other non-professionals, such as market players and governmental actors.

Also, professional authority and privilege are based not so much on economically or politically superior status as on the "technical competence" or "specificity of function", as well as the so-called "disinterestedness" of professional men (Parsons, 1939: 458, 460). In order to justify its monopoly over a specialized work, a profession must "claim that recruitment into their profession selects those who have qualities that resist the abuse of privilege, and that this 'altruism' is reinforced by the manner in which they are trained and by the way in which the organized profession functions after training in the world of practice".[33]

Who are selected as its members and how- or to say, the recruitment and selection process- is therefore the first crucial question for a profession, based on two major considerations: first, its ability to maintain a monopoly over a "particular technically defined sphere", as well as its professional autonomy, depends on how much it can control over such process by itself; second, since its professional authority and legitimacy are derived from the technical competence of its members, it needs to ensure that competence, i.e., professional knowledge, skill, and integrity, or "good will", of its membership, through this process.

As such, a large number of recent professionalization projects on courts have centered on the process of judicial appointment, and in particular, there has been a general trend toward professionalization and de-politicization of the judicial appointment procedure through utilizing independent "judicial councils" to control, or oversee, this process today. Judicial appointments used to be very much dominated by two modes: parliamentary or popular elections, and executive appointments, which sometimes are followed by legislative consents. However, more or less since 2010, similar practices aiming at enhancing judicial participation through judicial electoral committees and advisory bodies have begun to be adopted worldwide- not only in old and new democratic states,[34] but even in countries without an independent judiciary,

[32] See, Eliot Freidson, Theory and the Professions, Indiana Law Journal, vol 64 issue 3 (1989), at pp. 424-425.

[33] Freidson, i.d., at pp. 428.

[34] See, John Bell, Judiciaries Within Europe, Cambridge University Press (2006); Michal Bobek and David Kosar, Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and

such as China.[35]

In Europe, for instance, calls for prioritizing professional merits over political considerations and reducing executive discretions and arbitrariness in judicial appointments process were expressed fairly since the mid-1990s, and have finally yielded some fruitful achievements in the creation of the so-called "Judicial Council Euro-model" (Seibert-Fohr 2009; Müller 2009; Bobek and Kosar 2014), or the "pan-European template".[36] This refers to the emergence of a common technical solution to existing political problems, i.e., the establishment of special judicial selection commissions responsible for judicial appointments based solely on considerations of candidates' professional merits. For example, the UK Constitutional Reform Act 2005 created judicial appointments commissions/boards, which have the power of making recommendations on judicial candidates to the ministers of government.[37] Proposals for similar reforms, which center on setting up a system of non-partisan, independently affiliated judicial selection commissions with the power of recommending suitable candidates for the bench to the executive ministers, were adopted in many other common law countries in the 1990s.[38]

Following the same trend, and in 2009, Germany amended its law to allow its

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Eastern Europe (2013); Carlo Guarnieri, Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government, 24 Legal Studies (2004), 175; Nuno Garoupa and Tom Ginsburg, The Comparative Law and Economics of Judicial Councils, 27 Berkeley Journal of International Law, 53 (2009).

[35] The draft amendment of the Judges Law of PRC, for example, was proposed on December 22, 2017 for review by the 12th NPC Standing Committee in its 31st meeting. The draft act stipulates that judicial selection committees shall be set up at the provincial levels as well as within the Supreme People's Court for the purpose of ensuring the standardization, specialization, and professionalization of the judicial workforce in China. See, China Is About to Amend Judges' Law While Clarifying the Establishment of Judicial Selection Committees ("我国拟修改法官法 明确设立法官遴选委员会"), XINHUA NETWORK 2017-12-22, available at: http://www.xinhuanet.com/2017-12/22/c_1122153493.htm (last visited May 19, 2018).

[36] See, David Kosar, PERILS OF JUDICIAL SELF-GOVERNANCE (Cambridge University Press, 2016).

[37] See, Kate Malleson, The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?, in (Peter Russell and Kate Malleson, eds.) APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (2006), at pp. 39-40.

[38] See, J. Allan, Judicial Appointments in New Zealand: If it were done when 'tis done, then 'twere well it were done openly and directly', in K. Malleson, P. H. Russel (eds), APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, 103 (2006); R. Cooke, Empowerment and Accountability: The Quest for Administrative Justice, 18 Commonwealth Law Bulletin 1326 (1992). Cf. P. East, A Judicial Commission, New Zealand Law Journal 189 (1995).

nominations to the Court of Justice of the European Union to be made in agreement with the judicial selection committee, who proposes judicial candidates for federal courts.[39] In 2010, Finland also amended its law, which created a judicial advisory board to make opinions on its national nominations to the supranational courts.[40] Simultaneously, similar judicial advisory bodies have been established in Central and Eastern European countries, including Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia[41], due to additional pressures coming from "multilateral donor agencies" who "have made judicial councils part of the standard package of institutions associated with judicial reform and rule of law programming" (Garoupa and Ginsburg 2009: 58). Beyond Europe, the same trend has been observed in developing countries such as in Latin America and Asia.[42]

Generally speaking, such "judicial councils" demonstrate three features: 1) they are composed of, or at least partially made up of, judges and legal experts; 2) they have the power to either determine, or scrutinize, the professional qualifications of judicial candidates, and their opinions on individual candidates are highly influential, regardless of whether they are legally binding or not; and 3) their decisions on judicial candidates are made based solely on professional criteria and standards and not influenced by other considerations, while their deliberations follow self-enacted procedures and usually are not conducted in public. However, specific practices of similar selection bodies differ in terms of 1) the specific composition of such bodies-although most often the numbers of judicial and legal representatives need to remain above certain minimum standards; 2) the scope of their review power and privileges: some of them have the power of recommendation, while others only have the power to veto executive nominations, and the manner of review conducted by these bodies also differ; 3) their legal status: they are established by constitutional amendments, regulations, and are at times prescribed by organizational or procedural rules; and 4) political influence and significance.

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[39] Tomas Dumbrovsky, Bilyana Petkova and Marijn van der Sluis, Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States, Common Market Law Review, vol 51, no.2 (2014).

[40] Tomas Dumbrovsky, Bilyana Petkova and Marijn van der Sluis, Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States, Common Market Law Review, vol 51, no.2 (2014).

[41] See, David Kosar, Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice, European Constitutional Law Review, 13: 96-123, (2017).

[42] See, Rebecca Bill Chavez, The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence, 49 Latin American Politics & Society 33 (2007).

The establishment of these judicial selection bodies has been widely regarded as a progressive change for the judiciary in terms of enhancing professionalism and eliminating political arbitrariness in the process of judicial recruitment, and its prevalence and increasing popularity today have attracted more and more scholarly attentions. However, debates on this issue tend to focus on its normative aspects as moving deeper into the process of judicial appointments across space and time. That is to say, although judicial activities antedate all modern democratic ideas, legal and political studies on judicial appointments have displayed quite a parochial interest as they are overwhelmed by concerns about how appointment practices have interacted with positive ideas like democratic legitimacy (McNollgast 1995; Roger 2004), maintaining judicial independence (Ackerman 1988; Shapiro 1964), judicial accountability (Makin 2004), preserving the professional nobility of judges (Ziegel 1999), as well as the efficiency of the courts (Singleton 2004).

As a result, the questions most often raised and addressed in relation to the rising-into-power of various "judicial councils" include: how can judges be best selected? who get to select judges? Why set up judicial councils, i.e., their emergence as a response to frequent political interventions in the appointment process?[43] Is it problematic that the operation of judicial councils is confidential? How to balance judicial independence and accountability?[44] To what extent can such a practice serve as a safeguard of professional integrity and diversity?[45] To what degree should information be disclosed? How to strike a balance between politics and de-politicization, and judicial independence and democratic legitimacy? (G. Gee, 2010)

Admittedly, a few exceptions exist, in which attempts have been made at reflecting upon and conceptualizing the political nature of these discourses. For example, beyond the normative debates, Guarnieri and Pederzoli (2002) distinguished the bureaucratic and professional models of judicial selection; Bodnar and Bojarski (2012) were concerned about the shift in political atmosphere as well as the effects of the "structural deficiency" on the Polish legal system, while acknowledging the

[43] See, e.g., P. H. Russell, J. Ziegel, Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees, 41 University of Toronto Law Journal 4 (1991); T. Riddell, L. Hausegger, M. Hennigar, Federal Judicial Appointments: A Look at Patronage in Federal Appointments since 1988, 58 University of Toronto Law Journal 39 (2008), etc.

[44] See, for example, G. Palmer, Judcial Selection and Accountability: Can the New Zealand System Survive?, in B.D. Gray/R. B. McClintock (eds), Courts and Policy: Checking the Balance; J. McGrath, Appointing the Judiciary, New Zealand Law Journal 314 (1998), etc.

[45] See, e.g., B. Harris, Appointments to the Bench- The Role of a Judicial Service Commission, 15 Adelaide Law Review 191 (1993); D. O'Sullivan, Gender and Judicial Appointment, 19 University of Queensland Law Journal 107 (1996).

achievements of the "National Judicial Council" in preserving judicial independence in Poland; Trebilock and Daniels (2008) explored the political "frictions" and shift in power underlying the judicial councils established in some Latin American countries in the 1990s, e.g., the recommendations and decisions of the judicial councils in El Salvador and Bolivia were either ignored or faced with great domestic "political hostility".[46]

Nevertheless, the focus of these studies remains quite narrow and is still limited in both depth and scope. First of all, as stated before, a key element of judicial appointment is politics. Scholarship on this topic all stops short of the discussion of the process's political and institutional repercussions, despite its theoretical and practical importance; hence, the political and structural aspects of the operation and functioning of judicial councils have not yet been comprehensively explored yet.[47] Secondly, there has been a remarkable gap between the current scope of scholarly concern and the actual prevalence of this practice. As part of the rule of law reforms, such practices have actually occurred beyond the scope of democratic states and are increasingly adopted in transnational and authoritarian regimes, despite vastly divergent ideological commitments, political ethos, and social customs. In this respect, these practices have really become "universal" in practice, but have only received "unequal treatments" in theory.

Without fully recognizing the political nature and broad popularity of this development, the problems currently discussed by scholars might have obscured our perception of its fundamental political dynamics. Moreover, the limitations of and gaps in existing studies with respect to the prevalence of similar practices fail to help us either understand, or reflect upon, the nuance of the situations in different political and legal systems and might greatly hinder our efforts to explore the broader and more general issues underlying recent developments within a larger theoretical and comparative framework.

To obtain a different, more comprehensive and holistic perspective of analyzing the development of judicial councils, an analysis must therefore involve dimensions reflecting broader political dynamics that are peculiar to particular political systems, including those that are currently understudied. This may involve political actions taken on in various legal arenas and at multiple levels, and it underlines that the effects

[46] See, M. J. Trebicock and Ronald J. Daniels, RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS (2008), at pp. 70-71.

[47] The above-mentioned exceptions are not sufficient in exploring these aspects in a systematic and comprehensive manner.

and developments of judicial councils are contingent on such conditions so that the specific institutional arrangements and structural changes following their establishments reveal different forms of political dynamics. As such, this project distinguishes itself from existing studies with its findings on the relationship between market integration and professionalization, in which the operation of the two judicial councils under study is embedded, as well as its comparative reach into more nuanced and salient differences in political contexts, like those observed in supranational and authoritarian regimes.

4 The Comparative Study

In order to fill this gap in the literature, this project will extend its assessments beyond the scope of existing studies on the development of this practice with a multi-dimensional comparison of the European Union and the People's Republic of China during the past decade. Such a comparison focuses first on why and how the two completely different political regimes have, more or less simultaneously, accommodated the same route to professionalization into their own judicial selection settings, followed by reasons for the relatively different arrangements and outcomes displayed in the two systems.

It does so, especially by taking into consideration the distinctive approaches of the EU and China to market integration, i.e., the "courts-driven", and "rules-based" EU approach vis-à-vis the "state-centered" and "centrally-planned" Chinese approach. Throughout this study of comparison, it is assumed that why professionalizing the judicial workforce, what course is to be followed to transform the judiciary, how to professionalize judges through the medium of judicial councils, and differences in the relative status and operation of these expert bodies, need to be answered by looking at the holistic backgrounds of the two systems, both economically and politically, and they all strongly reflect the interconnected relation between "market integration" and judicial professionalization, as I outlined above.

While looking so different on the face of it, the EU and China share many interesting features and several factors help to make sense of their comparability. First of all, like other large systems, the European Union and China share similarities in terms of their political and social contexts. That is to say, both systems have a vast territory, encompassing a large portion of a continent with a huge, and demographically and culturally plural, population; regional disparities and imbalance are increasingly counterpoised with enhanced interconnectedness and interdependency in both systems; both legal systems belong to the civil law family; also, they are both situated in a large, multi-layered political systems and are both trying to

foster/preserve a desirable degree of solidarity among all jurisdictions with certain federalist characteristics, i.e., multiplicity of authorities, and vertical allocation of power within a multi-layered institutional structure.

As such, they face similar problems in the process of market integration, such as institutional imbalances, multilevel policy transmission difficulties, as well as conflicts between their civil law traditions and the liberal rule of law imperatives. On the one hand, they have to deal with difficulties relating to multilevel governance structures. In this regard, the European Union features a "quasi-federal" supranational structure,[48] while China is a politically unitary party-state with a multi-level system of government, which nevertheless functions like a federal state, economically speaking (Blanchard and Shleifer, 2000), i.e., "federalism, Chinese style", or, "market-preserving federalism" (Montinola, Qian, and Weingast 1995). On the other hand, both the EU and Chinese legal systems are characterized as civil law systems, which means their judiciaries do not possess jurisdiction over the constitution and must restrain themselves from legislative activities.[49] This, at times, is in conflict with their rule of law imperatives, and a certain degree of institutional accommodations is required in their legal reforms, while keeping attentive to national culture.

Second, and for our purpose, a salient yet often unnoticed common feature of the two systems is that the economic development of both systems is, to a large degree, dependent on the performance and growth of their internal market economies, i.e., the formation and development of the single European market as well as the Chinese domestic market. As a result, internal/domestic market integration is one of the most pertinent concerns of both systems. To do so, both need to abolish economic barriers and regional protectionism in various forms.

For the European Union, since its foundation, to build "one market without borders" is always the fundamental goal that transcends others.[50] Just as the EEC Treaty (1957) declares, "the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relationship between the states belonging to it". In other words, to have "the EU as one territory without any internal borders or

[48] See, Vivien A. Schmidt, The European Union: Democratic Legitimacy in a Regional State?, Journal of Common Market Studies, vol 42, no 4 (2004).

[49]

[50] See, The European Single Market, European Commission, available at: https://ec.europa.eu/growth/single-market_en (last visited on May 31, 2018).

other regulatory obstacles to the free movement of goods and services", is always "at the heart of the European project".[51]

The EU has been working progressively towards achieving full integration since its creation. Starting from the Treaty of Rome, intra-Community trade was free of internal tariffs and trade quotas, and the process was escalated by the Single European Act of 1986, which aimed to "establish the internal market over a period expiring on 31 December 1992".[52] This was followed by the launch of a single currency in Europe in January 1999, which has resulted in the formation of the euro currency among 19 EU member states. According to statistics and research, the single market has not only added to the economic growth and competitiveness of the EU, e.g., adding 2.2% to the EU GDP growth since its creation,[53] but also increased the social welfare of the EU citizens by creating more jobs and business opportunities, widening consumers' options for products and services, and ensuring the freedom and well-beings of individuals.[54]

Now, although national barriers still exist, the internal market in Europe has become more fully integrated, with goods, services, labor and currency freely circulated within increasing sectors of harmonization.[55] For instance, the national price levels in the Member States become assimilated overtime, when the "co-efficient of variation of price and volume levels" among the 28 EU members kept decreasing from 30.4 in 2005 to 28.4 in 2016.[56] But, development of the single market in key areas, including finance, energy, labor, transportation, services and e-commerce, is still lagging behind,[57] and further integration into the European Union faces unprecedented political challenges and resistance following a series of anti-EU events,

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[51] *I.d.*

[52] See, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0027 (last visited on May 29, 2018).

[53] See, Briefing of European Parliament, EU Single Market: Boosting Growth and Jobs in the EU (2017), available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/611009/EPRS_BRI(2017)611009_EN.pdf (last visited on July 3rd 2018).

[54] Of course, the agenda of European integration is subject to harsh criticisms as well. This study avoids engaging in substantive debates on this matter, but only uses the fact that market integration is a goal of utmost importance for the European project to support its arguments.

[55] See, https://europa.eu/european-union/topics/single-market_en (last visited on May 29, 2018).

[56] The co-efficient rate decreases, when the national price levels in the member states converge; and verse versa. See, Eurostat, http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tec00121 (last visited on May 24, 2018).

[57] See, European Commission, available at : https://europa.eu/european-union/topics/single-market_en (last visited May 27, 2018).

from the constitutional crisis of 2005 to the recent emergence of a series of anti-establishment, populist movements, as well as the UK's withdrawal from the EU in 2017.

As for China, while it has obtained remarkable economic growth during the past three decades, with its GDP increasing from $260 in 1976 to $6416 in 2015,[58] much of its economic development has been attributed to its openness to the global market since its opening-up and reform; relatively less known is its domestic market liberalization and integration, i.e., China's domestic market has also undergone important spatial integration through fostering a better environment for interprovincial trade.[59] Numerous studies and surveys have already demonstrated that China has achieved greater levels of integration in its domestic product, labor and capital markets (Xu 2000; World Bank 2011; Johansson 2010). According to official records, China's trade openness has increased from 19.95% in 1985 to 37.059% in 2016 (See Figure 3).[60] **(Figure 3, Trade Index)**

Although the specific economic effects of domestic market integration in China remain contested,[61] mainstream scholars warn against "a fragmented internal market with fiefdoms controlled by local officials" in China (Naughton 1999). People generally think that the existence of regional economic disparities, rural-urban divisions, local barriers and protective mechanisms impede China's economic

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[58] Jinhua Cheng, STATES, INTERGOVERNMENTAL RELATIONS, AND MARKET DEVELOPMENT (2018), at pp. 9, available at: https://books.google.com/books?id=Pi1bDwAAQBAJ&pg=PA9&lpg=PA9&dq=china+GDP+increasing+from+$260+in+1976+to+$6416+in+2015&source=bl&ots=32e_W7BHxw&sig=xXzOeSnrDQqPkN_B0AIhrKxEONU&hl=en&sa=X&ved=2ahUKEwiBtsmqk_3eAhUBVt8KHXkSBgcQ6AEwAHoECAoQAQ#v=onepage&q=china%20GDP%20increasing%20from%20%24260%20in%201976%20to%20%246416%20in%202015&f=false (last visited on April 29, 2018).

[59] See, Qingqing Chen, Chor-ching Goh, Lixin Colin Xu, and Bo Sun, Market Integration in China, World Bank Policy Research Working Paper No. 5630 (2011).

[60] See, World Bank, Trade Index, available at: https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS?locations=CN (last visited June 1, 2018).

[61] Many scholars think domestic market integration in China are more economically beneficial to its economically developed regions than underdeveloped regions; and some cautioned that the benefits of domestic integration should not be taken for granted. See, for example, Shanzi Ke, Domestic Market Integration and Regional Economic Growth – China's Recent Experience from 1995-2011, World Development, vol 66 (2015), 588-597; Jane Golley and Nicolaas Groenewld, Domestic Market Integration and Inter-Regional Growth Spillovers, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiswIqS-tzbAhUNsFMKHTcvA4AQFggyMAE&url=https%3A%2F%2Fcrawford.anu.edu.au%2Fpdf%2Fstaff%2Fjane_golley%2FChapter10-GolleyGroenewold.pdf&usg=AOvVaw3pq287FO-c1GR3FhGKQjA- (last visited on May 15, 2018).

performance so that further economic reforms must be directed towards greater domestic openness and spatial integration, which calls for the elimination of internal trade barriers (Poncet 2003; Young 2000; World Bank 2005; Lyons 1987). As stated by a high-ranking Chinese official responsible for industry and commerce, "administrative monopolies, forced deals, and market blockages have become a cancer in China's market" (People's Daily July 1st, 2000).

However, throughout history China's economic development has been characterized by a bouncing back and forth between internal integration and disintegration (Poncet 2003). This is why the State Council of the PRC issued the so-called "No. 303 Regulation", i.e., the "*Provisions of the State Council on Prohibiting Regional Blockage in Market Economic Activities*" ("《国务院关于禁止在市场经济活动中实行地区封锁的规定》"), in 2001.[62] Despite increasing awareness, for the past three decades, market reforms in China have fostered strong economic protectionism and strategic behavior (Naughton, 1999; Young, 2000) (e.g., provincial competition, shielding local firms and industries, collusion between local business and government, political factions and networks, etc.) at the sub-national levels, hindering the free flow of goods and services across regions, and thereby making internal market less accessible.[63] As such, as China set out to develop its socialist market economy,

[62] The Chinese version of the law can be found here: http://fldj.mofcom.gov.cn/accessory/200812/1228439077655.pdf (last visited on June 2, 2018).

[63] Disagreements exist with respect to the actual effects of decentralization on Chinese economic development. Most scholars associate China's remarkable economic growth in post-1978 with its decentralized policy-making and finance systems, which took place in around the mid-1980s. See, e.g., Yingyi Qian and Barry R. Weingast, China's Transition to Markets: Market-Preserving Federalism, Chinese Style, Journal of Policy Reform 1 (1996); Gabriella Montinola, Yingyi Qian, and Barry R. Weingast, Federalism, Chinese Style: The Political Basis for Economic Success in China, World Politics 48 (1995).; Yingyi Qian and Gerard Rolan, Federalism and the Soft Budget Constraint, American Economic Review 88 (1998); Ping Chen, China's Challenge to Economic Orthodoxy: Asian Reform as an Evolutionary, Self-Organizing Process, China Economic Review 4, no. 2 (1993); Chenggang Xu and Juzhong Zhuang, Why China Grew: The Role of Decentralization, in Peter Boone, Stanislaw Gomulka, and Richard Layard (eds.), Emerging from Communism: Lessons from Russia, China and Eastern Europe (Cambridge 1998); Eric Maskin, Yingyi and Chenggang Xu, Incentives, Information, and Organizational Form, Review of Economic Studies 67 (2000). Others stress the incompleteness and weakness of China's political and economic decentralization, and point to factors like central factional competitions with local connections. See, Hongbin Cai and Daniel Treisman, Did Government Decentralization Cause China's Economic Miracle?, World Politics, vol 58, no. 4 (2006), 505-535. For discussions on local incentives, see, Hongbin Cai and Daniel Treisman, Political Decentralization and Policy Experimentation (2005); Xiaopeng Luo, Rural Reform and the Rise of Localism, in Jia Hao and Zhimin Lin, eds., Changing Central-Local Relations in China: Reform and State Capacity (Boulder, Colo: Westview Press 1994); John P. Burns, Local Cadres Accommodation to

eliminating regional blockades in market activities has always been a major economic imperative for the Chinese central government.

It's worth pointing out that when talking about integration of the internal market, or domestic market, our focus is mainly on the interactions between political institutions at the central level and the one below it, i.e., between the EU and its member states, and between the Chinese central government and local governments, in particular, the provincial governments. This is so, because these two levels constitute the primary concern with regard to issues relating to centralization and decentralization for the EU and China, and hence, for the purpose of examining market integration, they are also the primary objects of our study on the approaches of the two systems to market integration. In this sense, here, the supranational institutions become the counterpart of the Chinese central authorities, whereas the national governments are parallel to the Chinese provincial governments.[64] However, we are aware that the two parallels are not identical in terms of sovereignty, power, and autonomy, or in the bargaining positions and power relations that are at play in the process of market integration and (de)centralization.

Thirdly, and closely related to the second point, both systems pursue a fuller, or much wiser, market integration through a series of cross-border structural and institutional reforms, while utilizing the rule of law as a norm of governance. Both systems are undergoing dramatic transitions in terms of institutions-building; and institutions-building, therefore, is a form of battle between central and local levels, as well as between the supranational bodies and states. To achieve fuller market integration, the EU and China are looking to the same institutional solutions, with which they could prevent, and ultimately eliminate, various regional barriers and blockages. In particular, as discussed in previous sections, the market liberalization/integration in the EU and China leads to two cases of the world's most extensive and lively cross-jurisdiction, or inter-regional, reform of institutional structures at present, which involves the harmonization/centralization of distinct state-level or provincial practices of judicial appointments towards the direction of professionalization.

In the EU, during the past decade, in response to concern over the political

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the 'Responsibility System' in Rural China, Pacific Affairs 58 (1985), 619-21; Yumin Sheng, Governing Economic Openness: Provincial Level Evidence from China, 1977-2002 (2004), etc.

[64] Within the Chinese context, the concept of "provincial level" refers to the level of government of provinces, as well as municipalities that are directly under the Central Government, which include Beijing, Shanghai, Chongqing, Shenzhen, and Tianjin. That's why the first PJSC was established in Shanghai.

maneuvering of national governments that the Court of Justice of the European Union ("CJEU") faced, the selection process of judges has undergone significant changes at both the EU and the member state levels (Bobek, 2015). At the EU level, a specialized expert advisory panel was set up according to Article 255 of the Lisbon Treaty in 2010, i.e., the "article 255 TFEU panel", in order to scrutinize the suitability of national candidates to perform the duties of Judges and Advocates General of the CJEU.[65] Before the establishment of the 255 TFEU panel, changes in the national selection process had already taken place in some countries, for example, the procedures for national nominations to the ECJ and GC were made after consulting with a special judicial selection committee in both the UK and Germany. Also, changes at the EU level were followed by a series of procedural and institutional reforms of the national appointment processes in many other EU member states, which "started to openly advertise judicial positions in European courts, making national nominations subject to competition".[66]

In China, apart from other professionalization measures introduced during the past few years, a similar advisory body is to be established at the provincial level, i.e., the so-called "provincial judicial selection committees" ("*sheng ji lin xuan wei yuan hui*"), which are also tasked to provide opinions on the professional qualifications of entry-level judges in local people's courts. Due to fears that local governmental control over the courts' personnel decisions would seriously erode the autonomy and credibility of local judiciaries, the Chinese central government launched the latest round of judicial reform of the courts' administration at the local levels in 2014. Once put into practice, the provincial judicial selection committees examine the profiles of candidates to people's courts at the local levels to determine their knowledge, competence, and suitability for the job.

Viewed together, the two expert bodies are identical, i.e., while representing the "merits-based", professional model of judicial selection, they are both set up as a means of "de-locationalization" and thereby both tasked with overseeing the suitability of judicial candidates from a professional, depoliticized perspective. Article 255 TFEU states that the panel is to "give an opinion on candidates; suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court" in accordance to criteria stipulated in Articles 253 and 254, before the member states make the appointments.[67] The draft amendment to the Judges' Law of

[65] Article 255, Lisbon Treaty.

[66] Michal Bobek, Selecting Europe's Judges: A Critical Appraisal of Appointment Processes to the European Courts (2013), at pp. 1.

[67] Article 255 Lisbon Treaty.

PRC briefly prescribes that the PJSCs are to "scrutinize the professional ability" as well as "professional integrity" of judicial candidates to the local people's courts. In this respect, it is hoped that such a body can "reduce the administrative, departmental nature of the judicial appointment process" through "highlighting the professionality, objectivity, and authorities" of such bodies.

They, therefore, have many commonalities. First of all, organizationally speaking, they are both bodies institutionally independent from local/national governments and authorities, and therefore lack the political motivations and concerns that are shared by the latter. The 255 panel is set up at the EU level, deliberately insulating its operation from the control of national governments; whereas the PJSCs operates at the provincial level, with its working office located in the provincial high people's courts.[68]

Secondly, due to their importance, either theoretical or practical, to judicial independence and rule of law, they are both set up in accordance with the law, i.e., treaty amendments, and draft amendments to the Judges' law. Thirdly, their compositions, working manners, and principles are the same in terms of professionalism, albert with operating with relatively different emphasis in reality. Fourth, their opinions are both influential substantively, although not legally binding,[69] meaning that they are usually adopted in the ultimate results of judicial appointments;[70] lastly, they both have the actual effect of facilitating political centralization and the harmonization and unification of judicial behavior, as well as fostering uniform ideologies, or beliefs, in legal technicality and professionalism, both through professionalization.

However, a careful observation reveals that they have nevertheless displayed quite different traits as the main objects, and starting points, of our analysis. As briefly described above, the two bodies, i.e., the 255 TFEU panel and the PJSCs, work

[68] See, Article 255 TFEU, and draft amendments to the Judges' Law of the PRC.

[69] It remains unclear as to whether the opinions of the PJSCs are legally binding, since the draft law doesn't clarify this matter. But since its task and operation are about to be written in legislation, it's highly likely that the opinions of the PJSCs will have legal binding effects on judicial appointments in China.

[70] This is measured against based on the past performance of the 255 panel and the PJSC in Shanghai. As of 2016, the 255 panel has delivered 13 unfavorable opinions out of the 131 opinions, i.e., affecting 19.1% of national nominations on their first terms of office. See, 4th Activity Report Article 255 Panel, at pp.14. Shanghai PJSC changed 9.2% of the original rankings of judicial candidates during its first round of evaluations, meaning 40 out of 152 candidates' rankings are changed. This data is according to the author's personal interview with a senior official who is also a member of the committee on July 2, 2015.

differently in several aspects: First, the 255 panel and the PJSCs, although both composed of a considerable number of judicial representatives, vary in terms of how much judges themselves are involved as members of such bodies. Despite initial controversies, the 255 panel has eight members, and all of them are chosen from former supranational and national supreme judges, senior lawyers "of recognized competence"; seven of them are nominated by the President of the ECJ, whereas only one is proposed by the European Parliament.[71]

Under the banner of "combining the party leadership, professional developments", the composition of the PJSCs follows the principles of both "social representation and professionalism",[72] and are accordingly made of both "judicial representatives" and "concerned social representatives", among which the number of judicial representatives should be "no less than one third" of the entire membership.[73] Also, according to the experience of the Shanghai PJSC, a significant portion of its membership is made up of the so-called "special members", i.e., 7 out of 18 of its members are relevant governmental officials at the provincial/direct municipal levels, with the rest of them being called "professional members", chosen from senior legal scholars, lawyers and legal practitioners.[74]

Second, despite the similar working manner of the two bodies, the scope of review of the 255 panel is relatively more broad than that of the PJSCs, and the specific guiding principles and emphasis they put on the criteria of professionality in evaluating judicial candidates vary slightly, but meaningfully. In a strict sense, the evaluations of the two bodies both have two dimensions, i.e., a "professional dimension", and a "policy dimension".

For example, the 255 panel operates to ensure the professional competence of judicial candidates on the surface, while scrutinizing the ideological commitments of them beneath that surface. It does a relatively more comprehensive assessment on the suitability of candidates, and its criteria for evaluations are "professional", in the sense

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[71] Article 255 TFEU.

[72] First Provincial Judicial Selection Commission of the Country Established ("全国首个省级法官、检察官遴选委员会成立"), 21 SHIJI JINGJI 2014-12-14, available at: https://m.21jingji.com/article/20141214/herald/0fc3fe31256509baea0535e65a2f453f.html (last visited on July 1, 2018).

[73] draft amendments to the Judges' Law of PRC, see, supra ?.

[74] First Provincial Judicial Selection Commission of the Country Established ("全国首个省级法官、检察官遴选委员会成立"), 21 SHIJI JINGJI 2014-12-14, available at: https://m.21jingji.com/article/20141214/herald/0fc3fe31256509baea0535e65a2f453f.html (last visited on July 1, 2018).

that they emphasize the requirements that candidates have similar, elite educational, and professional credentials, and share the same ideological commitments to the values of judicial independence. At the same time, it also asks to view the political visions of the judicial candidates, by extensively reviewing their background and activities.

As such, the 255 panel not only reviews the dossiers of candidates but may extend its review to available public information and other necessary information it requests to be sent by the member state governments, which are regarded as relevant for its decisions, as it states, "it does not rule out, … taking account of publicly available and objective information (e.g., easily accessible publications by a candidate)".[75]

Also, the 255 panel reviews and "takes as its basis" the dossiers of candidates submitted by the member state governments, which include, *inter alia*, the candidates' CVs and lists of publications, and may request national governments "to send additional information or other material which the panel considers necessary for its deliberations".[76] Also, it conducts private hearings with national nominees, so as to "supplement the examination of the content of the dossiers", and to assess "the candidates' professional experience, legal expertise, aptitude for working in an environment in which a number of legal traditions are represented, language skills, reasons why the candidate considers that he or she is suited for performing the duties…"[77]

And it particularly emphasizes the need for reviewing the broader professional background of judicial candidates, by looking into their past publications, writings, professional activities, memberships to professional associations, language skills, and educational backgrounds,[78] as well as the "national selection procedures" for the purpose "to know whether there was a call for applications, whether an independent body had decided on the merits, i.e., the professional merits of the candidature proposed with regard to the post to be filled, or whether any other selection procedure offering at least equivalent guarantees, such as choice of the candidate by a Member State's highest court, had been used".[79]

Based on the practice of Shanghai PSJC, the PJSCs also base their evaluations

[75] Fourth Activities Report of the 255 Panel, at pp. 15.
[76] Fourth Activities Report of the 255 Panel, at pp. 15.
[77] Fourth Activity Report of the 255 Panel, at pp. 18.
[78] Fourth Activity Report of the 255 Panel, at pp. 16.
[79] Fourth Activity Report of the 255 Panel, at pp. 18.

on candidates' professional competence on dossier reviews as well as through interviews.[80] It ranks the judicial candidates proposed by local people's courts according to its evaluations and then provides a shortlist of candidates with its own rankings.[81] Usually, judicial candidates are judicial assistant personnel who passed uniform examinations organized by provincial high courts and their "past trial performance" are very important factors to be considered in the evaluations of the PJSCs.[82] In particular, trial settlement rates and incidents of miscarriages of cases have always been primary evaluation factors, along with results from tests of legal and technical issues.[83]

Buti it's clear that the operation of the PJSCs is also heavily policy-oriented, as is always the case. Given the specific context of its working, the first round of assessments performed by the Shanghai PJSC focused on selecting judges for the first terms of office at intermediate and basic courts in Shanghai after the "quota system" (the so-called "*yuan e zhi*") went into effect. The Quota system is a major reform measure in the latest round of judicial reforms in China, and its main aim is to distinguish trial judges from those judges, who didn't hear and decide cases, like those court officials.[84] Under such circumstances, the Shanghai PJSC, interpreted the concept of "professionalism" in a particular way, i.e., referring to the fact that judicial candidates "actually participated in trial activities", rather than those didn't. It's predictable that the way it interprets the concept of professionalism into the criteria of evaluations will vary, depending on changes in policy orientations.

Furthermore, in terms of transparency and accountability, the two bodies differ contextually. Both bodies are undemocratic bodies and operate in a relatively opaque manner,[85] but are subject to different political pressures. Since its beginning, the 255 panel has been criticized for its deliberation process, which arguably lacks transparency. Its deliberations are filmed and forwarded to the member states without

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[80] Interview with Shen.

[81] Interview with Shen.

[82] Interview with Shen.

[83] Interviews with local judges in Xi'an and Beijing, which were conducted by the author in March, 2015.

[84] According to the decisions of the Central Politics and Law Affairs Committee ("zhong yang zheng fa wei") (hereinafter "CPLAC"), after the "quota system" takes effect, the ratio of judges to non-judges should at least be reduced to something less than 39%. See, The "Yuane System" May Lead to "Heavy Caseloads and Insufficient People", Experts Provide Solutions, THE SHANGHAI RULE OF LAW NEWS (2015-12-01), available at: http://www.shzfzz.net/node2/zzb/shzfzz2013/yw/u1ai936111.html.

[85] Whereas the operation of the PJSCs is declared to be open to the public, its specific opinions on individual candidates are not found disclosed to the public. It's more likely that its deliberations will be performed largely in private.

being disclosed to the public, and according to para 2 of point 8 of its operating rules, as well as Regulation [EC] No 1049/2001, the opinions of the 255 panel are directly "forwarded to the representatives of the governments of the member states" without being disclosed to the public. The 255 panel justifies this issue in the name of protecting the personal data of judicial candidates. However, such justification clearly isn't sufficient to cancel skepticism in this respect, and many people cast doubt upon the lack of transparency and democratic accountability in its working manner.[86] Such concerns are particularly salient at present, due to the growing anti-EU, populist sentiments in Europe today, and when supranational judges are frequently denounced as "unelected", "unaccountable" supranational bureaucrats.[87]

The deliberations and decision-making of the PJSCs, too, are not required to be disclosed publicly, according to the draft law; it's only stipulated that the decisions of the PJSCs regarding the rankings and lists of judicial candidates should be made by a simple majority vote.[88] However, the PJSCs don't face similar criticism and political pressures as the 255 panel does. In fact, it may be viewed much more positively in China. Although Chinese society traditionally honors the value of "judicial populism", which is believed to have run in the opposite direction with the tendency towards "judicial elitism",[89] now it's generally agreed that judging is a profession, characterized by "trained expertise and selection by merit, a selection made not by the open market but by the judgment of similarly educated experts".[90]

Third, affecting the substantive results of judicial appointments to a limited, yet satisfactory, degree, the opinions of the 255 panel and the PJSCs, however, have different political significance, especially structurally speaking. On the one hand, the 255 panel and the PJSCs are both associated with the trend of de-localization, i.e., they are part of the plan to centralize political control over the judicial appointment

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[86] See, Alberto Alemanno, How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections; and Armin von Bogdandy and Christoph Krenn, On the Democratic Legitimacy of Europe's Judges: A Principled and Comparative Reconstruction of the Selection Procedures; both in Michal Bobek, Selecting Europe's Judges (2015).

[87] The EU's Court is Picking Apart Our Laws, THE TELEGRAPH 22 June, 2016, available at: http://www.telegraph.co.uk/news/2016/06/22/the-eus-court-is-picking-apart-our-laws/.

[88] First Provincial Judicial Selection Commission of the Country Established ("全国首个省级法官、检察官遴选委员会成立").

[89] See, Zhang Zhiming, From Judicial Elitism to Judicial Professionalism, PEOPLE'S COURT DAILY July 26, 2002, (distinguishing "judicial elitism" from "judicial professionalism").

[90] HAROLD PERKIN, THE RISE OF PROFESSIONAL SOCIETY: ENGLAND SINCE 1880 xxii (2003). There is an enormous amount of theories in the West, defining what constitutes a "profession". See, e.g., Julia Evetts, The Sociological Analysis of Professionalism: Occupational Change in the Modern World, 18 (2) International Sociology 395-415 (2003).

process, despite the fact that the 255 panel oversees appointments of judges to supranational courts, whereas the PJSCs mainly scrutinize judicial appointments to local people's courts.

As such, the establishment of the 255 panel changed the previous appointment process, in which the governments of member states had exclusive control over appointments of EU judges. In China, local authorities used to control judicial appointments to the local people's courts, and the PJSCs are part of the centralized plan of vertically unifying court administration, i.e., the so-called "unified management system" ("*tong yi guan li*"), which aims to change the previous system through transferring the power of managing court personnel and finances from local authorities to the provincial high courts.[91]

On the other hand, the opinions of the 255 panel are of greater political significance compared to the opinions of the PJSCs. This is so, because the 255 panel has generated greater far-reaching, and fundamental political repercussions in the EU, by changing, in important ways, the dynamics and procedures of the national selection procedures of the member states. It has not only changed the fact that member states were in complete control and free to maneuver the judicial appointment process to the CJEU but also resulted in a series of institutional reforms among its member states, particularly the newly accessed states in Central and Eastern Europe.[92] As previously stated, it does so by "mandating", *in effect*, the member states to adopt open, competitive, and fair selection procedures for nominating their candidates to the CJEU. As pointed out, similar institutions are subsequently adopted in the member states, especially due to fear of "uncertainty threatened by mass accession from the former Eastern Bloc" (Lasser, 2018). As a result, there has been a large trend of setting up similar expert bodies in national selection procedures, resulting in the emergence of the so-called "pan-European" model.

A key argument of this study is that beneath the ostensible similarities, there are subtle, but striking differences in how the 255 panel and the PJSCs are actually operationalized and how they affected the central-local/supranational-state relations under the context of market integration. And It seeks to explain these differences by

[91] See, Supreme Court He Fan: Unified Management of Human, Financial and Material Resources is Not Vertical Mangament, CAIXIN NEWS Nov. 18, 2013, available at: http://china.caixin.com/2013-11-18/100606061.html.

[91] See, Supreme Court He Fan: Unified Management of Human, Financial and Material Resources is Not Vertical Management, CAIXIN NEWS Nov. 18, 2013, available at: http://china.caixin.com/2013-11-18/100606061.html.

[92] See, generally, Michal Bobek and David Kosar, (2013).

drawing attentions to the two distinctive approaches to market integration represented by the EU and China, i.e., the "courts-driven", "rules-based" EU model, and the "state-center" and "centrally-planned" Chinese model. It then suggests that the two models manifest themselves in the different institutional arrangements and strategic allocations of power in the EU and China, which, in turn, explain the similarities and differences of the 255 panel and the PJSNs. Part I of this study outlines its general idea, major arguments, as well as the comparative frameworks; Part II describes the establishment of the 255 panel in the EU as part of the EU's efforts on building the single market, and then explains how the fundamental role and political functions allocated to the CJEU contributes to the political significance of the 255 panel; Part III explains how Chinese courts are strategically located in the way that the central state of China seeks to integrate its domestic market has helped explain the relatively less significant role played by the PJSCs.

Overall, a systematic examination of the two cases of the EU and China not only contributes to the theoretical richness of studies on judicial professionalization and appointment processes by drawing our attentions to the relation between market integration and legal reforms that have a multi-level, structural dimension, but also bring into life a completely new comparative perspective to examine the similarities and differences of the EU and Chinese legal systems. In order to make the comparison work, this project will concentrate only on the differences between the two models of market integration, i.e., the "courts-driven", "rules-based" EU model, and the "state-centered", "centrally-planned" Chinese model, as well as those factors that have a structural implication about the judicial power, especially about the courts' role in supporting market integration. The principal reason for such a focus is that this aspect is fundamental in explaining the political nature of the rise and spread of the discourse of professionalism as well as various reform programs centered on professionalizing courts and judges during the past decade. Viewed from the lens of judicial appointments, this study will examine the specific arrangements adopted in similar reform programs in the two systems at hand, and in particular, the establishment and functioning of judicial councils in the selection processes of judges. Data used in this project are partly second-hand, with the rest obtained from field interviews conducted by the author in China during 2014-2015.

Part II. A Comparison Between the EU and Chinese Models of Judicial Councils: The Article 255 TFEU Panel and the Provincial Judicial Selection Committees

Against this background of market integration, the centrally driven efforts of mainstream political elites have been the main force behind professionalization reforms that have occurred under the banner of the rule of law. A key feature underlying these professionalization efforts is a move towards circumscribing governmental discretion and de-politicizing the functioning and works of courts. After making this point at a conceptual level in Part I, I then proceed by arguing that projects of professionalization through the selection and appointment procedure of judges in the EU and China is part of the wider trend of achieving political centralization and removing national/local barriers through depoliticization and technical maneuvers. Given the strategic positions of the judicial power in transnational/domestic politics, without structural changes put forth by centralized initiatives of professionalization, the political costs associated with market integration in both the EU and China would have been considerably higher.

Reviewing their development in the past decades, both the EU and China have made great reform efforts with regard to the institutional and procedural arrangements of judicial appointments, which are aimed primarily to turn their previous mode of appointment into more "merits-based" and politically-neutral ones, thereby limiting existing governmental controls and political arbitrariness.[93] On the one hand, proposals for setting up an "advisory panel" at the EU, "which would have the task of giving the member states an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications" were circulated around in Europe.[94]

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[93] See, e.g., Aida Torres Pérez, Can Judicial Selection Secure Judicial Independence? In Selecting Europe's Judges: A Critical Review of the Appointment Procedures, (ed.) Michal Bobek, at page 194, the author quotes the First Activity Report of the 255 Panel regarding the purpose of its function, "… to support its assessment of the candidate's legal expertise, experience, suitability for the office of Judge, independence and impartiality, the panel may take into account the conditions under which the Member State concerned selected the candidate and, in particular, whether there is a national merit-based selection procedure and if so, how it is organized…". Admittedly, the new selection mechanisms will not completely "depoliticize" the process; but by calling them more "politically neutral", I particularly refer to getting rid of those political intervening forces that used to affect the neutrality and impartiality of the selection processes in the two systems, such as undue political influences on candidates from the member states' governments.

[94] See the final report of the Discussion Circle on the Court of Justice set up by the Convention on the Future of Europe (2002).

On the other hand, after the market economy was officially established, China realized the imminent need of modernizing its adjudication system and has launched the process of "judicial professionalization" to improve the quality of court personnel.[95] For example, in 2002, the "Unified State Judicial Examination" was introduced, which not only added a professional dimension into the previous administrative mode of judicial selection in China, but also has led to a dramatical improvement of the overall quality of the Chinese judicial workforce. And now, the focus of the central authorities in China is on to eliminate the political arbitrariness embedded in its previous judicial appointment process, in which the local party/governmental authorities had the controlling power.

Despite different progresses they've made so far, since roughly around 2010, similar programs of professionalization, i.e., adopting judicial councils in the selection procedures of judges, have been initiated in the EU and China. Given the trend that the judicial council has now been perceived as a standard practice for regimes engaged with the rule of law- as Bobek and Kosar (2013) describes, "how to achieve judicial independent" has been "frequently reduced to the institutional reform", which "has itself been limited to promoting one particular model of court administration: the Judicial Council model"-[96] both the EU and China have taken this course of action to aid legal and economic reforms.

Although more fundamental reforms didn't happen, Article 255 of the Lisbon Treaty was successful in placing an advisory expert panel at the EU (hereinafter, the "article 255 TFEU panel"), acting precisely as a professional reviewing body responsible for assessing the suitability of candidates of national nominations for the CJEU. Since the beginning of its working on 1 March 2010, and by way of delivering expert opinions, either favourable or unfavourable, on the candidatures for the offices of Judges and Advocates General for the CJEU, the article 255 TFEU panel has not only influenced the substantive results of national nominations, but also pushed many member states to carry out similar reforms on their national selection procedures. As such, it has further insulated the CJEU from political interventions of member states, who used to exclusively control the judicial appointment process to the CJEU; also, it

[95] For discussions on judicial professionalization in China, see, e.g., Yu Xingzhong, Judicial Professionalism in China: From Discourse to Reality, in PROSPECTS FOR THE PROFESSIONS IN CHINA 78-108 (Wiliam P. Alford, Kenneth Winston and William C. Kirby eds. 2011); He Weifang, Ex-Servicemen of the PLA Now Serving at Court, SOUTH WEEKLY Jan. 02, 1998; Nicholas C. Howson, China's Judicial System and Judicial Reform, Law Quad. Notes 54, no. 1 (2011): 62-4 (delivered at the inargural "China-U.S. Rule of Law Dialogue" held at Tsinghua University, July 29-30, 2010); Wang Chenguang, The Professionalism and Elitism of Judges, 6 Jurisprudence 3-9 (2002), etc.

[96] Bobek and Kosar (2013), at pp. 3.

enables the EU of introducing structural reforms that have a court-empowering effect, not only within itself, but also among its member states.

Whilst debates about the effects and effectiveness of the ongoing reforms regarding court administration in China are continuing, there is sufficient evidence to suggest that the judicial selection committees to be set up at the provincial level for evaluating the professional knowledge, competence and past performance of candidates for the judicial posts at local people's courts represent a significant, and profound change in the appointment system of Chinese local people's courts. It was stipulated in July 2014 by the fifth "Five-Year Reform Plan" ("第五个五年计划") issued by China's Supreme People's Court", which reiterated the principles and measures announced by the Central Leading Group for Judicial Reform of the Chinese Communist Party ("CCP") under the leadership of President Xi Jinping.

Together with the newly introduced "quota system" of judges ("员额制"), the new system basically means that in order to enter, or remain, in the judicial posts at local people's courts, the number of which is prescribed by a specified quota to reflect the ratio of judges actually handling cases to non-judicial personnel,[97] judicial candidates are eventually appointed based on results of internal appraisals, uniform examinations as well as the assessments performance by the judicial selection committees set up at the provincial levels.[98] This change will fundamentally alter the previous mode of court administration, whereby local governments were in charge of the allocation of financial resources and personnel management of local people's courts.

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[97] According to the decision of the Central Politics and Law Affairs Committee, the ratio of judges to non-judges should be less than 39%. See, Summary of Judicial Reform Pilot Works in Qinghai Province, available at: http://www.qhchangan.gov.cn/Qhcazq/sj/newsContent.action?id=86275. However, local variations are allowed. See, Pilot Reform of Yuanezhi, Paving the Path for Judicial Reform, LEGAL DAILY Oct. 27, 2015, (describing how the ratio of judges is localized among the pilot areas. For instance, while the ratio is 33% in Shanghai, it's 35.2% in Changchun's municipal courts of Changchun, and 37.5% in its basic courts), available at: http://finance.sina.com.cn/sf/news/2015-10-27/12568314.html.

[98] See, e.g., Shanghai Judicial and Prosecutorial Selection (Disciplinary) Committee is Established, SHANGHAI RULE OF LAW VOICE Dec. 14, 2014, available at: http://www.chinalaw.org.cn/Column/Column_View.aspx?ColumnID=892&InfoID=12954. In this reform, the system of "specified number of judges" is accompanied by the "lifelong responsibility system" ("zhong shen ze ren zhi"), according to which judges are held responsible for every case that they have handled in the past for a life time. In case of misjudged cases, the judges who made the judgments will be held responsible. See, Realizing Judges' Lifelong Responsibilities Requires Both Internal and External Cultivations, PEOPLES NETWORK May 30, 2014, (explaining that only by accepting the supervision of the public, can courts obtain credibility), available at: http://opinion.people.com.cn/n/2014/0530/c1003-25085409.html.

Both the 255 TEFU Panel and the PJSCs are judicial councils that are composed by a majority of judges and legal experts to oversee the professional competence of judicial candidates, and whose opinions function as a check on the executive power of judicial appointments. As described earlier, both the 255 TFEU panel and the PJSCs share these common features. And corresponding to the imperative of internal/domestic market integration, their involvements in the selection and recruitment process of judges both emphasize the role of expert scrutiny on the suitability of judicial candidates. By so doing, they are able to remove, or generate more constrains on, the state/local executive powers relating to judicial appointments, promotion and removals, as well as remunerations, etc. As such, both the 255 TFEU panel and the PJSCs, are, by nature, methods of "de-localization", or to a certain degree, centralizing the power over judicial appointments to the supranational/provincial levels.

Moreover, along with this tendency of de-localization/centralization, the two expert bodies also function to foster a sense of solidarity, in terms of law, ideologies and policy. That is to say, by way of advancing a uniform set of the criteria/qualifications, in particular, the professional background, legal knowledge and skill sets of judges, in judicial appointments in the name of professionalism, they both work to advance the unification/harmonization of judicial behavior, thereby helping to ensure the unification/harmonization of applications of law, although in reality this works only indirectly and convolutedly. Also, their scrutinization fosters, and reinforces, the sense of judicial professionalism among judges, and hence enhancing their ideological commitments to legal technicality and the rule of law. Such an effect of solidarity is reflected in the growing cooperation among European judiciaries and judges, the widespread institutional reforms among EU member states following the Lisbon Treaty, as well as the so-called "uniform court administration" ("*tong yi guan li*") reforms accompanying the provision of the PJSCs in China.

Lastly, viewed from the perspective of policy considerations, and underlying the technical dimension, the operation and functioning of both the 255 TFEU panel and the PJSCs are simultaneously "policy-oriented". In the case at hand, it means that these two expert bodies under study are inevitably embedded in the particular politics of market integration, as noted earlier by North (1990: 16), "institutions are not usually created to be socially efficient, [but] are created to serve the interests of those with bargaining power to create new rules".

In the EU, the 255 panel not only reviews the professional background of national nominees, but also asks to see their publications and past writings and implied in their

emphasis on their ability of working in an international setting is an implicit requirement that the personal visions of judges at the CJEU must be, at least, ideologically compatible with the European project, irrespective of domestic politics. Although the personal political views of CJEU judges tend to vary, it's undeniable that the appointment process is able to foster certain European identity through the lens of professionalism, such as their commitment to the EU law, despite of their nationalities.[99]

In China, as mentioned before, there is a clear policy orientation in the working of the PJSCs. As seen in the case of the Shanghai PJSC, the primary guiding policy behind its operation in assessing judicial candidates is to distinguish trials judges from court officials, and in ranking judicial candidates, it relies on their past trial performance and factors like case settlement rates and numbers of misjudged cases, etc. Also, the draft amendment to the Judges' Law emphasizes selecting judges at intermediate and high people's courts from judges working at lower courts, and as such, it's likely that the PJSCs would look at the lengthy of trial experience in examining candidates to courts above the basic levels.[100] However, to the extent that the operation of the PJSCs is heavily policy-oriented, its working principles remains uncertain and might change in accordance with new policies.

1. Two Modes of Judicial Councils in the EU and China:

Generally, the involvement of judicial councils in the selection and recruitment process of judges emphasizes the role of expert scrutiny on the suitability of judicial candidates, and it, therefore, removes, or generates more constrains on, the executive

[99] A clear example of how this works can be exemplified by referring to what former ECJ judges say about their role as an EU judge. See, e.g., Transcript of the Interview with Judges David Edward (2005). When asked about his understanding of the EU law, he replied by emphasizing their adherence to treaties provisions, and he goes on saying that "[W]hat I was trying to emphasize was that the interpretation of the Treaty is interpretation in relation to its purposes as well as its strict wording. It's not enough simply to ask whether a national measure if, formally speaking, apparently compatible with the terms of the Treaty, but one has to go on and ask, 'What is the effect of this national measure', …, is that compatible with Community law or not, rather than a strictly textual analysis".

[100] The draft amendment of the Judges Law of PRC, for example, was proposed on December 22, 2017 for review by the 12th NPC Standing Committee in its 31st meeting. The draft act stipulates that judicial selection committees shall be set up at the provincial levels as well as within the Supreme People's Court for the purpose of ensuring the standardization, specialization, and professionalization of the judicial workforce in China. See, China Is About to Amend Judges' Law While Clarifying the Establishment of Judicial Selection Committees ("我国拟修改法官法 明确设立法官遴选委员会"), XINHUA NETWORK 2017-12-22, available at: http://www.xinhuanet.com/2017-12/22/c_1122153493.htm (last visited May 19, 2018).

powers relating to judicial appointments, promotion and removals, as well as remunerations, etc . Generally, such involvement displays the following five features: 1) such bodies are politically independent and are mainly composed of legal experts, with a significant part of its members selected from the judiciary, while parliaments/governments sometimes get to select several representatives; 2) decisions of judicial councils are usually advisory, i.e., functioning as a check on results from executive appointments, or parliamentary elections, and are based solely on considerations of the suitability, competence and expertise of candidates in accordance with professional standards and criteria (e.g., legal knowledge and skills, professional practice experience, integrity), without taking into account any political factors (e.g., ideological commitments, fidelity to political parties); 3) the procedure of scrutiny usually takes the form of profiles/documents review, as well as oral interviews; 4) for the sake of insulating from political influences, the deliberation process of judicial councils is often carried out *in camera* and not made public; 5) such bodies usually acquire different legal status, i.e., some are established by the constitutional amendments while others are simply set up according to legislative, or regulatory, provisions.

A. the EU Model of the Article 255 TFEU Advisory Panel ("the 255 panel"):

In response to widespread calls for prioritizing the professional expertise of judges and criticisms towards the unlimited discretion of member state governments in appointing judges to the supranational courts, the Lisbon Treaty has established the famous "Article 255 TFEU panel".[101] This change ended the previous situation in which judges and advocates at the CJEU were solely determined by member state governments, regardless of political arbitrariness and procedural opacity and informalities. It had often been reported that appointment procedures within the domestic settings of the member states were often carried out in arbitrary manners, whereby executive discretions threatened to prioritize considerations of political patronage and alliance over those about the ability and competence of the judicial nominees to the CJEU[102].

[101] The aim of the 255 TFEU panel is to ensure the competence and impartiality of judge candidates. See the final report of the Discussion Circle on the Court of Justice set up by the Convention on the Future of Europe (2002), although in favor of maintaining the system of appointment by common accord of the governments of the member states, it explains "the circle also felt it was appropriate to set up an 'advisory panel', which would have the task of giving the member states an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications. …"

[102] Martin Trybus, Lucs Rubini, THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY (2012), at pp. 37, (describing that "if ever, seem to have been challenged. It did

In the absence of a centralized qualification oversight system, incidents of political arbitrariness have significantly undermined the judicial independence and credibility of the CJEU membership.[103] Such concerns were widely expressed, for instance, by Judge Paul Mahoney, in October 2008, "". However, member states had no incentive to oppose unqualified judicial candidates proposed by another state, and national nominations tended to be non-transparent and unaccountable.[104] The problems of politicization and lack of transparency and accountability of EU judicial appointments led to proposals for alternative selection methods,[105] and the adoption of the plan for setting up an "advisory panel" was finally considered by the Discussion Circle on the Court of Justice during the period of preparing for the draft of the Constitution for Europe.[106]

As a result, the Lisbon Treaty on the Functioning of the EU has established the special expert advisory panel ("the 255 TFEU Panel") at the EU level, while nominating and appointing candidates for the CJEU remains a prerogative of the

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not enable outsiders to verify that national nominees possessed the independence and ability required. An indication that improper motives may sometimes have played a part in national nominations is provided by the practice of some Member States when a member's appointment fell to be renewed").

[103] Cases, in which judicial renewals failed due to domestic politics were found, in the past. See, Trybus and Rubini (2012), i.d., at pp. 36-37, (quoting former Advocate General Jacobs that "from time to time the appointment of a particular judge or advocate general has not been renewed, for apparently arbitrary reasons", and a senior judicial official, "in several cases members were not reappointed because of party politics").

[104] Dumbrovsky, Petkova and Sluis, i.d., at pp. 4.

[105] Pressures first became from the European Parliament, who asked for the power of ratification of national nominations. See, Resolution of the European Parliament's Position Concerning the Reform of the Treaties and the Achievement of European Union, 1982, OJ (C 238) 25, 6 July 1982. The CJEU opposed such proposals on the grounds of judicial independence. See, Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (Luxembourg, May 1995), para. 13, available at: http://www.cvce.eu/content/publication/2003/4/2/ 3644862f-2e8f-4170-9616-e573a41b61c5/publishable_en.pdf (last visited July 3, 2017); also, similar concerns over the parliamentary involvement in the appointment process were expressed in the Final Report of the Discussion Circle on the ECJ, CONV 636/03, 25 March 2003, para. 6.

[106] See, Final Report of the Discussion Circle on the ECJ, CONV 636/03, 25 March 2003, para. 6, "The circle also felt it was appropriate to set up an 'advisory panel', which would have the task of giving the Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications. The panel-whose deliberations would not be public and which would not hold any hearings – might be made up of former members of the Court and representatives of national supreme courts, while the European Parliament might also appoint a legal expert".

member state governments.[107] The 255 TFEU panel is tasked with providing opinions on the suitability (e.g., integrity and intelligence) of national nominations to the CJEU; consequently, member states are required to consult with the 255 TFEU panel before they make appointments. This is a small yet important change, since the panel functions as a vet on national nominations, which used to be quite "ad hoc and often politicised", "scattered and haphazard", and completely controlled by the member states.[108]

Having been operationalized since March 1, 2010, the 255 TFEU panel is mainly made up of senior judges and lawyers, and it has a composition of seven experts chosen from former national highest court judges and constitutional judges as well as from former EU judges. The European Parliament has the voice to nominate one member of the panel, while the President of the ECJ nominates the rest. Once the President of the ECJ submits the list of nominations for the panel, the European Council will appoint all panel members for a fixed term of four years, renewable once. As such, the majority, i.e., six out of seven, of the panel members come from the bench, and this has a potential of judicial self-governance, as warned by some scholars, who are interested in reflecting upon the appropriate combination of its membership.[109]

Specifically, the 255 Panel is responsible for making either favorable or unfavorable opinions upon the suitability of the candidates nominated for (re)appointments to the ECJ and the General Court by the member states' governments, and it has the privilege to interview candidates, deliberate *in camera* as well as require member states to submit any supplemental materials regarding their nominations when it deems necessary. To assess the suitability of national candidates, the panel reviews their profiles submitted by the national governments, examines candidates for a first term of office in a two-stage private hearing, and may ask the member states to submit additional information that it deems important for its deliberation.[110]

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[107] For detailed provisions, see, Article 255 TFEU; Decision 2010/125 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union [2010] OJ L50/20.

[108] Lord Mance, The Composition of the European Court of Justice (a talk given the the UK Association for European Law, 19th October 2011), at pp. 10.

[109] See relevant discussions made by Lord Mance, *i.d.*, para. 13, (saying that "I disagree, …, that such councils should have a substantial majority of judges", and that "the right course is to expand the scope and diversity of the appellate appointing commissions"); also, a tendency toward judicial self-governance is warned by Dumbrovsky, Petkova, and Sluis, supra 81.

[110] Its operating rules was established by the Council Decision of 25 February 2010 and was supplemented at its meeting on 25 April 2014 with additional operational rules, such as the submission

The panel is generally regarded as a progressive change in the EU in terms of improving judicial independence and professionalism of the CJEU, [111] i.e., "[w]hereas in the past, a variety of factors has influenced member states' choices when selecting future judges, the novel system has evidently made a more objective review possible".[112] its working manners and procedures, however, elicit criticisms for lack of transparency and accountability[113]. Despite of incidents where member states lobbied for its members, the panel remains an independent body, not associated to the member state governments. Its decision-making is limited to performing a professional check on candidates according to the criteria laid down by Article 253, 254 and 255 TFEU; while taking place in camera, it's not influenced by any outsiders.[114] The panel must make a reasoned opinion on the suitability of each national nominee, and its opinions are forwarded to the Representatives of the Governments of Member States.[115] And based on Article 2 of the Regulation (EC) No 45/2001, O.J. 2001,

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of a harmonized CV template, as well as the specific stages of private hearings. For detailed descriptions of its current operating rules, see, Fourth Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union (2017), at pp. 15-21.

[111] The panel is believed to be significant in the sense of avoiding "past experience with member states appointing candidates with not only no knowledge of EU law, and/or very little capacity to work in an international environment, but even without any decent knowledge of French and English" without usurping states' prerogatives in national nominations. See, e.g., Michal Bobek, Of Feasibility and Silent Elephants, in JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF EUROPEAN COURT OF JUSTICE, (eds.).

[112] See, Henri de Waele, Not quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union, in Michal Bobek (ed.), SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURE (2015), at pp.?.

[113] The operation of the 255 panel is challenged on the ground of lack of democratic legitimacy, accountability and transparency, see, Alberto Alemanno, How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections; and Armin von Bogdandy and Christoph Krenn, On the Democratic Legitimacy of Europe's Judges: A Principled and Comparative Reconstruction of the Selection Procedures; both in Michal Bobek, Selecting Europe's Judges (2015). Moreover, its ability to insulate appointments from political intervention is doubted, and some people think it would offer greater guarantee on judicial independence and competence, while respecting the member states' legitimate interests, if the panel was given the power to appoint members from a list of candidates put forward by the member states. See, Anthony Arnull, THE EUROPEAN UNION AND ITS COURT OF JUSTICE, Oxford EC Law Library (2006), at pp. 29.

[114] Some member states lobbied for their candidates. See, Tomas Dumbrovsky, Bilyana Petkova and Marijn van der Sluis, Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States, Common Market Law Review (2014), vol 51, Issue 2, pp. 455-482, at pp. 461.

[115] it is said that the rules and criteria of selection elaborated by the panel are too vague and ambiguous, thereby leaving too much space for discretion and too much room to maneuver, and such at pp.11, "[t]he panel has not, however, laid down any specific criteria for the concept of 'jurisconsult of

L8/1, and Case C-28/08, *European Commission v. the Bavarian Lager Co. Ltd.*, [2010] ECR I-06055, as well as *European Data Protection Supervisor* (EDPS), the panel decided not to disclose its opinions to the public.[116]

Since its operation to 2016,[117] the panel has delivered 131 opinions in total. It has delivered 13 unfavorable opinions, among which 12 were on candidates for the first term of office to the General Court, while one was made on a candidate for a first term of office to the ECJ.[118] As indicated by the panel itself, its opinions, have greatly changed the dynamics of national nominations. Although not legally binding, its opinions are always taken seriously by member state governments, i.e., nominations that received negative opinions were subsequently replaced, or withdrawn, by their governments.[119] It's believed that "the member states will in practice find it difficult to appoint a candidate who does not command the confidence of the panel, for the absence of a reference to a favorable opinion of the panel in a decision of appointment would reveal that the opinion was unfavorable, thereby destroying the credibility of the candidate in question",[120] and therefore, the panel's opinions have *de facto* binding effects on national nominations.[121]

For example, the Greek government nominated Christos Vassilopoulos to be the Judge at the General Court, but his name never appeared again, which means his

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recognized competence' as enshrined in the Treaty. Therefore, one of the criteria for candidates to the ECJ loses its meaning".

[116] See, First Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the EU, Section I.1.

[117] So far, the 255 TFEU panel has issued four activity reports since its operation, and the latest one, i.e., the fourth one, was published in 2017, covering its activities up till 2016. The materials included in this project, therefore, mainly focus on its works from 2010 to 2016.

[118] The first unfavorable opinion on candidate for the first term of office at the ECJ was made in 2015, see, Fourth Activity Report of the 255 Panel, at pp. 11. However, who received this negative evaluation, and why, are not explored by scholars yet. First-hand materials on this occurrence are quite limited.

[119] See, fourth activity report, i.d., at pp. 13, ("The panel's opinions, whether favorable or otherwise, have always been followed by the governments of the Member States"). It is believed that the opinions of the 255 Panel are effective in constraining national nominations, largely because no country wants to nominate a badly marked candidate to the ECJ.

[120] Trybus and Rubini (2012), supra 80.

[121] See, supra 90, (saying that "the government concerned is likely to experience peer pressure to justify itself, but if it refuses to present an alternative, it may yet have its cake and eat it"); see, also, Camilla Cordelli, Judicial Appointments to the Court of Justice of the European Union, ACTA JURIDICA HUNGARICA, 54, no.1, 24-39 (2013), at pp. 31, (similarly observing that "the opinions on the suitability of the nominees, even though still merely advisory, are taken into great consideration by the Member States").

nomination was likely received a negative evaluation by the 255 panel.[122] One ambiguous case is the reappointment of Judge Czucz, who was nominated by the Hungarian government but was likely given a negative opinion by the 255 panel. His application was withdrawn[123] but then returns on July 5, 2010, when Hungarian government nominated him for reappointment again.[124] He was finally appointed on July 7, 2010, but the fourth recital said, "the panel set up by Article 255 of the Treaty on the Functioning of the European Union has given an opinion on the suitability of those two judges to perform the duties of Judge of the General Court". [125] These cases were in contrast with the situation in which Judge Prechal was appointed by the member states in June 2010: the second recital of the preamble to their decision declared: "the panel set up by article 255 of the TFEU has given a favourable opinion on the suitability of Alexandra Prechal to perform the duties of judge of the Court of Justice".[126]

More importantly, in addition to the profiles and personalities of judicial candidates, the panel's working also constitutes a screening test on the selection procedures of candidates within their domestic settings, i.e., "the panel asks for information on the national procedure that led to the candidate being selected, inviting the government to say inter alia whether there was a public call for applications, whether a national selection committee was set up and if so how the national selection

[122] Mr Christos Vassilopoulos was proposed by the Greek government. See, Proposals for Appointment of Mr Christos Vassilopoulos, Council of the EU, Brussels, 9 February 2010 (6125/10), available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206125%202010%20INIT (last visited April 5, 2018). But he was not appointed subsequently.

[123] See, Decision of the Representatives of the Governments of the Member States of the EU appointing Judges to the General Court, Brussels, 24 June 2010 [10952/2/10 REV 2], recital 2 says, "The panel set up by Article 255 of the Treaty on the functioning of the EU has given an opinion on the suitability of the aforementioned eleven judges to perform the duties of Judge of the General Court of the EU. Afterwards, the application of Mr. Ottó Czúcz has been withdrawn", available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010952%202010%20REV%202.

[124] See, Proposal for Appointment of Mr Ottó Czúca, Brussels, 6 July 2010 (11908/10), available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011908%202010%20INIT (last visited July 1, 2018).

[125] See, Decision of the Representatives of the Governments of the Member States of the EU appointing Judges to the General Court, Brussels, 7 July, 2010 (11912/10), available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011912%202010%20INIT (last visited July 1, 2018).

[126] See, Decision of the Representatives of the Governments of the Member States of the EU appointing Judges to the Court of Justice, Brussels, 31 May, 2010, 9720/10, available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209720%202010%20INIT (last visited on July 1, 2018).

committee was made up and what it recommended".[127] And it explains that "[t]he purpose of the request if to know whether there was a call for applications, whether an independent body had decided on the merits, i.e., the professional merits of the candidature proposed with regard to the post to be filled, or whether any other selection procedure offering at least equivalent guarantees, such as choice of the candidate by a Member State's highest court, had been used";[128]

By doing so, the panel places a strong emphasis on the procedural aspect of its evaluations, as it indicates in the fourth activity report, "the method for selecting the candidate chosen at national level may in no circumstances be prejudicial to him or her", and that "the existence of a national procedure enabling the merits of candidates to be assessed in an independent and objective manner may, when in the eyes of the panel a candidature could have certain weak points, work in the candidate's favor as the panel's doubts and questions can be put aside by the panel's justified trust in the national procedures".[129] From the perspective of the member states, therefore, in order to successfully nominate their candidates, they must also fulfil the procedural requirements explicitly outlined by the panel. A Greek nominee was given an unfavourable opinion by the 255 panel in 2010, due to the fact that the Cabinet of Prime Minister nominated him by disregarding the shortlist of recommendations provided by the Ministers of Justice and Foreign Affairs.[130]

Moreover, this procedural aspect of the panel's evaluations has produced significant political implications on the national selection procedures of nominating candidates for the CJEU, because it leads to a series of institutional reforms on the national nomination processes in the member states, i.e., "formal selection processes being instituted in a number of European countries".[131] Many people applauded for this procedural effect, arguing that it represents a positive change in terms of improving judicial independence in Europe. For example, Lord Mance describes the procedural evaluation of the 255 panel as "an important feature of the panel's practice", because, he so argues, "[t]he existence of an objective appointments procedure independent of executive influence can provide some assurance about the quality of a candidate for judicial office".[132]

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[127] First Activity Report, section II, 3.

[128] Fourth Activity Report, at pp. 18.

[129] *I.d*., at pp. 19.

[130] See, Council Decision 2010/125/EU of 25 February 2010 appointing the members of the panel provided for in Article 255 TFEU [2010] OJ L50/20, art. 1.

[131] Lord Mance (2011), supra 86, at pp.

[132] Loard Mance (2011), supra 86, at para 36.

Along with the trend toward professionalization and de-pollicization in Europe, there has been a remarkable degree of procedural harmonization, marked by the emergence of the so-called "pan-European template" of selection procedures in the form of judicial councils, or, the "Judicial Council Euro-model".[133] Although it's not easy to tell the origin of this model, it's been found that "the JC Euro-model is in fact only a subset of judicial councils that exist in Europe", such as in Italy, France and Portugal, albert with different features;[134] also, viewed broadly, its development is also part of the larger trend that has happened globally.[135] Before the establishment of the 255 panel, similar practices have been adopted in the national processes of nominating international judges in several other EU states, such as the UK and Germany.[136] Subsequently, most of the rest EU member states, especially those central and eastern European states, have begun to introduce such judicial advisory bodies into their domestic procedures by way of constitutional amendments.

In other words, a byproduct of the advisory role of the 255 panel is the increasing harmonization of the national selection procedures of judges within the European Union. Some people are enthusiastic about it, and the panel is said to have been "progressively influencing the national selection process by de facto harmonizing – through a set of minimum standards – not only the criteria candidates must satisfy but also the overall transparency of that process".[137] Others, however, show much more skeptical attitudes toward it. Kosar (2017: 93) points out that the "Judicial Council Euro-model" may work to shield Czech judges from external threats "coming from the executive and legislative branches", "they are left unprotected against internal threats from court presidents, and may become, *de facto*, dependent on them". In an earlier assessment, Kosar and Bobek (2013: 1) made a much more acute critique of the importation of judicial councils Europe-wide on essentially normative grounds, warning against its "impact on further judicial and legal transition has been either questionable or outright disastrous".

In all, the 255 panel's advisory role, as a mode of professionalization/depoliticization, represents a clear change from the previous

[133] See, David Kosar, Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice, European Constitutional Law Review, 13: 96-129 (2017), at pp. 96-97.

[134] See, Michal Bobek & David Kosar, Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe (2013), at pp. 18.

[135] *I.d.*

[136] Dumbrovsky, Petkova and Sluis (2014).

[137] See, Alberto Alemanno, How Transparent Is Transparent Enough?, in Selecting Europe's Judges, p. 204, etc.

mechanics of judicial selection, which had been dominated by "decidedly informal mechanisms that all but granted national governments the power to appoint their chosen candidates to the ECJ and the ECHR",[138] and its functioning through the above elaborated formal procedural and substantive requirements has been largely successful in holding the member state governments "far more accountable for their judicial nominations by putting them in the position of having to justify the mechanics and the results of their judicial selection procedures".[139]

The sheer effectiveness of this new mechanism in performing quality-check and achieving the EU-wide procedural harmonization reflects the common grounds that have been reached, at least within the enclosure of the European legal community, with respect to the autonomy and roles of the judicial power in European politics.[140] As demonstrated by the declaration of the European Commission (2017), "Across the EU, mutual understanding and trust in justice systems – their quality, independence and efficiency – is essential to the functioning of the internal market",[141] and it's also reflected in the collective activities currently undergoing across Europe, which are marked by a vertical coalition of supranational and national judges/legal practitioners in the form of network-buildings, i.e., mutual exchanges and communication, judicial training activities, financial supports, as well as political coordination and assistance in

[138] Mitchel de S-O-l'E Lasser, Judicial Appointments and Independence, in Tamara Perišin, Siniša Rodin (eds.), THE TRANSFORMATION OR RECONSTRUCTION OF EUROPE: THE CRITICAL LEGAL STUDIES (2018), at pp. 145.

[139] Lasser (2018), *i.d.*, at pp 145.

[140] For discussions on this aspect, see, e.g., K. J. Alter, Who are the Masters of the Treaties? European Governments and the European Court of Justice (1998); Eric Stein, Lawyers, Judges and the Making of a Transnational Constitution (1981); Stuart Scheingold, The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the EU (1971); C. Marchand and A Vauchez, Lawyers as Europe's Middlemen? A Sociology of Litigants Pleading to the ECJ 1954-1978, in A POLITICAL SOCIOLOGY OF THE EU: REASSESSING CONSTRUCTIVISM (2010); Werner Feld, The Judges of the Court of Justice of the EC (1963); S. J. Kenney, The Judges of the Court of Justice of the EU (1999); Karen Alter, Jurist Advocacy Movements in Europe: The Role of Euro-law Associations in the European Integration 1953-1975, in THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS (2009); J. H. H. Weiler, A Quiet Revolution: the ECJ and its Interlocutors (1994); Morton Rasmusse, the Origins of a Legal Revolution: The Early History of the European Court of Justice (2008); H Schepel and R Wesseling, The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe (1997); Vauchez, Antoine, Bruno, Lawyering Europe: European Law as a Transnational Social Field (2013); A Cohen and M Rask Madsen, Cold War Law: Legal Entrepreneurs and the Emergence of the European Legal Field 1945-65, in EUROPEAN WAYS OF LAW: TOWARDS A EUROPEAN SOCIOLOGY OF LAW (2007).

[141] European Commission, Quality of Public Administration: A Toolbox for Practitioners (2017), at pp. 1.

cases of governmental discretions.[142]

What have been so far achieved, e.g., enhancing "national accountability for judicial candidates"[143], insulating European judges from domestic politics, and promoting the professional privileges of judges, are political outcomes of the collective efforts of the European legal elites, especially judicial elites, who use "the language and logic of law" (Stein 1981) to play their political roles. That's why Bobek and Kosar (2013: 14) attributes the adoption of the specific model of judicial councils across Europe to the fact that the ENCJ was "formally established in Rome". As summarized by Burley and Mattli (1993), "the ECJ's accomplishments have long been the province only of lawyers, who either ignored, or assumed their political impact". In the context of European integration, "[a]t the minimum, the margin of insulation necessary to promote integration requires that judges themselves appear to be practicing law rather than politics", and "[t]heir political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning".

Viewed from the lens of the global trend of power movements, i.e., the so-called "judicialization of politics", the European story manifests how "the rise of constitutional adjudication has transformed the landscape of parliamentary politics by forcing legislators to take constitutional considerations into account when crafting legislative schemes" (Sweet, 2000). Judicial elites, as active proponents of the European project of the common market, are, therefore, both the beneficiary of the series of changes outlined above, and one of those actors who helped to achieve them. In Shapiro's words, "the Community is presented as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology".

B. the Chinese Model of the "Provincial Judicial Selection Commissions":

[142] A vivid example of such vertical coalition of the European legal professionals is the operation of the EJTN ("European Judicial Training Network") with its members across the EU. As stated in its annual report of 2016, its "strategical goals" are to "foster mutual trust between judges and prosecutors from different European legal systems", "increase the level of knowledge of EU law among the European judiciary", "assure high standards of quality of European judicial training and promote high standards of quality for national judicial training", "foster the early development of a judge's prosecutor's European profile", "strive towards an increased networking function" and "a more effective extern cooperation". See, EJTN Annual Report 2016, at pp. 9.

[143] Lasser (2018), supra 116.

Since 1979, China has launched a series of legal reforms, as the country's leaders resolutely committed themselves to establishing the market economy and opening the country to the world (Lubman, 1999). After the market economy was officially established, the country realized the imminent need to improve the quality of its adjudication system and launched a process called "judicial professionalization".[144] As a result, in 2002, the Unified State Judicial Examination was introduced, following the enactment of the Judges' Law. Upon a series of efforts and setbacks, the overall quality of Chinese judges has already been raised dramatically, in terms of the legal education and professional training that judges receive. Nevertheless, it seems that now, the level of professional quality and expertise is still uneven among local judges, and meanwhile, problems, such as localization (Liu, 2003; Alford, 2007; Peerenboom, 2002) and the administrativation of local courts (Xu, 1999; Gu, 2000), i.e., courts depending on local authorities for personal and funding, hence forcing them to serve local and political interests, still exist, which seriously undermines the independence and professionalization of the judicial system.

As China has embarked on the road towards the rule of law, it also sets out to address its court personnel management system, which has been lamented for a long time as a major source of "judicial localization" (*si fa di fang hua*), "local protectionism" ("*di fang bao hu zhu yi*"), and "the administration of justice" ("*si fa xingzheng hua*").[145] In particular, court administrations used to be the domain of local affairs, and the personnel, budget and management of local people's courts were under

[144] For discussions on judicial professionalization in China, see, e.g., Yu Xingzhong, Judicial Professionalism in China: From Discourse to Reality, in PROSPECTS FOR THE PROFESSIONS IN CHINA 78-108 (Wiliam P. Alford, Kenneth Winston and William C. Kirby eds. 2011); He Weifang, Ex-Servicemen of the PLA Now Serving at Court, SOUTH WEEKLY Jan. 02, 1998; Nicholas C. Howson, China's Judicial System and Judicial Reform, Law Quad. Notes 54, no. 1 (2011): 62-4 (delivered at the inaugural "China-U.S. Rule of Law Dialogue" held at Tsinghua University, July 29-30, 2010); Wang Chenguang, The Professionalism and Elitism of Judges, 6 Jurisprudence 3-9 (2002), etc.

[145] For decades, local courts are controlled by local governments in terms of courts' personnel, financial and material resources, and such situation has opened a gate for local governments to encroach on the independence of local courts. Also, traditionally, judges are ranked, and paid, similarly as ordinary civil servants, which has been criticized as going against the laws of the operation of justice. See, e.g., Liu Zuoxiang, Critique on China's Judicial Local Protectionism and on the Judicial Reform Idea of Judicial Nationalization, 1 Jurisprudential Study 83-98 (2003); Jiang Huiling, The Advantages and Disadvantages of Judicial Localization, 2 People's Judiciary 29 (1998); Zhou Yongkun, Judicial Localization, Administrativation, and Normalization: On the Overall Normalized Idea of Judicial Reform, 6 Journal of Suzhou University (2014); Qin Qianhong, Difficulties of Judicial De-localization, 24 Procuratorial View 34-5 (2013); Chen Ruihua, The Executive Decision Model of Judicial Decisions: Re-investigate the Phenomenon of Judicial Administrativation of Chinese Courts, 4 Journal of Social Science of Jilin University 134-143 (2008), etc.

the leadership of the political and legal departments of local authorities; as a result, "the courts can't take any action without relying on the local authorities at every level of government", which led to a series of miscarriages of justice and huge number of civil complaints.[146] Such circumstances have seriously undermined the authority and credibility of local people's courts.[147]

Over the course of the past four years, and under China's President Xi Jinping's leadership, both the selection procedure of judges as well as the institutional arrangements of court administration have begun to undergo systematic changes, as courts across China set out to conduct pilot reforms.[148] Major changes include the establishments of the "quota system" of judges ("*yuan e zhi*"), the provincial judicial selection commissions ("*sheng ji fa guan lin xuan wei yuan hui*"), as well as the system of "recording leaders and officials' interference in court proceedings" ("*ling dao gan bu da zhao hu deng ji zhi du*").

In July 2014, China's Supreme People's Court released its newest five-year reform plan, which reinforces the principles and measures announced by the Central Leading Group for Judicial Reform of Chinese Communist Party ("CCP"). The principles and measures contained in the reform plan were reiterated in the Fourth Plenum of the 18th CCP Central Committee. Along with the "quota system" and the system banning officials from intervening in court decisions, the plan to set up an advisory expert committee at each province in the process of selecting judges to local people's courts is one of the most remarkable changes stipulated in the reform plan. In December 2017, it was formally stipulated in the proposed draft amendment to the Judges' Law, which was submitted for examination by the 31st meeting of the standing committee of the 12th national congress.[149]

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[146] See, China's Judicial Reforms Won't Shake Party Hold on Courts: Experts, Radio Free Asia 2015-03-31, available at: https://www.rfa.org/english/news/china/judicial-reforms-wont-shake-party-hold-on-courts-03312015144807.html (last visited on July 2, 2018).

[147] I.d.

[148] In February 2015, China's Supreme People's Court issued "The Opinions of Supreme People's Court on Comprehensively Deepening Reform of People's Courts", bringing up the idea of "the quota system" of judges, which very likely means downsizing local people's courts. See, Supreme People's Court: Setting Up the Quota System of Judges, Make Sure Good Judges Stay in the Front Line of Adjudication, CHINA NEWS ONLINE Feb. 26, 2015, available at: http://www.chinanews.com/fz/2015/02-26/7080762.shtml.

[149] China Is About to Amend Judges' Law, Clarify the Establishment of the Judicial Selection Commissions ("我国拟修改法官法 明确设立法官遴选委员会"), XINHUA NET 12-23-2017, available at: http://www.npc.gov.cn/npc/cwhhy/12jcwh/2017-12/23/content_2034477.htm (last visited on March 25, 2018).

The draft amendment basically says, an expert advisory body shall be set up at the Supreme People's Court as well as at the provincial level to oversee the professional competence of judicial candidates. Specifically, the provincial judicial selection commissions are tasked to assess the professional qualifications of judges for their first terms of office at local people's courts, i.e., courts at the sub-provincial levels.[150] The draft act also prescribes the composition and operational rules of the provincial judicial selection commissions, which shall be composed of representatives coming from local people's courts as well as relevant social representatives, and among them, at least one third of its membership should be judges.[151] The provincial selection commissions shall set up their offices at the provincial high people's courts, and these offices shall be responsible for issues relating to the functioning and works of the provincial selection commission.[152] Judges at the intermediary and high people's courts shall be gradually selected from those judges working at courts at basic levels for longer than five years and with relevant practice experience for more than three years; while supreme people's court shall choose its judges from judges working at the intermediary and high people's courts for longer than eight years and with relevant working experience for more than five years.

As such ,the target of the whole set of reforms is local people's courts, i.e., courts at the sub-provincial levels, which include intermediary and basic people's courts.[153] And to put simply, the intent of the reform is twofold: 1) to enhance the overall quality of judges and achieve judicial "specialization, professionalism and elitism" (Ji, 2014), by reducing the ratio of judges and non-judges in local courts and by selecting trial judges based on merits through internal exams and external evaluations, i.e., a judicial expert commission is to be set up at the provincial level to interview and assess the profiles of judicial candidates (e.g., exam results, trial performances, etc.); 2) to eliminate the phenomenon that local authorities control the appointments, promotion and removals, as well as the remunerations of local judges, and thereby wrestling judges away from external local administrative and political pressures. As stated by Zhou Qiang, current President of the Supreme People's Court of PRC, such an amendment to the Judges' Law is meant to "promote the standardization, specialization, and professionalization of judges".[154]

Under this new system, judicial candidates, usually proposed by the personnel

[150] *I.d.*

[151] *I.d.*

[152] *I.d.*

[153] The selection procedures and personnel arrangements for the supreme court and the high courts have not been changed.

[154] *Supra* 125.

offices at local people's courts on the basis of internal exams and evaluations, will be appointed to local people's courts upon being evaluated by the expert selection commissions at each province. Such evaluations will be performed by way of interviews and examination of the candidates' dossiers, and decisions will be made by the selections commissions on the basis of objective, professional merits. The first of such expert bodies was set up on December 13, 2014 in Shanghai, and its first meeting was conducted on the same day, during which the proposal of the procedural and operational rules of the commission was reviewed and endorsed.[155]

As a sample for other provincial judicial selection commissions, the Shanghai Judicial Selection Commission is made up of 15 members, divided into two groups, i.e., 7 of the members are called "special members" ("*zhuan men wei yuan*"), and the other 8 members are called the "professional members" ("*zhuan jia wei yuan*").[156] The former includes officials from the political and law committee, the organizational departments, disciplinary committee, people's congress, civil servants' office, and high court and prosecutor office of Shanghai; whereas the latter is mainly chosen from senior practitioners, lawyers, legal scholars and other professional experts.[157]

According to a senior official of the Shanghai judicial selection commission, Shen Guoming, the commission is a relatively independent body with a diverse membership, which can reduce the administrativation of the judicial appointment process to a very large extent while stressing the professionalism, objectivity and authoritativeness embodied in this process; also, he says the assessment made by the commission focuses on both the professional competence and integrity of judicial candidates, which are essential for enhancing the overall professional quality and efficiency of the Shanghai judicial workforce.[158] The advisory role of the commission, also according to Shen, is relatively high, at least as reflected from the case in Shanghai.[159]

After interviewing with all of the judicial candidates, who were first ranked in a

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[155] First Provincial Judicial Selection Commission of the Country Established ("全国首个省级法官、检察官遴选委员会成立"), 21 SHIJI JINGJI 2014-12-14, available at: https://m.21jingji.com/article/20141214/herald/0fc3fe31256509baea0535e65a2f453f.html (last visited on July 1, 2018).

[156] *I.d.*

[157] *I.d.*

[158] *I.d.*

[159] Information based on a personal interview conducted by the author with Shen Guoming on July 20, 2015, a senior official in the political and legal committee of Shanghai, and also a legal scholar and a meber of the Shanghai Judicial Selection Commission.

list in accordance with the results of courts' internal examinations, the commission ranks them again independently based on both the professional ability and integrity reflected in the candidates' dossiers and hearings.[160] Among the first 152 judicial candidates submitted for evaluation, the Shanghai commission changed the rankings of a total of 40 candidates, amounting to nearly 9.2% of the original nominations, and this shows both the political independence and the merits-based spirit of the Shanghai commission.[161] "We adjusted a significant portion of the ranking to such a large extent, because we are a relatively separated body, basing our decisions solely on the principle of 'professionalism and trial experience'. As such, we might have different standards and perspectives than courts and other governmental departments, and we don't share the same motives and concerns of other political bodies in the appointment process of judges."[162]

One important outcome of this round of judicial reform is increased efficiency of court performance, i.e., both the number of new cases as well as the rate of closed cases (the so-called "*jie an lv*") have increased dramatically.[163] Judges selected from the new system face even greater caseloads, and the settlement rates of claims/cases of individual judges remains a key performance evaluation indicator for future evaluations and promotions. This responds to some of the most salient problems of the China's governance in recent decades, including the flooding number of petitions and complaints filed to higher levels of government in the form of "letters and visits" (the famous "*xin fang*" system).

Professionalization programs are, thus, accompanied with other "efficiency-enhancing" measures, such as the new "case filing registration system" ("*li an deng ji zhi*"), which opens the gate of local people's courts to any complaints and claims filed to them, compared to the old "case filing review system" ("*li an shen cha zhi*"). In effect, the new court administration system has turned local people's courts into a giant cases-settling "factory", always pursuing a "results"- and "efficiency"- driven agenda, *albert* under the banner of professionalism and judicial independence. This reveals the central-planning nature of judicial reform in China, as well as its political agenda and practical considerations underlying various mechanisms of professionalization.

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[160] *I.d.*

[161] *I.d.*

[162] *I.d.*

[163] See, How to Ease the Burden for Judges? ("如何为法官减负") PEOPLE'S DAILY 2017-08-02, available at: http://paper.people.com.cn/rmrb/html/2017-08/02/nw.D110000renmrb_20170802_1-19.htm (last visited on April 1, 2018).

Another important effect of the quality-control function performed by the provincial judicial selection commissions is, however, structural. It means that as part of the mechanics enhancing judicial professionalization/depoliticization, the functioning of the commissions shifts the power of appointment and control over court administrations away from the local authorities to the provincial level. In the past, local officials can interfere court decisions at will and using a number of methods, such as investigations and instructions through the so-called "calls and passing notes" ("*da dian hua, di tiao zi*") to trial judges.[164] It, therefore, fundamentally changed the previous longstanding model of localized control over court personnel and funding, by setting up a new court administration system "that properly separates regional government and the judiciary below the provincial level",[165] and ultimately guaranteeing "the independent and fair exercise of the courts' judicial powers".[166]

Nevertheless, these changes are far from fundamental and comprehensive in terms of judicial independence, i.e., they might help courts get rid of pressures and interference coming from local and regional interests, but party control and governmental control at the central and provincial levels have actually tightened as a result of them. It is officially clarified that the new system distinguishes itself from Western idea of "judicial independence" in the sense of "separation of powers" and "checks and balances", as declared by President Zhou Qiang, Chinese courts "must dare to pull out the sword" to the "erroneous" Western ideas, such as judicial independence, which threatens the hold on power of the party-state.[167] Again, it's still a product of political strategic balancing and careful planning of political actors and institutions, and in the Chinese case, the central state plays a leading role in the game.

2. A Comparison of the 255 TFEU Panel and the PJSCs

An in-depth comparison between the two judicial councils shows that they are

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[164] See, Three Key Issues in Judicial Reform (“司法改革中的三个关键问题”), CPCNNEWS 2015-03-04, available at: http://theory.people.com.cn/n/2015/0304/c207270-26635525.html (last visited on April 1, 2018).

[165] Communiqué of the 3rd Plenum of the 18th Party Congress, CHINA COPYRIGTH AND MEDIA 11-12-2013, available at: https://chinacopyrightandmedia.wordpress.com/2013/11/12/communique-of-the-3rd-plenum-of-the-18th-party-congress/ (last visited on Oct 15, 2017).

[166] See, Opinions of the Supreme People's Court on Comprehensively Deepening Court Reforms (“最高法院发布全面深化人民法院改革的意见（全文）”) XINHUA NET 2015-02-26, available at: http://www.xinhuanet.com/legal/2015-02/26/c_127520462.htm (last visited on April 1, 2018).

[167] See, China's Judicial Reforms Won't Shake Party Hold on Courts: Experts, RFA NEWS 2015-03-31, available at: https://www.rfa.org/english/news/china/judicial-reforms-wont-shake-party-hold-on-courts-03312015144807.html (last visited on August 13, 2018).

operationalized in slightly different ways, despite of their commonalities; and their opinions, both influential substantively speaking, have quite different political significance, which deserves further analysis. In sum, the 255 panel and the PJSCs are different in the follow three different dimensions: 1) organizational dimension; 2) professional dimension; 3) political dimension, which will be elaborated in this section.

2.1. The Organization Dimension:

First of all, in terms of their organizational structures, the 255 panel and PJSCs are composed differently, are tasked with assessing different candidates. Strictly speaking, the 255 panel is a form of judicial self-governance at the EU level, which is manifested by way of an independent, supranational body, tasked with quality-control against member states' political intervention in the judicial appointment process to the CJEU. It, therefore, is provided by Article 255 TFEU that "[t]he panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom shall be proposed by the European Parliament", and "[t]he Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice".

The fact that the EP gets one vote of nominating its member is the result of a long-term bargaining between the EP and the court; also, given the importance of this panel, it is said that member state governments also lobbied for its membership.[168] Despite so, its composition is almost entirely dominated by senior *juris*, who theoretically "[purse] their own self-interests within a politically insulated sphere" (Burley and Mattli, 1993).

Viewed in this way, the organization of the 255 panel is marked by two features, i.e., its high judicial representation, as well as its independence from the member state governments. On the one hand, the 255 panel is composed entirely by European legal elites, and 7 out of eight members are proposed by the President of the Court of Justice, with only 1 member proposed by the European Parliament. Such an arrangement is due to the bargaining over its membership among political actors, who

[168] See, Dumbrovsky, Petkova & Sluis (2014).

had asserted interests in the process of establishing the 255 panel.[169]

Also, it has been reported that the EP put for an alternative plan of parliamentary scrutiny during the discussion period,[170] which, along with the idea of letting the EP proposing one member on the panel, were objected by the Court, on the ground of judicial independence.[171] The establishment of the 255 panel, therefore, can be seen as a form of judicial self-governance in the name of judicial independence, whereby "the community is presented as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology" (Shapiro, ?).

On the other hand, another important aspect of the organization of the 255 panel lies in its independence from the political influence of the member state governments as well as its ability to check on the power of appointments of the governments and limit political arbitraries previously embedded in this process. The original intent of setting up the 255 panel is to eliminate arbitrariness, discretion and lack of transparency of the national nomination processes, as it's stated in the final report of the discussion circle (1995), "it was appropriate to set up an 'advisory panel', which would have the task of giving the Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications", and such an intent of curbing member state governments is clearly declared that "setting up a panel of this kind might make Member States more demanding in the choice of candidates they put forward".[172]

By asserting the importance of the organizational independence of the advisory panel, therefore, political elites in the EU find legitimate basis for their efforts on

[169] See, the Final Report of the Discussion Circle on the Court of Justice (March 25 2003), para. 5, (saying that "some members felt that appointment should be by act of the Council and, of these, several felt that the Council should act by a qualified majority").

[170] See, Dumbrovsky, Petkova & Sluis (2014).

[171] See, the Report of the ECJ on Certain Aspects of the Application of the TFEU 1995, para. 17, (the Court of Justice reasoning that "without needing to express an opinion at this stage on the other proposals which have been put forward, the Court considers that a reform involving a hearing of each nominee by a parliamentary committee would be unacceptable. Prospective appointees would be unable adequately to answer the questions put to them without betraying the discretion incumbent upon persons whose independence must, in the words of the treaties, be beyond doubt and without prejudging positions they might have to adopt with regard to contentious issues which they would have to decide in the exercise of their judicial function").

[172] the Final Report of the Discussion Circle on the Court of Justice (March 25, 2003), para. 6.

constraining the member states' intervention in the appointment process to the CJEU; and to view from one step further, this will further ensure the ability of the court to preserve the uniform application of the EU law, thereby facilitating their progress toward further market integration, i.e., the European project is carried forward progressively, in part, relying on the court, who defends the project legitimately and acts "based on its vast formal powers and according to its treaty-based duty to exploit those powers to their utmost" (Burley and Mattli 1993).

The PJSCs, is also marked by two features, organizationally speaking, i.e., a combination of professional and political supervision in terms of composition, as well as the relative organizational independence from local governments. The draft law stipulates that, the PJSCs, are composed both by "judicial representatives" as well as "social representatives", whereas the portion of judicial representatives shall constitute not less than one third of its membership.[173] As the experience of the Shanghai PJSC shows, the "professional members" constituted a slight majority, i.e., 8 out 15 are local senior lawyers and legal experts (not necessarily judges), in relation to the "special members", who include relevant provincial/direct municipal officials and leaders (e.g., the leaders and officials from the Shanghai party political and legal commission, the Shanghai party personal department, the Shanghai party disciplinary department, the Shanghai People's Congress, the Shanghai civil service office, the Shanghai high court and high procuratorate).

Moreover, the PJSC in Shanghai was set up not in affiliation with any local governments, i.e., organizationally, it's not responsible to any political organization or governmental department. And according to official Shen in Shanghai PJSC, the purpose of such an arrangement is to make this body "detached" from any political considerations previously embedded in the judicial appointment process.[174] Accordingly, "under such an organizational arrangement, we don't have the kind of motivations or considerations that other political departments have when appointing judges".[175] As a result, the operation of the PJSCs essentially removes the power of local authorities in appointing local judges and shifts it to the provincial level.

That said, the PJSCs, in nature, is not so much of a form of judicial self-control as one of centralized political control, albert exercised through a professional way. As part of the efforts for applying the "uniform court administration" ("*tong yi guan li*"), its ultimately purpose is to enhance "the uniformization" of law in China, and thereby

[173] draft amendment to the Judges' law.

[174] Interview with Shen.

[175] Interview with Shen.

facilitating market integration. As Han Zheng, former Shanghai Municipal Party Secretary, states, following the establishment of the first Shanghai PJSC in 2014, "given the core role played by judges and prosecutors in judicial activities, setting up the PJSCs is an important basic task of pilot judicial reforms, which is directly linked to the enforcement of the '*uniform system of court administration*'" (emphasis added).[176]

A comparison between the 255 panel and the PJSCs in terms of their organizational arrangements, therefore, reveals both commonalities as well as differences. At both the conceptual and practical levels, the 255 panel and the PJSCs are linked with the idea of judicial independence and strategically achieving a kind of vertical political control/centralization as well as legal unification. In the case of the 255 panel, this means to shift the control over judicial appointments from the national level to the supranational level through professional quality-control; while for the PJSCs, it refers to the battling against local authorities by the central government, who seeks to centralize the control over local courts by transferring the power of appointments away from local governments to the provincial level.

Nevertheless, the two bodies also differ in nature as well as in the manners of centralization and unification. First, as stated before, the 255 panel is, in essence, a judicial creature, and a form of judicial self-governance, meaning that it's dominated by elite judges, who are simultaneously promoters of the European project; and this is reflected from its composition, which consists entirely of esteemed judges and legal experts, while the Court of Justice controls the nominations of most of its members. The PJSCs, however, are mainly a manifestation of tightened central political control over local affairs, and it's in nature a form of centralization by way of professional control; also, given the lack of feasibility of complete centralization over local courts, the power of appointments is ultimately, but strategically, allocated to the provincial level.

Secondly, the manners of such political centralization and unification in the two cases also vary. On the part of the 255 panel, it embodies a kind of judicial self-governance, favored by the pro-EU political/legal elites, while its pinions are only "advisory", since "most members of the circle were in favor of maintaining the status quo (appointment by common accord of the governments of the Member States)". Hence, in order to be influential and effective, the 255 panel needs to stress the importance of judicial independence and autonomy, and it has to rely solely on the

[176] First PJSC set up in Shanghai (“首个法官连选委员会成立”), 21 Caijing, available at: https://m.21jingji.com/article/20141214/herald/0fc3fe31256509baea0535e65a2f453f.html.

professional, objective principles in its functioning, while explicitly observing the boundaries of its behavior.[177] Such a legalistic approach in asserting legitimacy is acknowledged by scholars, e.g., "the court kept the confidence of the institutions of the community and saw them often move forward from where it had itself left an issue at the outer boundary of what was still solvable on the basis of the existing texts".[178]

As for the PJSCs, it's not a body governed by judges, and its manner of more political, and centrally-sponsored than professional. In terms of its membership, the appointments of the members of the Shanghai PJSC are made by the Shanghai Party authority, and it's not mainly composed of judges, as the 255 panel is.[179] In fact, even the so-called "professional members" are not really made up of judges, and in the case of the Shanghai PJSC, its professional members are mostly senior local legal scholars/practitioners, who are usually relatively esteemed people and have some kind of connections to the government. For instance, Ye Qing, Shen Guoming, two professional members of Shanghai PJSC, are both senior scholars and leaders of the Social Science Institute of Shanghai, who at the same time have other governmental responsibilities. According to Shen Guoming, such a composition is best in establishing the "objectivity, professionality, and authoritativeness of the commission".[180]

Also, the PJSCs are organizationally "independent", i.e., it's not directly, or formally, affiliated with any governmental department; rather, it only establishes its working office in either the provincial high courts, or the provincial party political legal departments.[181] This is aimed at "eliminating the localization/administratization of court appointments".[182] Moreover, the operation of the PJSCs, as part of the efforts for establishing "the uniform court administration system", is followed by a complete removal of the power of appointing local judges from the local authorities and a centralization of the appointment process to the provincial level. Similarly, initiated by the central authority, the professional scrutiny of the PJSCs are more likely to be

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[177] The 255 panel clarifies in its activity reports that "the fundamental responsibility in the appointment of Judges and Advocates-General of the Court of Justice and the General Court is with the Member States", and that "it is not the panel's job to take part in determining the composition of the Court of Justice or the General Court…". See, Fourth Activity Report, at pp. 14.

[178] Burley and Mattli (1993).

[179] See, Han Zheng Issued Letters of Appointments to 15 Members of the Shanghai PJSC ("Han Zheng Xiang 15 Wei Wei Yuan Ban Fa Pin Shu"), available at : http://www.sh12345.gov.cn/gnyw/17649.jhtml (last visited on July 8, 2018).

[180] First PJSC Set up in Shanghai.

[181] See, PJSCs As Firewall Against Judicial Corruption, available at: http://news.sohu.com/20150418/n411457977.shtml.

[182] I.d.

legally effective than the 255 panels. Although the opinions of the 255 panels are high influential in reality, the opinions of the PJSCs might be more authoritative in a formal sense, because it's essentially a political agent for the central government when viewed from the lens of political centralization.

2.2. The Professional Dimension:

Second, compared with the PJSCs, the 255 panel that relies more on judicial professionalism in maintaining the legitimacy of its operation adopts criteria of "professionalism" in a stricter sense when evaluating judicial candidates, both substantively and procedurally speaking, and its scope of professional assessments is relatively broader than that of the PJSCs. Given their common professional background, both the 255 panel and the PJSCs emphasize the principle of professionalism in assessing the suitability of judicial candidates (professional competence and personality), and this is reflected in their evaluations and opinions.

Whereas the 255 panel stresses reasons of its opinions on the ground of professional qualifications, i.e., "concerning the candidate's legal capabilities, professional experience, ability to perform the duties of a Judge with independence and impartiality, knowledge of languages and aptitude for working in an international environment",[183] the PJSCs are meant to "ensure the professional ability and judicial integrity of judicial candidates" by "exercising professional functions of commission members", who must "insist on setting up and using selection standards from the professional perspective, delivering opinions, and ensuring the professional quality of judicial candidates".[184]

However, the 255 panel adopts a stricter principle of professionalism, both substantively and procedurally, and its professional evaluations tend to focus on a broader scope, hence it seeks to perform a more comprehensive review of judicial candidates by trying to obtain a larger picture of them. For the 255 panel, the Lisbon Treaty only states that it shall assess judicial candidates in accordance with Article 253 and Article 254, but in practice, it requests as much information that it deems necessary to evaluate a candidate as possible, and its requires candidates to the CJEU to possess not only qualities of a senior judge, but also of one suitable for working in an international court; also, it also demands the national selection procedures through which candidates are nominated follow a fair, open and professional manner.

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[183] First Activity Report, at pp. 6.

[184] First PJSC Set up in Shanghai ("首个法官连选委员会成立") 21 Caijing, available at: https://m.21jingji.com/article/20141214/herald/0fc3fe31256509baea0535e65a2f453f.html.

As it states, “the panel systematically requested the most comprehensive information”, which includes, in the case of candidates for the first terms of office, “the essential reasons which led the government to propose the candidate”, “information on the national procedure that led to the candidate being selected, if there was one”, “a letter from the candidate explaining the reasons for the application”, “a CV in the harmonized format defined by the panel at its meeting on 25 April 2014”, and “the text of one to three recent publications, of which the candidate is the author, written in or translated into English or French”, “the presentation of one to three sensitive legal cases which the candidate has handled in his or her professional practice, which must not exceed five pages per case”,[185] in addition to the information obtained in the hearings, which is “to supplement the examination of the content of the dossier”, and which “enables the panel to assess, in particular, the candidate’s professional experience, legal expertise, aptitude for working in an environment in which a number of legal traditions are represented, language skills, reasons why the candidate considers that he or she is suited for performing” such tasks, etc.[186]

Also, the professional criteria that the 255 panel adopts is also elaborated in detail. In particular, it requires a candidate to the Court of Justice to meet “the conditions required for appointment to the highest judicial offices”, to the General Court to have “the ability required for appointment to high judicial office”.[187] And specifically, it takes into considerations six main factors, including “the candidate’s legal expertise”, “his or her professional experience”, “the candidate’s ability to perform the duties of a Judge”, “language skills”, “aptitude for working as part of a team in an international environment in which several legal systems are represented”, and “whether his or her independence, impartiality, probity and integrity are beyond doubt”.[188] Such an extensive review of information is important, as the panel stresses, “its assessment of the candidature is an overall assessment”.[189]

As for the PJSCs, its evaluations are also based on a variety of information, including the exam results, dossiers, and interviews; but given the political embeddedness of the commissions, such evaluations are relatively more policy-oriented, and factors to be considered depend largely on how the PJSCs interpret the concept of “professionalism” in accordance with the policy orientation. For example, according to a senior official of the Shanghai PJSC, the principle of “ensuring

[185] Fourth Activity report, at pp. 17.
[186] Fourth Activity report, at pp. 18.
[187] Fourth Activity report, at pp. 22.
[188] Fourth Activity report, at pp. 22.
[189] Fourth Activity Report, at pp. 22.

professionality, while favoring trial performance" ("*zhuan ye ba guan, tong shi xiang yi xian qing xie*") was thoroughly applied in the first round of evaluations of the commission.[190] This is because, their evaluations at that time were meant to enforce the main policy of the overall judicial reform, the so-called "quota system of judges", i.e., removing those who didn't actually do trial works from the judicial posts at local people's courts.[191]

In addition, the evaluations of the PJSCs only constitute the last step of the entire appointment process, following a series of court exams, internal evaluations as well as interviews, and therefore, its assessments are relatively simpler and easier, given "previous rounds of evaluations must have already yield satisfactory results",[192] but it also means that political considerations might also take place in previous rounds of evaluations, and the PJSCs can do little to change them. Also, broadly speaking, the operation of the PJSCs is still situated within the system of "party controls cadres" ("*dang guan gan bu*"), which means that the appointments, removals and promotions of cadres and officials are all controlled by the CCP.

Thus, political considerations must prevail in the selection process of judges, in case of conflicting with professional standards. As stated publicly by Ye Qing, a member of the Shanghai PJSC, evaluations of the commission are not in conflict with the principle of 'party-controls-cadres', because "the first and foremost step of selecting judges is political evaluations", and "before the evaluations of the panel, the party offices of each court had already performed their political assessments on candidates, so candidates submitted for evaluation by us are already politically qualified".[193]

2.3. The Political Dimension:

Perhaps the biggest contrasts that can be drawn between 255 panel and the PJSCs are found in their parallel in the political dimension. As stated before, the 255 panel is a form of judicial self-governance, whereas the PJSCs combines professionalism and political representation; also, although both the 255 panel and the PJSCs don't openly disclose their opinions, the former faces great challenges for its lack of transparency

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[190] Interview with Shen.

[191] See, Quota System of Judges, Construct New Judicial Framework, ("Yuan E Zhi Gai Ge, Gou Jian Si Fa Xin Zhi Xu"), XINHUANET 2017-01-11, available at: http://www.xinhuanet.com/legal/2017-01/11/c_1120284822.htm (last visited on July 8, 2018).

[192] Interview with Shen.

[193] See, PJSCs As Firewall Against Judicial Corruption, available at: http://news.sohu.com/20150418/n411457977.shtml (last visited on July 8, 2018).

and accountability, and the PJSCs don't have such pressures. Furthermore, despite of their common quality-control functions, the 255 panel have played a more important political role than the PJSCs in the sense that its opinions have produced more far-reaching impacts on the national selection procedures.

First, the 255 panel generally derives its political legitimacy from the principles of professionalism and judicial independence, but the technocratic manner of its functioning (ts composition, deliberations and the opacity of its opinions) ignores the political demands for political representation and democratic accountability, which become major grounds of criticisms to the ECJ in recent years.[194] As already introduced, the operation of the 255 panel is highly "merits-based", as Michal Bobek notes, "The idea that 'merit' should be the guiding principle of judicial selection is a universal principle".[195] It consists exclusively of judicial and legal experts, and its deliberations are highly technical; also, it does not disclose its reasoned opinions to the public for the reason of protecting the personal data of individual candidates. Such a technocratic feature has increasingly elicited populist critiques in Europe today. As the recent Brexit campaign to leave the ECJ's jurisdiction demonstrates, critics in Europe increasingly "invoke the democratic values of accountability and transparency to call for a diminution in prime ministerial control over judicial appointments".[196]

Unlike the 255 panel, the establishment and operation of the PJSCs combine professionalism with a sense of political embeddedness, and they don't face same political pressures as the 255 panel does. Not only is the composition of the PJSCs more inclusive- its membership is relatively more diverse, because it includes relevant party and governmental officials, esteemed and relatively well-known legal scholars and practitioners, but it operation is both professional and political- yes, they are put together!- as the Charter of the Shanghai PJSC indicates, the decisions of the commission are made by a majority vote;[197] also, the operation of the commission is carried out after the political evaluations of the judicial candidates, and in practice, it interprets "professional criteria" in accordance with the policy orientations of the

[194] See, Lasser, 2018; also, Tomas Dumbrovsky, Bilyana Petkova and Marijn van der Sluis.

[195] See, Michal Bobek, Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation, Research Paper in Law, College of Europe, (03/2014), at p.1

[196] See, Judith Resnik, Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure (2005), Faculty Scholarship Series. Paper 759: at p. 579.

[197] See, PJSCs As Firewall Against Judicial Corruption, available at: http://news.sohu.com/20150418/n411457977.shtml (last visited on July 8, 2018).

government.[198] The PJSCs, therefore, are essentially acting as an agent of the government, albert through professional means.

But, "what goes around comes around". The fact that the 255 panel faces a crisis of political legitimacy also shows its political significance, especially compared to the PJSCs. Although being part of the international trend, the 255 panel has generated great political repercussion in the EU, especially because it leads to the creations of similar judicial councils in the national selection procedures of the EU member states, including Slovakia, Slovenia, Croatia, Finland, Germany, Poland, Romania, and so on.[199] Not only do its opinions remain substantively influential on the results of judicial appointments to the CJEU, but its procedural requirements also have pushed member states to carry out institutional reforms on their national selection procedures.

As a result, there has been an emergence of the so-called "pan-European template" of judicial councils.[200] Although initially perceived as a progressive change, the 255 panel becomes more problematic because of such political consequences, and its role has been challenged on normative grounds, such as the lack of democratic legitimacy and accountability, due to the widespread establishment of similar bodies in member states, especially Central and Eastern European states.[201]

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[198] See, PJSCs As Firewall Against Judicial Corruption, available at: http://news.sohu.com/20150418/n411457977.shtml (last visited on July 8, 2018).

[199] See, Tomas Dumbrovsky, Bilyana Petkova and Marijn van der Sluis; David Kosar, Shadow of the Law between Court Presidents and the Ministry of Justice (2017), at 97;

[200] David Kosar, Shadow of the Law between Court Presidents and the Ministry of Justice (2017), at 97.

[201] See, Michal Bobek and David Kosar (2013).

Part III: The Court-Driven, Rules-Based EU Approach to Market Integration and the 255 TFEU Panel

Article 255 TFEU Lisbon Treaty grants to the 255 TFEU panel the power to "given an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254". This provision has served as the major vehicle of judicial self-governance and autonomy in the EU, and as the institutional basis for curbing the national discretions, informalities, and political arbitrariness, overwhelmingly defining the previous judicial appointment process to the CJEU by means of enhancing professional scrutiny. The political influences of its opinions, especially taking into consideration the fact that it induces changes on the national selection procedures in the member states, have been remarkable, in terms of both its horizontal and vertical effects on the judicial power in Europe.

In China, quite interestingly, an analogous practice – the establishment of the provincial judicial selection committees – has also been carried out during the recent judicial reforms, which is provided for initially by the newest five-year reform plan of the Supreme People's Court and is to be codified by the proposed draft amendments to the Judges' Law of the PRC. Local authorities used to be in charge of determining the appointments, promotions, removals and remunerations of judges in local people's courts, and the resultant close ties between local courts and local interests have been generally viewed as a fundamental defect of local judiciary, which has significantly undermined the credibility and authority of judges for a long time. Recent reforms are meant to change such situations and setting up the PJSCs is one important part of this plan.

However, the 255 TFEU panel in the EU and the PJSCs in China display important differences in terms of their organizational, professional, and political features, although they look ostensibly the same in nature. This chapter inquiries into why the 255 panel and the PJSCs have turned out to be a similar practice but operationalized and functioning in such disparate ways and expands on the relationship between the demands for market integration and various initiatives of judicial professionalization. In particular, it explains the two distinctive modes of market integration that the EU and China have relied on, i.e., the "courts-driven", "rules-based" EU approach and the "state-centered" and "centrally-planned" Chinese approach, and surveys their different implications on the role, power and structural position of courts as well as how they are shaped by political and social culture and

traditions.

Compared with the PJSCs in China, I argue that the 255 TFEU panel is marked by three features: first, organizationally, it has a tendency towards judicial self-governance due to its technocratic composition, procedural opacity, and institutional independence from the member states; second, professionally, the 255 TFEU panel relies on the technicality and neutrality implied by judicial professionalism and applies a variety of criteria to screen the professional background and suitability of judicial candidates, and its assessments over national judicial candidates are stricter, more demanding and more comprehensive in terms of dossier requirements, review criteria and objects, deliberations, etc.; thirdly and politically, its opinions are more influential and significant, because they are always reflected in the ultimate results of judicial appointments to the CJEU and have already produced reflexive effects on the way that national governments select their candidates for the judicial posts at the CJEU.

Such organizational, professional, and political features of the 255 TFEU are resulted from the distinct relationship between courts and market integration in the EU, which has been forged on the basis of its "courts-driven", and "rules-based" approach. Due to the technical nature of the EU governance, there is a gradual transfer of political functions to the CJEU, and its case laws have clearly incorporated the consideration of preferences in policies and balances of interests, i.e., "political jurisprudence". [202] As such, a trend can be found in the EU, where judges have increasingly become political actors and agencies with clear policy preferences, i.e., "political jurists", "who fulfill their political functions by the creation, application and interpretation of law" (Shapiro 1964: 297, 298). Both the volume and subject matters of cases as well as the procedure mechanisms used by the CJEU have clearly demonstrated its expansive role in driving market integration.

Specifically, this "courts-driven", "rules-based" approach is marked by a centrality of courts in driving market and political integration, as evidenced by three general conditions that define the status and functioning of the CJEU,[203] i.e., 1) the increasing caseload of the CJEU with a clear focus on subject matters relating to the intra-EU trade; 2) the policy-making outcomes of the CJEU through its production of case laws, or the so-called "judicialization of politics", and to this effect, the court has deepened legal integration, especially through the use of the preliminary reference system, while successfully bypassing the decision-making process of the member

[202] See, generally, Martin Shapiro, Political Jurisprudence (1964).

[203] Reasons for such a crucial role played by the court in European integration are a matter of scholar debate.

states; 3) the consensus and networks-building between Union court and national courts and among judicial elites in the EU, i.e., the rise of judges and courts as a successfully empowered, independent, and mobilized force behind European integration.

First of all, the CJEU has had a steadily growing caseload, which are primarily comprised of cases that are related to those areas of law that are key to transnational exchanges and cross-border interactions, such as intellectual property rights and competition laws. Second, it has exerted decisive influence on market and political integration in the EU through its case laws, both in terms of promoting intra-EU trade and changing the balance of powers in the multi-layered political structure; as a result, courts drive the process of market integration by legal harmonization and elimination of technical barriers. In this part, I will focus primarily on the functioning of the "preliminary reference" system by the ECJ, provided for by Article 267 TFEU, which is one of the most important mechanisms for the court to ensure the uniform application of the EU treaties.

Second, the EU judicial elites and communities have generally reached a consensus with regard to their role, power as well as what and how the court should behave, which explains the style and rhetoric of the EU adjudicators. On the one hand, the CJEU judges tend to give a formalistic account of their judicial activities in treaty interpretation and constitutional reviews, and EU judicial elites rely heavily on the concepts of rule of law and judicial independence as a source of self-legitimation. On the other hand, they have sought to establish a friendly, interactive, and dynamic relationship between the supranational and national judicial courts, promoting positive feedbacks with each other while striving to build trans-judicial dialogue and networks. Hence, by virtue of the proclaimed "technical-neutral" nature of the judicial profession, judicial elites have gradually transformed themselves into an independent, self-governed and increasingly empowered political force behind European integration.

In the EU context, this "courts-driven", "rules-based" mode of market integration is most effective when the court is able to walk the fine line between law and politics, as well as to circumvent the activities of individual member states while carefully avoiding extra-judicial confrontations with them. This requires the court to always act within the confined boundaries to be drawn on the basis of the technical-neutral propensities of judicial professionalism. The establishment and operational manners of the 255 TFEU panel are better understood by explaining the EU's distinctive approach to market integration, which strategically places a kind of centrality and solidarity on courts and judges as well as the resultant judicial

federalism, highlights the demands for judicial self-governance and empowerment, and relies on the claims for the technicality and neutrality of judicial law-making activities. All of these are meant to enable the CJEU to eliminate national barriers, ensure the unified application of the EU laws, while maintaining legitimacy for the its political impacts. However, such an approach has fostered a trend of judicial self-government in Europe, which become a major source of criticisms for the lack of accountability and transparency of the CJEU today.

Section I briefly introduces the emergence of the courts-driven, rules-based approach to market integration, which has its legal basis in treaty provisions and has been gradually unfolded in the practice of relevant actors, and it shows that the article 255 TFEU panel is a part of the continual development of this approach. Section II explains how the CJEU has led the course of market integration in the EU through three general conditions underlying the EU's approach to market integration and how they support the CJEU to become the primary actor in European integration, i.e., 1) the CJEU's judicial policy-making, 2) legal harmonization, and 3) promoting economic and political integration. Section III explains that how judicial professionalization is operationalized to enhance market integration in the EU, both as a mechanism of judicial self-legitimation, as well as a way of judicial self-governance, network-building and mobilization. Section IV points out that the 255 TFEU panel is part of the overall efforts of judicial professionalization. Section V. briefly considers what defects and weaknesses this approach has shown, as reflected in the widespread anti-EU, populist movements in Europe today.

1. An Overview of the EU's Courts-Driven Approach to Market Integration

The Lisbon Treaty provides for a special advisory panel, who is tasked with overseeing the professional competence and qualifications of national nominees to the CJEU in the name of judicial professionalization and independence. This is an important change in the judicial appointment process for the EU, because it not only limits the political arbitrariness embedded in previous selection model, which is exclusively controlled by the member state governments and usually carried out in informal and opaque procedures, but also leads to a series of far-reaching institutional and structural reforms in the national selection procedures of the member states, thereby significantly altering the dynamics and configurations of judicial power in Europe.

Viewed in comparison with the PJSCs in China, the institutional arrangements and functioning of the 255 TFEU panel is characterized by greater organizational independence, stricter demands for professionality, as well as more far-reaching

political significance. Such contrasts, however, are explained by means other than focusing on the nitty-gritties of things, or which are "good" or "bad" in a normative sense.[204] Rather, it's best understood through taking a holistic view on the circumstances around the composition and operation of the article 255 TFEU panel. This is so, especially by considering the relationship between demands of market integration and the role of courts and by examining how the CJEU has become an important actor, driving the process of European integration, regardless of whether or not this is consistent with the wills and interests of a particular member state.[205]

Without engaging in the efforts of legal and political science scholars to define the nature of things, i.e., to view the CJEU as a loyal legal technician dedicated to treaty interpretation and application in a strict sense, or as an agent of particular national interests vis-à-vis a supranational pro-integration policy-maker, I take the central role played by the CJEU in European integration as a matter of fact, while underpinning this observation with an analysis of three interconnected sets of judicial behavior of the CJEU in order to demonstrate its power, functions and role. Both the substantive and procedural implications of the CJEU's case laws are important for the court to facilitate intra-EU trade, cross-border exchanges, and legal harmonization.

Given that the EU relies on a system of multilateral rules and enforcement mechanisms to pursue its mission of market integration, so its main approach to market integration is defined as a "rules-based" one. Because the EU doesn't have a central executive system, and nor does it have a central legislative organ backed by a European *demo*, the task of enforcing treaty obligations and guaranteeing credible commitments among member states is inevitably assigned to its court, whose actions within the confines of its legal technical functionalities are protected from the political maneuvers of any particular state. Hence, despite of existing debates on the nature of things, i.e., "whether the EU has transformed itself from a largely intergovernmental arrangement … into a supranational polity",[206] it's generally agreed that the EU features a series of "rules-based", "courts-driven" strategies underpinning the

[204] This is not to say that the normative aspect of this issue are not important, but that this study is meant to point out other perspectives to understand similar practices under different political contexts.

[205] Such debates are primarily carried out among political science scholars, especially between the intergovernmentalists and neo-functionalists. See, Geoffrey Garrett, International Cooperation and Institutional Choice: The European Community's Internal Market, 46 INT'L ORG, 533 (1992); G. Garrett and Barry Weingast, Ideas, Interests, and Institutions, Constructing the European Community's Internal Market, in Ideas and Foreign Policy 173 (Goldstein & Keohane eds., 1993); Anne-Marie Burley & Walter Mattli, Europe Before the Court: A Political Theory of Legal Integration, 47 INT'L ORG. 41 (1993).

[206] W. Sandholtz and A. Stone Sweet (eds.), European Integration and Supranational Governance (1998), at pp. 135.

development of the internal market, which "are considerably more elaborate and constraining on member states than has been the norm for international regimes" (Garrett and Weingast, 1993).

As a result, courts play a pivotal role in the process of European integration through treaty interpretation and judicial review, and in effect, substitute the legislative/administrative agencies in policy-making, i.e., the "judicialization of politics" in Europe (Shapiro and Stone Sweet, 2002). And this is acknowledged by both intergovernemntalists,[207] i.e., people who tend to conceptualize this process as a normal phenomenon of inter-state, multilateral cooperation dominated by state preferences, strategic bargaining, asymmetric interdependence, and credible commitments (Moravcsik, 1998), as well as neofunctionalists, who propose "political integration is the process whereby actors shift their loyalties, expectations, and political activities toward a new center, whose institutions possess or demand jurisdiction over preexisting national states".[208] Although they view the state of the EU differently, e.g., whether it makes traditional international law "obsolete",[209] or whether it deserves a *sui generis* theory; whether loyalties and interests are transferred from the national level to the supranational level; and whether states still control and benefits from the state of affairs that occurs at the supranational level.

For example, emphasizing that the EU is "one of the most important instances of multilateral cooperation in the postwar period", Garrett and Weingast (1993: 173, 174) nevertheless admits that "the internal market rules are buttressed by a legal system without precedent in international politics", "the EC's legal structure is more akin to a constitutional order than to a normal system of international treaties, in which signatory reserve the right to interpret the extent of their obligations", and "the ECJ exercises considerable autonomy in the interpretation and application of EC laws", which have "'direct effect' in the courts of member states and override contending national laws".

Arguing against such insistence on states, neofunctionalists, like Burley and Mattli (1993) similarly observe that the role undertaken by the court in European integration, "the Court created a pro-community constituency of private individuals by giving them a direct stake in promulgation and implementation of community law".

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[207] See, Robert O. Keohane, Andrew Moravcsik and Anne Marie-Slaughter, Legalized Dispute Resolution: Interstate and Transnational, International Organization, Vol. 54, No. 03, (Summer 2000), 457-488.

[208] Ernst Haas, The Uniting of Europe (1958), at pp. 10.

[209] See, Wayne Sandholtz and Alec Stone Sweet, Neofunctionalism and Supranational Governance, 2012: p.3.

However, they draw our attention to the fact that the supranational rules-making goes beyond the control and preferences of the member states, i.e., "the establishment and growth of the community legal order" exerts a kind of vertical unification effect, considering that it "was essential for the whole legal profession to become acquainted with the new system and its requirement".

So far, the competence and role of the CJEU in European integration has been extensively examined. However, as I will demonstrate later, the establishment of the 255 TFEU panel is an extension of the development of the EU's "rules-based", "courts-driven" approach, whereby the court and the EU judicial elites have deftly managed to slide into place as an independent, technical-neutral norm-setter, expanding its jurisdiction and the influence of EU laws into various areas of law, curbing national protectionist behavior, and even assisting their colleagues in national courts to acquire more power and benefits than their national parliaments or governments were willing to grant them. That is to say, viewed holistically, the 255 TFEU panel can be seen as a further result of such "rules-based", "court-driven" efforts for market integration, and its composition, operational manners and political significance can thus be understood as a reflection of how this approach is operationalized in the EU context.

A. The CJEU and the Judicial Construction of a Constitutional Order in the EU

The CJEU was created by Article 31 of the 1951 Treaty of Paris that established the ECSC, which provided that the court was "to ensure that the law is observed" in the Community, and its mission was subsequently reaffirmed by other treaties provisions, including article 164 TEEC in 1957, Article 220 Treaty of Nice (2002), and Article 19(1) TEU in 2010.[210] Article 19(1) TEU now stipulates, the ECJ "shall ensure that in the interpretation and application of the treaties the law is observed". Such provisions seem to have prescribed a simple and pretty marginal role for the court, as many people observe, "the court's early success was partly due to its insignificance and its "invisibility" in the public eyes, and "the expansive and powerful role of the court" is not something predicted by the member states. [211] However, it's a little problematic if one also considers the fact that article 19(1) TEU

[210] It's interesting to note that the wordings and meaning of these provisions are almost identical after the EU itself has been transformed into a powerful, expansive, yet fragile, supranational entity, during the past decades.

[211] According to an interview with a Dutch scholar, the court's activist behavior in the following years were not anticipated when drafting the treaties, and that many of its decisions were "forced upon" their national courts.

continues to copy similar wordings of article 164 TEEC (1957); after all these years of criticisms for the ECJ's judicial activism, nothing was changed with regard to the courts when the Lisbon Treaty was negotiated and drafted.

According to the treaty provisions, the court mainly deals with three major types of cases[212]: 1) "infringement proceedings", where the European Commission and the member states can bring a matter to the CJEU in case of an alleged infringement of treaty obligations on the part of other member states;[213] 2) "annulment actions", where the court reviews the legality of legal acts of other EU institutions challenged by EU institutions, member states and private parties;[214] 3) preliminary rulings, whereby the CJEU gives a ruling to questions submitted from a national court or tribunal concerning the interpretation of the treaties as well as the validity and interpretation of acts of EU institutions and agencies.[215]

Among these different types of cases that the CJEU adjudicates, those that might have a constitutional significance, especially cases relating to the unification of EU laws and the Union vis-à-vis member states relationship, constitute the majority and most important part of its workload, whereas cases with no such ramifications are less significant. By virtue of its judgements in these cases, the CJEU has led the process through which the EU treaties have been transformed into constitutional texts, while managing to keep the direction of the integration as a constitutional norm-setter. And such a role of the CJEU in the constitutionalization of EU treaties was first marked by the early landmark judgments of the ECJ during the 1960s and 70s, which laid down the constitutional foundations of the EU laws, and then by the subsequent performance of the court in adjudicating constitutional matters.

1) Supremacy, Direct Effect, and State Liability

Two of the ECJ's case laws are well known, i.e., *Van Gend & Loos* (1963) and *Costa v.s. ENEL* (1964), as they are the beginning of the judicially-driven process of integration, and the court's judgements in these two cases are game-changing in a constitutional sense. In the two cases, the court established the doctrines of supremacy and direct effect of the EU treaties on the basis of ensuring the uniform application of the union laws, while demarcating the relationship between the union law and domestic laws of the member states. By virtue of its judgments in the two cases, the

[212] The court also has jurisdictions to other matters, such as those provided for by Articles 265 and 268 TFEU, but they don't have the kind of constitutional importance so are not mentioned here.

[213] Articles 258, 259, 260 TFEU.

[214] Articles 263, 264, 265, 269 TFEU.

[215] Article 267 TFEU.

ECJ successfully filled up what the treaties left unsaid, and by changing "what international judges do and are capable of",[216] it shifted the law-making power from the national level to supranational level.

It, therefore, created a new legal order with a supranational constitution for the community. As the ECJ declared in *Van Gend & Loos* (1963), "the Community constitutes a new legal order of international for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals … Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".

In *Costa v. ENEL* (1964), it further clarified that "integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. … The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7 … the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

Following the establishment of the supremacy and direct effect doctrines, but closely related to the constitutionalization process, the ECJ has also adopted the principles of state liability and preemption in subsequent decisions. For instance, in *Francovich*, the ECJ successfully claim that the member states shall be liable for violating the EU laws, a principle that was inherently implied by the EU legal order. And the ECJ's holding in ERTA, that "to the extent to which Community rules are promulgated … the Member States cannot … assume [international] obligations which might affect those rules or alter their scope", was codified in Article 3(2) TFEU and known as the "pre-emption" principle.

[216] H Wealer, Judicial Activism (2015).

Perhaps most significantly, in these cases, the ECJ managed to substitute the legislative power, which had failed to enshrine such principles in the treaties, by its judicial law-making, and successfully directed the overall structure and pace of integration as the guardian of the treaties.[217] As Hirschl (2008:119) says, "the judicialization of politics involves greater reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies".

In so doing, the court effectively directs the dynamics towards legal integration, regardless of whether its actions are too "bold" and transformative to be legitimate, or whether the member states would have ever intended to endow such supremacy and direct effect with the union treaties;[218] moreover, it has fundamentally changed the balance of powers and competence between national and supranational actors, by creating the possibility for national actors to directly invoke the EU laws before the national courts or tribunals in the member states, bypassing national parliaments, governments and constitutional courts, and potentially annulling national rules that were not in compliance with the provisions of the treaties.

Most importantly, the CJEU has transformed itself into a pivotal actor and the major driving force for the European integration project, and it has acquired a power of constitutional review, which enables it to exert influence on the policy outcomes of expanded areas of law. All of these were not supported by explicit treaty provisions. But viewed practically, perhaps this rules-based, judicially-driven approach is the

[217] Before Francovich, for example, efforts had been made to incorporate the principle of state liability into the treaties; however, this proposal was not adopted. See, Court of Justice, Suggestions of the Court of Justice on European Union, BULL. EUR. COMMUNITIES, SUPP. 9/75, 17-19; Report of the European Commission of 21 October 1990 for the 1991 IGC, BULL. EUR. COMUNITIES, SUPP. 2/91, 165-69; Resolution on the Responsibility of the Member States for the Application of and Compliance with Community Law, 1983 O.J. (C 68) 32.

[218] For example, Stone Sweet says explicitly points out, "the Court initiated and sustained" the constitutionalization of EU laws without any explicit authorization by the treaty provisions, and "despite the declared opposition of Member State governments", in The Judicial Construction of Europe, OUP, Oxford 2004, at pp 66. See, also, K. J. Alter, Who are the 'Masters of the Treaty'? European Governments and the European Court of Justice?, International Organization (2000), (depicting the court's decisions as "bold", "revolutionary", and "extremely controversial") at pp. 489. Such views on the court's role in the EU constitutionalization are commonly shared in most conventional studies. See, Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, American Journal of International Law, (1981); H. Rasmussen, On Law and Policy in the European Court of Justice (1986); J. H. H. Weiler, The Transformation of European Law: The Making of an International Rule of Law in Europe (2001). In this study, the author doesn't take sides with any particular view regarding the nature of the court's role, but merely takes such important role of the court as a given fact.

most efficient and effective central mechanism that can be possibly adopted at the supranational level, in terms of avoiding the dichotomies of the "intergovernmentalism vis-à-vis supranationalism" and the "monism vis-à-vis dualism", setting up the hierarchy of legal norms with the EU laws at the top, and enforcing interstate agreements and property rights and pushing forward the process of integration.

And according to Slaughter and Mattli (1993: 44), the CJEU does so on two principal dimension: first, "formal penetration" of law through "the types of supranational legal acts, from treaty law to secondary community law that take precedence over domestic law" and "the range of cases in which individuals may invoke community law directly in domestic courts", and second, "substantive penetration", which means "the spilling over of community legal regulation from the narrowly economic domain into areas dealing with issues such as occupational health and safety, social welfare, education, and even political participation rights".

2) Constitutional Review and the Preliminary Reference System

It is no accident, then, that many of the most important judicial innovations, both substantive and institutional, are made by the court by virtue of judicial review.[219] The court, created by the treaties, nevertheless, derives "what amounts functionally to constitutional review" from the constitutional legal order that it has constructed over the years through its case laws, and this a fact is remarkably underscored by the failure of the attempt to ratify the European Constitution in 2005. [220] The ECJ, therefore, is empowered to interpret the EU laws and to vindicate the superiority of the treaties in the course of adjudicating legal disputes, while its subsequent case laws have gradually expanded the scope of the EU law into legal areas that are traditionally confined within national competence, i.e., the "pervasive effects of federalism", as conceded by Lenaerts (2010: 1339).

With the passage of time, the CJEU has played an enormous role in the process of European integration by way of judicial review.[221] One important mechanism is the preliminary ruling procedure provided for by Article 267 TFEU, which allows, and in some cases, mandates, the national courts or tribunals of the member states to submit questions relating the interpretation of the treaties or the validity of a legal act of EU

[219] See, for example,

[220] See, Michel Rosenfeld, Comparing Constitutional Review by the European Court of Justice and the US Supreme Court, International Journal of Constitutional Law, Vol 4, issue 4 (2006), 618-651.

[221] On an institutional account of the nature of constitutional review by the ECJ and its implications on democracy, see, Martin Shapiro, The European Court of Justice: Of Institutions and Democracy, 32 Isr. L. Rev. 3 (1998).

agencies. It has been adopted as an effective tool for the court to expand its influence and activities into national courts, while providing opportunities for constructing dialogues between the CJEU and national courts. Originally functioning to ensure the EU law is applied uniformly in the member states, the political significance of the preliminary reference procedure thus goes far beyond the scope laid down in the treaty provisions.[222]

On the one hand, through this mechanism, the court was able to re-define the constitutional relationship between the national courts and itself in the absence of explicit treaty provisions.[223] In *Foto-Frost* (1987), for example, the court established that it has "exclusive jurisdiction to declare community acts invalid" by declaring that national courts are incompetent to decide on the validity of EU laws and are legally responsible for bringing such questions to the CJEU. As the judgment goes, "Article 177 is to ensure that community law is applied uniformly by national courts.

That requirement of uniformity is particularly imperative when the validity of a community act is in question. Divergences between courts in the member states as to the validity of community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirements of legal certainty". Again, this enables the court to directly engage in demarcating the distribution of competence between the EU and the member states, especially when legislative efforts didn't produce any substantive results.[224]

On the other hand, the CJEU was able to expand its competence and review to the areas of law that used to be within the domain of the national courts, while engaging in "constructive dialogue" with national courts.[225] In *Pupino*, *Segi* and *Advocaten voor de Wereld* (2007), for example, the ECJ extended its jurisdiction to the domain of the so-called "PJCC", i.e., the police and judicial cooperation in criminal matters of the member states, by claiming that "the framework-decision on the European Arrest Warrant did not infringe the legality, equality and non-discrimination principles".[226] In *ECOWAS* (2008), its goes on to further extend its review to the area of "CFSP", i.e., issues relating to the common foreign and security policy of the member states, by declaring its competence to review the legality of CFSP instruments, even when such

[222] See, Carl Otto Lenz, The Role and Mechanism of the Preliminary Ruling Procedure, Fordham International Law Journal, vol 18, issue 2 (1994), 388-409.

[223] I.d., at 392.

[224] I.d.

[225] See, G. Di Federieo (ed.), THE EU CHARTER OF FUNDAMENTAL RIGHTS: FROM DECLARATION TO BINDING INSTRUMENT, at pp. 30.

[226] Advocaten voor de Wereld (2007).

acts are formally excluded by Article 46 TFEU.

As the jurisdiction and influence of the CJEU expands, the need for judicial control of the compliance with the EU law rises accordingly, and the preliminary reference mechanism accordingly functions to secure legal unity within the EU by guaranteeing that the community law is interpreted and applied in a consistent and uniform manner.[227] For example, the recent preliminary ruling question submitted by the Irish court to the CJEU provides the opportunity to extend the scope of effective EU judicial protection to the areas of the European Criminal Justice and the EAW, while enabling the court to uphold the rule of law and fundamental rights protection effectively within a broader political context.[228]

Since the domestic courts and tribunals usually submit not only question relating to the EU law, but also other information concerning the general circumstances of the issues in dispute, the ECJ inevitably intervenes the decision-making process of the referring court in terms of substantive matters. Also, preliminary rulings give more opportunities to individual citizens to bring matters of infringement of their rights to the CJEU, since they could only defend against the acts of member state authorities before national courts before, but can now do so before the CJEU through this mechanism on the ground that the acts of member state authorities in question are related to the EU law.

B. Theorizing the EU's Court-Driven, Rules-Based Approach:

Market integration is a "purposeful" and intersubjective process, whereby manifold actor's dynamic interactions at various levels lead to the particular institutional and structural arrangements underlying the "rules-based", "court-driven" process (Stone Sweet 2004; Cichowski 2007; Moravscik 1998). A variety of factors contribute to the emergence and development of this approach: whereas member states may seek to advance given sets of preferences and interests through strategic bargaining, negotiation and compromises struck in the treaties (Moravcsik 1996, 1998), non-state actors strive for self-empowerment by harnessing specialized activities in various specific sectors of integration (Haas 1958).

Regardless of which actors and whose interests are more deterministic, and to the

[227] The ECJ itself repeatedly stressed this need in its decisions, e.g., FOglia v. Novello (II) (1981); Firma C. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1965), etc.

[228] See, Submissions of Proposed Amicus Curiae, Fair Trials Europe, available at: https://www.fairtrials.org/wp-content/uploads/2018/03/Amicus-Submission.pdf.

extent that the market integration involves the settlement of contentious issues between states and non-state actors, enforcing property rights and credible commitments, and bolstering compliances with treaty agreements through legal means, the EU relies heavily on a rules-based, judicially-driven approach to market integration, which has gradually moved the decision-making process beyond the states' limitations (Slaughter 2002). As Martin Shapiro points out, the essence of this approach is as follows, "The Community is presented as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology.'"

1) The Powerful and Politically Influential CJEU:

A fundamental feature of this rules-based, court-driven approach lies in how power is distributed among different political institutions and actors. Due to the inherently fragmented nature of the EU decision-making process, this approach is characterized by a structure with a weak executive, and legislative power, in contrast to a powerful judicial power. The CJEU enjoys a remarkable degree of law-making power and has great political influence on the process of integration.

As mentioned before, at the time of its founding, the CJEU, formerly known as the Court of the ECSC, wasn't expected to become such a powerful organization as it is today. It was rather given the unimpressive task of interpreting the EU law at the request of the national courts and according to the continental European legal tradition, such a relatively marginal role would allow the court to simply ensure the coherence of the EU law exclusively on the basis of the written treaty provisions. Also, it was believed that the drafters of the treaty provisions of the Court intentionally left the court no power of "permitting individuals in general to bring cases directly before the Court",[229] and the court was among those courts in the world who "are so lacking in links, direct or indirect, with the symbols of democratic governments"[230].

However, since the 1960s, the Court has made a series of fundamental, game-changing legal decisions, which have laid down rules and principles without which the Europe Union would look quite different today.[231] As recognized even by the realists, "No other international organization enjoys such reliably effective supremacy of its

[229] Ditlev Tamm, The History of the Court of Justice of the European Union Since Its Origin, at pp 12.
[230] Mancini and Keeling 1994, at pp. 176.
[231] Van Gend en Loos and Costa v. ENEL.

law over the laws of member governments, with a recognized Court of Justice to adjudicate disputes" (Keohane & Hoffmann, 1991: 11). Some scholars come to conclude that because of "the Court's status as the authoritative interpreter of the Treaty which, among other things, gave it de jure authority over the exercise of legislative authority", today "the dice were loaded in favor of the supranational side of the equation".[232]

Although the reasons provided by scholars tend to vary, the judicial power of the EU becomes very powerful. Kelemen's (2012: 58) attribution of the effect of constraining states to the increasing judicial independence, which offers some insights into this imperative, and according to him, "political fragmentation encourages judicial independence, which strengthens the ability of courts to act as a check against bureaucratic drift, enforcing legal norms against bureaucratic agents who may seek to deviate from them (Shapiro 1981; Kagan 2001)".

Eric Stein's argument also helps illustrate why member governments didn't alter the system so as to lessen the constraints imposed on the national governments, though it remains a debatable point, "[a]lthough the issues determined in the judicial process often have significant long-term implications, the political decision makers view them mostly as technical, and thus lawyers are given a more or less free hand". Rationalists, on the contrary, argue that such constrains as caused by supranational legal systems are paradoxically "consistent with the interests of member states", since "[e]ach member would most prefer for EC rules to constrain the behavior of the others while allowing itself to flout internal market rules when it so desired. … Such uncertainty would potentially have significant deleterious consequences for the stability of the internal market." (Garrett 1992: 556-557).

In all, under this court-driven, rules-based approach to market integration, various political actors are incentivized to play a role in the process of integration, primarily by forming a close tie with the supranational court and laws. Admitted or not, the court constitute a great political force that promote the course of integration by providing a beneficial alternative to self-interested actors, which could either be states or non-state actors. As Scheingold describes, by acting as a powerful supranational decision-maker, the court was "feeding into the symbiotic relationship emerging between community institutions and existing national structures – mobilizing national elites, enlisting national institutions in behalf of community goals, and generally blurring the lines which divided one set of structure from the other".

[232] Alec Stone Sweet and Daniel Kelemen, Assessing the Transformation of Europe: A View from Political Science (2013), at pp. 3.

2) Europeanization/Centralization of Public Policy in the EU:

Another feature of the EU's approach to market integration is how it derives significant dynamics from the technicality of law to Europeanize market-related conflicts and disputes and transfer the power of adjudication from national to supranational courts, thereby undermining the traditional conceptualization of state sovereignty. "A bias in favour of centralization"[233] in adjudicating cases relating to the balancing of power between national and supranational authority of the CJEU are demonstrated by various studies which tend to view the court as a high court in a federal-typed system (Bzdera 1993; Halberstam 2008; Volcansek 2008). Scholars have produced different explanations for such a bias of the CJEU, such as the empowerment of national courts (Alter 2001; Burley and Mattli 1993) and lawyers (Vauchez 2008), the profits-maximization of private litigants (Cichowski 2007; Conant 2002; Kelemen 2011), the self-reinforcing process of judicialization (Stone Sweet 2004), or the "spillovers" process (Slaughter), as well as the support for and acquiescence of the member state governments (Cooter and Drexl 1994; Garrett 1991, 1995; Garrett and Weingast 1993).

A core idea behind the traditional international-relations, as well as the liberal intergovernmentalist, concepts of international institutions, is the principle of state "sovereignty" (Ruggie 1986; Krasner 1987; Keohane 1988) and self-interests. As such, Keohane points out that "Defining institutions entails drawing a distinction between specific institutions and the underlying practices within which they are embedded, of which the most fundamental in world politics are those associated with the concept of sovereignty".[234] Hans J. Morgenthau (1940:279) describes sovereignty practices as based on "the permanent interest of states to put their normal relations on a stable basis for predictable and enforceable conduct with respect to these relations".

Such a conception of sovereignty is defined in international law, i.e., it means that a state is "subject to no other state and has full and exclusive powers within its jurisdiction without prejudice to the limits set by applicable law".[235] In this way, states preferences can always examined in terms of preserving and enhancing state sovereignty in the political and economic sense, whereas the relationship between states and international institutions remains in a "principal vis-à-vis agent" sense

[233] See, R. Danial Kelemen and Susanne K. Schmidt, Introduction-the European Court of Justice and Legal Integration: Perpetual Momentum?, Journal of European Public Policy, 19:1 (2012), at pp. 1.

[234] Robert O. Keohane, International Institutions: Two Approaches, International Studies Quarterly, Vol. 32, No. 4 (Dec. 1988), 379-396: 382.

[235] See, the decision of the Permanent Court of International Justice in Weimbledon (1923).

(Keohane 1984; North 1990; Williamson 1975; Garrett 1992). Having objected that the EU is *sui generis,* Moravcsik applies the ideas of state sovereignty into the practices of the EU by saying that "In the intergovernmentalist view, the unique institutional structure of the EC is acceptable to national governments only insofar as it strengthens, rather than weakens, their control over domestic affairs"[236], and "Yet economic interests remained primary".[237]

It is against such a backdrop that the "rules-based" system of EU governance brings challenges to the realm of international relations and politics, and it both reflects and transcends the principle of state sovereignty. Unlike other international organizations, the decision-making process of the European Union is indeed characterized by a *sui generis* rules-based system, which produces new opportunities and constraints for various political actors beyond the nation states, i.e., a "Europeanization of dispute resolution". It is said that the EU regime has undermined that traditionally informal, cooperative and opaque approaches to regulation at the national level" but has "simultaneously encouraged the introduction of more formal, transparent, juridical regulation at the EU level".[238]

By transcending state sovereignty, rules, and hence the court, have successfully played a central role in the process of European integration beyond the limitations implied in the traditional notion of international law, i.e., facilitating the possible equilibrium of the "purposeful behavior of relatively small numbers of actors engaged in strategic bargaining" (Keohane 1984; Axelrod 1984; Oye 1986; Moravscik 1982), "the balance of power, international law, the diplomatic mechanism, the managerial system of the great powers, and war" (Bull 1977: 74), or reflexively reinforcing "the intersubjective meanings" (Kratochwil and Ruggie 1986: 765), rules "pictured as summaries of past decisions" (Rawls 1955:19) and "norms of reciprocity" embedded in human practice and discourses (Wight 1977), etc.

At the heart of such a trend towards "Europeanization of dispute resolution" is a gradual empowerment of non-state actors who become active and resourceful supporters of European integration once they are incentivized to engage in the functional and political "spillovers" (Haas 1958). On the one hand, the rules-making activities at the EU level empower a number of subnational actors, such as the private litigants, national courts at the lower levels, when they willingly choose to participate

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[236] Andrew Moravcsik, Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach, Journal of Common Market Studies, 31 (1993) 473-524: 505.

[237] See, Andrew Moravcsik, THE CHOICE FOR EUROPE (1998), at p. 4.

[238] Daniel Kelemen, Eurolegalism and Democracy, at p. 58.

in the integration process by bypassing the national authorities and referring their disputes and conflicts to the CJEU (Slaughter 1999), as well as the groups of people like tradesmen and transnational corporations, who benefit from the new distributions of gains resulting from measures of market liberalization, e.g., the "freedom of movements", the removal of tariffs and protective barriers, the uniformization of market rules and standards (Burley & Mattli 1993; Alter 1998). It is hoped, as at least by the interest groups, unions and politicians benefiting from liberalization regime, that what have failed to be done by domestic actions can be achieved at the European level.

On the other hand, the rules-based, technical and functional nature of the EU governance has gradually led to a vertical transferring of decision-making authorities from the national level to the supranational level, thereby empowering the supranational bureaucrats, experts and judges to carry out law-making and policy-making activities, which used to be within the domain of nation states. Emphasizing the limits created by these bureaucrats' "technical" and "functional" entrepreneurship, the incompleteness of knowledge as well as the rule-based organization practices, the supranational courts like the ECJ have skillfully moved beyond the limitations of state sovereignty, simply by playing a "technical serviant" role (Slaughter and Mattli 1993: 49).

The role of rules in power shifting is particularly embraced by neo-functionalists alike; for example, Stone Sweet explains, "the migration of rule-making authority from national governments to the European Union" is attributed to "the EU's capacities to create, interpret, and enforce rules as 'supranational governance'", and as such, "the expansion of supranational governance in the European Union is one of the most remarkable political innovations in the world in the past half-century".[239] Eric Stein similarly observes the "mostly technical" nature of the EU governance, which gives the EU institutions, especially the CJEU, a "free hand" to engage themselves in supranational policy-makings.[240] Weiler goes further to elaborate on how such a reliance on rules is operationalized in the governance practices of the EU by distinguishing between "normative supranationalism" and "decisional supranationalism".[241]

[239]See, Alec Stone Sweet, Neofunctionalism and Supranational Governance (1-1-2012), available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5636&context=fss_papers

[240] See, Eric Stein, LAWYERS, JUDGES, AND THE MAKING OF A TRANSNATIONAL CONSTITUTION, at pp. 3.

[241] Weiler (1995)

2. Judicial Policy-Making, Legal Harmonization, and Economic/Political Integration

The *raison d'être* of the EU is always to establish the internal market in which the free movement of goods, persons, services, and capital was ensured, as well as a regime of free and undistorted competition.[242] And as a matter of fact, "the internal market would never have been what it is right now" without the CJEU (Burley and Mattli 1993; Mattli and Slaughter 1995, 1998; Garrett and Weingast 1993; Garrett 1995; Garrett Kelemen, and Schulz 1998; Alter 1996, 1998, 1999, 2001; Alter and Meunier-Aitsahalia 1994). This study argues that the CJEU engages in the promotion of the establishment of the internal market through its judicial policy-making as well as efforts on legal harmonization.

A. Judicial Policy-Making:

It's generally believed that the judicial practice of the CJEU in interpreting and applying the free movement of goods, persons, services and capital is pro-integrative, [243] to the extent that it finds almost "all sorts of national rules and practices contrary to the relevant articles of the Treaty".[244] In cases relating to the free movement of goods, for example, *Dassonville* (1974), the ECJ carried out a broad read of treaty provision and concluded in its decision, "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" and thus violate Article 28 TEEC. And it did similarly expansive interpretation in cases concerning the free movement of services and labor, such as *Reyners*, *Sager*, *Gebhard*, and *Centros*.

Critical to the internal market is the judicial policy-making activities of the CJEU, along with the complicity of other non-state actors, who benefit from this process. While the CJEU could promote using the law-making system in such a policy-oriented

[242] Article 3 TEU states the objectives of the EU, which include "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".

[243] Many attempted to illustrate the intension of the court in its pro-integration practices, see, e.g., H. Rasmussen, Law and Politics of the Court of Justice of the European Union. This study doesn't engage in interpreting the attitudes and preferences of the CJEU judges.

[244] See, Carri Ginter, Free Movement of Goods and Parallel Imports in the International Market of the EU, at pp. 505.

way, private litigants as well as national courts are important interlocutors of the court, who bring matters to the CJEU and follow its lead to develop the supranational system. Take preliminary reference system as an example, its development and functioning depend on both individual citizens or institutional actors and national courts, who must choose to take advantage of this supranational mechanism. Otherwise, this system will not operate; and once it's used, the court's decisions are hard to be reversed due to institutional factors that constrain treaty amendments (Scharpf 1988; Rasmussen, 1986).[245]

The role of the CJEU in promoting the free flow of intra-community trade and the development of the internal market can be observed from both the subject matters of cases as well as the types of procedures used to bring matters to the CJEU. In terms of subject matters, the majority of cases dealt with by the ECJ are related to intra-EU trade and the so-called "four freedoms", as demonstrated by statistics, cases in agriculture, "four freedoms",[246] intellectual property rights and competition,[247] as well as taxation are the four major subject matters of cases dealt with by the ECJ (2009-2016).[248]

A more recent decision in Case C-284/16 *Achmea* also sheds lights how the CJEU safeguards the internal market through treaty interpretation. In this case, the CJEU avoids engaging in the evaluation of other legal grounds, such as non-discrimination as well as the principle of subsidiarity, and directly ruled that intra-EU BITs, especially the so-called ISDS provisions under the Netherlands-Slovakia BIT, undermines the autonomy of EU law enshrined in Articles 344 and 267 TFEU. [249] That said, legal principles laid down in the treaty often gives the court broad space of discretion and allow it to insert policy considerations into the interpretation and application of the EU law- and in this case, the "autonomy of EU law"- thereby enable the court to fulfil its role in safeguarding the internal market. As Judge Prechal points

[245] A unanimous agreement is needed to make treaty amendments. Also, some argue that "the joint-decision trap" have limited the ability of the member state to control the actions of the court. See, Scharpf (1988).

[246] This include the total numbers of five types of cases, i.e., "free movement of capital", "free movement of goods", "freedom of establishment", "freedom of movement for persons", and "freedom to provide services", as characterized in the "New cases- Subject Matter of Action" section of the annual reports of the CJEU.

[247] Given legal issues are always corelated, we combine IPRs and competition cases into one subject matter; however, both of them are significant on their own in terms of the volumes of cases brought to the court shown in the annual reports of the CJEU (2009-2016).

[248] See, "Cases Completed by the ECJ", in the Annual Reports of the Court of Justice of the European Union (2009-2016).

[249] See, Case C-284/16 Achmea (2018).

out before she's appointed to the ECJ, in the area of internal taxation, the principle of "equality and non-discrimination" was used as "a tool for market integration".[250]

In such cases, the CJEU usually justifies its pro-integration agenda by engaging in broad and innovative treaty interpretations, while always considering the need to guarantee the effective establishment and functioning of the internal market and to prevent national barriers from hindering the free flow of cross-border trade and exchanges., e.g., intellectual property rights and competition,[251] agriculture and fisheries,[252] labor and consumer protection, etc. For example, in cases of employment, the court takes on a liberal approach in interpreting the concept of "worker", thereby granting rights of free movement and social security benefits to EU citizens in a broad setting.[253]

In terms of procedure, the majority of the ECJ's works are dealing with requests for preliminary references from national courts, and the number of these cases have kept growing after the Lisbon Treaty takes effect. The total number of references and their proportion in relation to other types of cases brought before the ECJ has increased over time, which is in sharp contrast to the steady decrease in the number of direct actions. However, the rate at which references are submitted by country and types of national courts varies substantially.

While different theories are presented to account for such variations, studies have generally illustrated close relationship between the court's activities and the development of the single market. For example, Stone Sweet and Brunell (1998) and Stone Sweet and Caporaso (1998) demonstrated that preliminary references were closely linked to transnational economic activities, because they were made most frequently by member states that engaged in intra-EU trade.

Subsequent empirical studies generally present consistent findings that confirm the

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[250] Sacha Prechal, Non-Discrimination Does Not Fall Down from Heaven: The Context and Evolution of Non-Discrimination in EU law, available at: https://csesp.files.wordpress.com/2015/05/eswp-2009-04-prechal.pdf.

[251] See, Vladimir TYC, Radim Charvat, European Court of Justice as Law-Maker: Example of Intellectual Property Protection on EU Internal Market, available at: https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/mezin_soud/Tyc_Charvat.pdf.

[252] See, e.g., ECJ, Case C-180/96 UK v. Commission [1998]; Case C-157/96 The Queen v. Ministry of Agriculture, Fisheries and Food [1998] ECR I-2211. In both cases, the court ruled in favor of the intra-community trade with a view to the completion of the internal market.

[253] See, e.g., Case 53/81, Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 1035; Case 139/95, Kempf v. Staatssecretaris van Justitie, 1986 E.C.R. 1741; Case 196.87, Steymann v. Staatssecretaris van Justitie 1988 E.C.R. 6159; Case C-456/02, Trojani v. CPAS, 2004 E.C.R. 1-7573.

primary function of the preliminary reference system with respect to the internal market (for the relationship between national litigation rate and GDP, see Christian Wollschlager 1998). For instance, upon taking into account various variables, including public support for integration, political information, legal doctrines and tradition, judicial review, and trade to GDP ratio, show that "preliminary references seem to rely most strongly upon the level of intra-EU trade", and that "EU trade levels are positively and significantly related to use of the preliminary ruling system".[254]

As such, viewed from both perspectives (i.e., subject matters and procedures), the court benefit transnational businesses and individuals (e.g., exporters) who are provided with legal channels to protect their economic interests against national laws, thereby facilitating the elimination of cross-border barriers to intra-EU trade. Once national barriers to free movements of goods, services, people and capital are eliminated, "the opportunities for profitable cross-national activity increased, transnational actors grow more numerous and more powerful, governments came under more pressure to pass more EU legislation in support of these increasingly important transnational actors, and the body of EU law increased", which in turn leads to "more opportunities to challenge national law".[255]

B. Legal Harmonization:

Another aspect of the CJEU's role in market integration is more structural, i.e., through legal harmonization, a process which inevitably affects the economic interests of actors involving in trans-border economic activities as well as the balance of power and authorities between the national and supranational bodies/actors. The harmonization or unification of legal norms is at the heart of the EU legal order, or *acquis communautaire*.[256] By its nature, legal integration promotes market integration, and is an indispensable condition for the latter.[257] It also is an important legal guarantee for market integration, as it enhances the harmonization of the national

[254] See, Clifford Carrubba, Lacey L. Murrah, Legal Integration and Use of the Preliminary Ruing Process in the European Union, available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.111.73&rep=rep1&type=pdf.

[255] Clifford J. Carrubba, Legal Integration and Use of the Preliminary Ruling Process in the European Union, at pp. 7-8, available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.111.73&rep=rep1&type=pdf.

[256] See, Venice Commission, European Commission for Democracy Through Law, CDL-UDT(2010)017, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2010)017-e.

[257] Uniformity of law is important for trade liberalization. See,

legal system to the extent that is required for the functioning of the single market.[258] That's why new strategies of legal harmonization were developed as necessary for "completing the internal market" in the EU during the 1990s.[259]

As a substitute for legislative power, the CJEU engages in judicial law-making by filling up the gaps and lacunae of treaty provisions,[260] and its role in promoting legal harmonization is thus crucial for market integration. Acting as the guardian of the treaty, the CJEU contributes to legal harmonization not only by ensuring the enforcement of economic rights of private parties, fair competition, and the free flow of trade, but also by establishing an amicable, cooperative relationship with the national courts of the member states.

On the one hand, as a dispute settlement mechanism of regional trade agreements, the CJEU is devoted to enforcing economic interests and property rights and protecting the free movements of goods, services, labor and capital in the community.[261] It thus becomes an important locus for integrating trade and human rights underpinning the internal market.[262] In this aspect, the court has made remarkable achievements, as legal harmonization goes beyond legal rules in economic areas, such as intellectual property, company and investment,[263] competition, and financial, to those regulating social sectors, like sustainable environmental development, social welfare and human rights.

As Stone Sweet points out, on the other hand, "Legal integration steadily proceeded thereafter, as each of the high courts in the EU gradually accepted supremacy and its consequences, albeit on their own doctrinal terms".[264] Although not always being a smooth trend, legal harmonization has been progressively going forward, since the court's pronouncement of the supremacy and direct effect doctrines, and its "systemic coherence and effectiveness have depended on how the ECJ and the national courts have negotiated their relationship with one another"[265] Scholarships on the increasingly entrenched inter-judicial relationship between the CJEU and the

[258] For example, The 1958 Treaty of Rome demands as part of the effort to create a common market that extant trade quotas among member staes be abolished during a transitional period.

[259] See, European Commission White Paper, Completing the Internal Market (1984).

[260] See, Stone Sweet; Martin Shapiro, The ECJ: of Institutions and Democracy (1998).

[261] See, annual report of the CJEU.

[262] See, in general, Grainne De Burca, The Language of Rights and European Integration (1996).

[263] See, e.g., Sebastian Mock, Harmonization, Regulation and Legislative Competition in European Corporate Law, 3 German Law Journal (2002).

[264] Stone Sweet, at pp. 31.

[265] I.d.

national courts of the member states are also abundant (Slaughter 1993, Stone Sweet 1994, Weiler 1994, and Alter 2001).

Member states follow the court's lead to harmonize domestic laws with the EU law for different reasons: some of them might be pressured to do this as a condition of getting accession to the EU membership,[266] some might be benefited from legal harmonization as it facilitates trade liberalization and encourages foreign investments, [267] while other countries might also be forced to allow legal harmonization in certain areas due to asymmetric information or weak bargaining positions (Moravcsik 1998), etc. In the domestic legal settings, legal harmonization means both incorporating the content of the EU laws in a variety of substantive legal areas as well as embracing the constitutional principles developed by the CJEU, which "entail significant, and structural adaptation on the part of national judiciaries".[268] Despite of the mixture of reasons and factors (Stone Sweet 1998; Conant 2002; Chalmers 2000; Lazowski ed., 2009; Malecki 2012), it's generally acknowledged that legal harmonization develops along with the dynamic inter-judicial relationship in the EU (Weiler 1991, 1994; Alter 2001).

C. Economic and Political Integration:

If there is one more thing to be addressed about the CJEU's role in the process of market integration, that is the fact that through economic integration, the CJEU is also promoting the course of political integration in the EU. As economic and political integration is interconnected goals, the pro-integrative role of the court makes its judicial practices and policy-making more politically significant. Just as scholars have already observed, associated with this role of the court "is an assumption of its ability to deliver integration both in terms of the integration of the national and community legal orders and in respect of law's ability to deliver social, political and economic integration".[269]

It is such political significance that defines the CJEU as a *sui generis* international

[266] See, e.g., Attila Agh, Europeanization of Policy-Making in East Central Europe: The Hungarian Approach to EU Accession, Journal of European Public Policy, (Jan 1999).

[267] See, e.g., Lorand Bartels and Federico Ortino (eds.), REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM (2006); Richard M. Buxbaum/Klaus J. Hopt, Legal Harmonization and the Business Enterprise (Berlin 1988), 201.

[268] I.d.

[269] Kenneth A. Armstrong, Legal Integration: Theorizing the Legal Dimension of European Integration, Journal of Common Market Studies, vol 36, no.2 (1998), at pp 156.

court.[270] The CJEU has thus undertaken more political functions than other international and national courts, and the "judicialization of politics" in the EU becomes the crux of the economic and political integration process. In this process, the court has played an enormous role by developing and using many unique judicial practices, including the constitutionalization of the union treaties, the incorporation of the legal traditions and judges from newly-joined member states in Central and Eastern Europe, and pro-integrative judicial decision-makings, etc.

Since its funding, efforts on market integration have increasingly been concomitant with the move towards political integration in the EU. After the EU enlargement, whether, and how, will the EU turn into a full-fledged integrated political community emerge again, while social, political and cultural discrepancies and obstacles still exist, hindering the completion of a political union. A series of constitutional crisis and referenda have demonstrated the ambiguity and uncertainty underlying the political integration of the EU, and the recent Brexit reveals various political and institutional problems of the European project, such as the long-standing problem of "democratic deficit".[271]

In particular, it underscores the lack of societal legitimation inherent in the dramatic institutional overhauls of the EU, as well as the enlarging disparity between EU elites and citizens. Nevertheless, this author thinks that these confusions and obstacles with regard to political integration are by nature more philosophical and political than institutional.[272] This reveals some of the limitations of the EU's judicially-driven approach to integration, for problems like low voter's turnout, reduced public trust, as well as anti-EU sentiments are hardly something that could be addressed in judicial means.

3. Judicial Professionalization as A Strategical Mechanism of Judicial Self-Legitimation, Network-Building, Self-Governance, and Mobilization

Whereas the CJEU is portrayed as a political actor covered with a technical-neutral identity under the banner of the rule of law, law is to be constructed as the instrument not only for judicial policy-making, but also for properly exposing itself to external forces against the unprecedented role played by the court in market integration. In this

[270] See, Katarina Peročević, European Union Legal Nature: EU As *Sui Generis* - A Platypus-Like Society, Intereulaweast, Vol. IV (2) 2017.

[271] For debates on the democratic deficient of the EU, see, Andrew Moravscik, In Defense of the "Democratic Deficit": Reassessing the Legitimacy in the European Union, JCMS 2002 Volume 40. Number 4. pp. 603–24.

[272] For philosophical debates on the European project, see, e.g., Jugen Habermas,

sense, rule of law is also political by nature; accordingly, the concept of judicial professionalization is explored in terms of its use as a medium for judicial self-legitimation, whereby judicial actors seek to give a more technical-neutral explanatory role for law. In the EU context, judicial professionalization is particularly becoming the medium by which the CJEU has played its pro-integrationist role in judicial law-making- whether intentionally or not. Key to the functioning of this medium is how the concept of judicial professionalization affects people's perceptions as to the role of the law and courts as well as the kind of behavioral and organizational solidarity that it's fostered within the judicial community in the EU.

A. Rule of Law and Judicial Independence

Our point of departure is that rule of law and judicial independence are strategic rhetoric, or discourse, of a particular kind in the context of the EU. To understand them from the political perspective we need to consider in what ways their meanings have strategically shaped the kind of behavior and rhetoric of the EU judicial actors, and how they command professional legitimacy in the EU judicial community. In this section, it is argued that as the EU legal system evolves into a supranational legal order, the creation of the discourse of the rule of law and judicial independence was the concomitant result of the spontaneously, yet strategically, distillation and indoctrination of discrete elements of professional self-identification.

Such creation is crucial for the consolidation of a supranational judicial community, which relies not only on the loyalty of and support for the supranational agencies (Gibson and Caldeira 1998), but also on the inter-judicial cooperation between national and supranational courts (Stone Sweet 2004; Weiler 1994; Slaughter and Mattli 1993). Furthermore, it enables the judiciary to be better insulated from other political powers as well as to expand its political role and influence on a self-asserted basis of legitimacy (Kosar 2013). All of these are especially important for the effectiveness and legitimacy of the CJEU, if one also considers the diversity of, and discrepancies among, the different legal traditions in the EU.[273] To transcend the conflicts of the notions of nationalities, political loyalties (e.g., membership to political parties), legal traditions and cultural norms (e.g., civil law vis-à-vis common law), the idea of rule of law and judicial independence contributes to the kind of

[273] On this point, see, e.g., Michael A. Becker, Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals, Yale Human Rights & Development Law Journal vol 7 (2004);Jacob Öberg, Legal Diversity, Subsidiarity and Harmonization of EU Regulatory Criminal Law, in R. Colson and S Field (eds.), EU CRIMINAL JUSTICE AND THE CHALLENGES OF DIVERSITY, LEGAL CULTURES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE (2016), etc.

solidarity and fidelity among judicial actors, which is necessary for the establishment of a supranational legal order.

Once created, this discourse becomes modular and capable of being ingrained into the EU judicial actors, in spite of the wide variety of political, cultural and ideological constellations at play. So far, the deep professional attachments that it has aroused among supranational and national judicial actors has greatly contributed to the enormous role of the CJEU in European integration, and it, in turn, becomes a tool of judicial self-legitimation. It thus becomes demonstrably necessary for the CJEU to push the scope and depth of European integration beyond what EU law-makers aimed at.

Here, the discourse of rule of law and judicial independence is strategic because of the difficulty for one to hypostasize, and always strictly adhere to, the boundaries between law and politics in practice. And it's also because the concept of rule of law and judicial independence is quite often deployed as the "mask and shield" of EU lawyers and judges (Burley and Mattli 1993), which enables them to exert political influences under the protection of their professional identity, i.e., it "hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere" (Burley and Mattli, 1993).

As a strategic mechanism, this discourse distinguishes the EU judicial community, as well as their behavior, not by their real political impacts, but by how they are (or "ought to be") perceived, i.e., technical, apolitical, and neutral legal arbitrators of EU treaties. In this discourse, courts are viewed as a third-party conflict resolver, who must act in a neutral and independent manner in order to effectively and legitimately solve conflicts between the two parties (Stone Sweet 2000) When two parties in a dispute come to a third party to resolve their conflict, they delegate the power of norm interpretation and application to this third person, and require him/her to be competent, neutral, and independent (Stone Sweet 2000).

However, since law and rules are inherently incomplete and cannot predict all scenarios, courts inevitably make laws in the process of interpretation and application, and they differ only as a matter of degree, to which they possess the law-making power. But by asserting their distance from politics, supranational judicial actors avoid a realistic sense of judicial law-making and defend their activities by portraying them as strictly "legal". In this way, they create an isolated, de-politicized, "legal" domain of professional activities, even when they are aware, consciously or subconsciously, that it does not exist at all. Rhetoric like rule of law and judicial independence marks the strategic efforts of a judicial community, which is too often criticized for behaving

in an activist manner, for self-legitimation.

This explains the style of behavior and rhetoric commonly taken by the supranational adjudicators, and it also demonstrates the reasons why programs of judicial professionalization are widespread in the EU right now. The answer to the latter lies, in part, in the way this formal conception of judicial professionalism as a strategic discourse has provided opportunities for EU-wide judicial mobilization, empowerment, and inter-judicial network-building, which is aimed to structurally change the strategic location of the judicial power in the EU.

1) The Rule of Law Rhetoric Among EU Judges:

So far, the official language and wordings used by the EU supranational adjudicators in both public speech and academic writings always contain a formalistic defense of judicial activities, as strictly adhered to the principle of rule of law. Just as neofunctionalists predict, "Law is widely perceived by political decision-makers as 'mostly technical', and thus lawyers are given a more or less free hand to speak for the EC Commission, the EC Council of Ministers and the national governments. The result is that important political outcomes are debated and decided in the language and logic of law" (Stein 1981).

Specifically, supranational adjudicators tend to uniformly proclaim that the CJEU acts based on its vast formal powers bestowed by the treaty provisions to the extent that these treaty-based power and duties are exploited to their utmost for judicial empowerment (Burley and Mattli 1993). They acknowledge, but deftly observes, the inherent limitations on their judicial functions created by the tenets of the rule of law. For example, refuting claims on judicial federalism of the ECJ, Lord Slynn of Hadley speaks for the court, "I do not think that the court has exceeded its jurisdiction or has adopted a federalist approach contrary to the provisions of the Treaty itself. It seems to me that the Court has sought to do what the Treaty required it to do. I certainly never saw myself as one of a unanimous group of committed federalists conspiring to push federation beyond the limits laid down by the Treaty. If we had been such, a great deal of the hard-headed discussion in thrashing out judgments within the framework of the treaty could have been avoided. Instead we sought to decide in accordance with the Treaty and the object and purpose of the legislation".[274]

Similarly, judges currently sitting on the bench also employed the same rule of law

[274] Quoted in Koen Lenaerts, Federalism and the Rule of Law: Perspectives from the European Court of Justice, Fordham International Law Journal (2011), at pp. 1338.

rhetoric in their scholarly writings, public speech, and personal interviews. Judge Thomas von Danwitz from Germany, for example, incorporates the rule of law narrative in his article, *The Rule of Law in the Recent Jurisprudence of the ECJ* (2014). While admitting the inevitable political influences, he nevertheless describes the development of the ECJ's past and recent jurisprudence as made truly on the basis of the rule of law principle codified by the treaty. Drawing on "general experience which the judiciary has made throughout the western world", he seeks to use the rule of law rhetoric to command political legitimacy for the ECJ, and he goes as follows:

"Whether you take the practice of the EU Supreme Court or of the German Constitutional Court on the national level or of the European Court of Human Rights or of the European Court of Justice on the supranational level, the experience is essentially identical in the sense that the democratic process does not offer sufficient and sufficiently effective guarantees against an abuse of power. … This is why it is and will remain a continued task of the judiciary to ensure the respect of the rule of law. In the European Union, this is in principle no different than in its Member States, but it is of course subject to a significant number of specific considerations in the respective contexts in which the scrutiny of the ECJ intervenes".[275]

In a way, the discourse of rule of law has also shaped the type of judicial behavior that judges in the CJEU takes on in their daily work, as reflected by the interview with the current ECJ Judge Alexander Prechal. Viewed from "a long term perspective", she said, "the judgments have to fit in a kind of idea what Union law is, where it stands and how it should develop, but the emphasis is different. The emphasis on deciding case by case".[276]

This rule-of-law style of adjudication, as explained by former Advocate General Francis Jacobs, is effective in limiting the state power, which is important for market integration. He first says, "The rule of law has gone well beyond the constitutional foundations of the Community and permeates the case-law of the ECJ: not least in the most central areas of EC law, the law of the internal market. The Court of Justice has exercised strict scrutiny over national measures affecting the fundamental freedoms of the Treaty – especially the free movement of goods, of persons, of services. Here the

[275] Thomas von Danwitz, The Rule of Law in the Recent Jurisprudence of the ECJ, Fordham International Law Journal (2014), at pp. 1313-1314.

[276] See, Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU, available at: https://europeanlawblog.eu/2013/12/18/interview-with-judge-sacha-prechal-of-the-european-court-of-justice-part-i-working-at-the-cjeu/.

rule of law imposes requirements also on the national courts".[277]

And then he goes on to defend the expansion of the ECJ's jurisdiction by arguing that the unfortunate situation of judicial activism is the result of ambiguities and conflicts of treaty provisions, "There is now far greater uncertainty about the borderline between these regimes than there was with the previous dividing line between the first and third pillars. The net result is both to limit in an apparently random way the jurisdiction of the ECJ and to create apparently maximal confusion about its scope". To remedy such judicial activism, he suggests, "a proper solution to the patchwork created by successive perhaps rather ill-thought-out Treaty amendments can now be only by a full-scale recasting of the Treaty, removing the unfortunate three-pillow structure".[278]

Of course, finding rule of law as a common rhetoric used by CJEU judges for judicial self-legitimation is not to say that all CJEU judges have had similar political visions or understood their role in the same way; rather they might have quiet opposite views about law and the role of judges, but they all embrace the same fundamental idea of rule of law. Indeed, CJEU judges do have different personal visions and temperaments, according to the recollection of a former ECJ judge from the UK, David Edward, "Judge Mancini, the Italian Judge, was a particularly charismatic kind of character and he always took a particularly personal line – not always a predictable personal line- but one always enjoyed hearing what he was going to say and of course he was a great advocate of the Community.

At the other end of the scale, so to speak, was Judge Joliet, who was the Belgian judge. He wasn't a Euroskeptic, but he was always urging caution in the direction the Court might go and he held very strong opinions and if one was on the other side from him then the argument could sometimes become fierce. It was good humoured in the end, but he was a man of strong opinions. Then, there was Judge Kakouris, who was the Greek judge, who had a rather spiritual view of life and,being Greek, he frequently said, 'All you Latin lawyers, you don't understand about the ultimate purpose of life and you're too logical. There are times when you just have to say 'I believe' and accept that is the basis for taking a decision rather than trying, in a Latin kind of way, to reason it out to the end'. He was rather a special person in his own way, but there were many others."

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[277] Francis Jacobs, The European Union and the Rule of Law, available at: https://www.birmingham.ac.uk/Documents/college-artslaw/law/holdsworth-address/holdsworth07-08-jacobs.pdf, at pp 12.

[278] I.d., at pp. 13.

2) Protecting National Judicial Independence:

Judicial independence is arguably one of the most important things for pro-integrative actors, who would like the CJEU to play a potentially enormous role in integration, because of its political implications on the horizontal and vertical divisions of power in the EU. Horizontally speaking, the CJEU gets to review the legal validity of the actions of other EU institutions, such as the European Commission. But perhaps more consequentially, it alters the vertical relationship between the CJEU and the member states, as previous described, i.e., the transferring of the judicial power from national to supranational level as well as the expanding influence of the CJEU's law-making activities on increasing numbers of areas of law have undermined the traditional conception of, and relations to, state and sovereignty (Scharpf, 1999).

The interdependence of judicial independence and the redistribution of the decision-making power between the supranational and national levels has created a situation, in which a lot of integrative actions are carried out by the CJEU and other EU institutions in the name of judicial independence. Just as article 19(1) TEU provides, "Member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". And this explains why the ECJ demands the member states to take measures to ensure the independence of national courts as it emphasized recently in a series of cases.

In a recent case, *Associação Sindical dos Juízes* (Case C-64/16), for example, the ECJ reviewed the domestic legislation of Portugal, which essentially reduces the general salary of judges of the *Tribunal de Constas*, and it reasoned by defining the concept of judicial independence as a binding feature for both national and supranational tribunals. Its ruling, therefore, amounts to the establishment of a general obligation on the part of the member states to take measures to ensure and protect the independence of the national courts and tribunals in accordance to Article 19(1), Articles 2 and 4(3) TEU.

Although the case was decided in favor of Portuguese legislation, the ECJ directly points out the importance of judicial independence with respect to the supranational-national relationship, "The guarantee of independence, which is inherent in the task of adjudication … is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, … but also at the level of the Member States as regards national courts. The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system… that [preliminary ruling] mechanism may be activated only by a body responsible for

applying EU law which satisfies, *inter alia*, that criterion of independence".

Also, it strictly defines judicial independence in terms of its implementation within domestic settings by providing "the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraints or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. … the receipt … of a level of remuneration commensurate with the importance of the functions they [judges] carry out constitutes a guarantee essential to judicial independence".

A similar case is the preliminary ruling request submitted by the Irish High Court before the CJEU in the case of *Minister for Justice and Equality v. Artur Celmer* on March 23, 2018.[279] A core issue in this case is whether a national judge is obliged to surrender a criminal suspect pursuant to a European Arrest Warrant issued by a member state of the EU, which nevertheless constitutes the breach of the rule of law. The question of judicial independence has been examined by the CJEU implicitly in a series of rulings on the definition of the term 'judicial authority' for the purposes of the operation of the Framework Decision on the EAW. The Court treated the concept of judicial authority as an autonomous concept in EU law in previous cases.[280] The Court confirmed that the words 'judicial authority' are not limited to designating only the judges or courts of a member state. It may extend more broadly to the authorities required to participate in administering justice in the legal system concerned.[281] The importance of judicial independence was certainly a determinant consideration for the court in dealing with such cases.

Another case, in which the CJEU tried to exert pressures on national governments in order to protect the independence of national judiciaries, occurred in 2011. It was when the right-wing governing coalition in Hungary successfully managed to amend the Constitution which changed the powers and composition of its judicial power and

[279] See, Judicial Independence: The Irish Court's Request for a Preliminary Ruling on the European Arrest Warrant, 11 April 2018, available at: https://www.ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary.

[280] See, C-452/16 PPU, Poltorak of 10 November 2016, C-477/16 PPU, Kovalkovas of 10 November 2016 and C-453/16 PPU, Özcelik, of 10 November 2016.

[281] I.d.

threatens to undermine judicial independence in Hungary.[282] The national judges were forced to retire prematurely, and it thus leads to the illegitimate early termination of the terms of office of the Supreme Court president and vice president. Conventional domestic constitutional means could no longer provide any remedy given the fact that the governing party won a two-thirds majority in the general election, which was large enough for it to amend the constitution.

Under such circumstances, national courts must turn to the CJEU for supranational legal remedies, i.e., "the role of the international or supranational judicial fori such as that of the European Court of Justice (ECJ) and that of the European Court of Human Rights (ECtHR) became overwhelmingly important".[283] After national judicial protections failed to entirely annul the age-limit imposed upon constitutional court judges, the European Commission brought the issue before the ECJ through an expedited procedure, and the court subsequently finds such age limit did not satisfy the principle of proportionality and therefore illegal under the EU law.[284]

Since a crisis in rule of law leads to challenges to the effectiveness and legitimacy of the EU law, its implication on the supranational-national relations of judicial independence becomes particularly meaningful and salient in times of political backlashes against the rule of law in Europe today. And that's why the European Commission has taken serious actions to denounce and prohibit the ongoing judicial reforms in Poland, which strengthens the political control of the ruling party over the nation's judiciary and endangering its judicial independence and rule of law. The European Commission has not only set out to push the Polish authorities to make remedies for its reforms by threatening to bring an infringement procedure against Poland for breaches of EU law, but also decided to sanction the Polish government by cutting down its budget to Poland, i.e., to "suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule-of-law deficiencies".[285]

Over time, this discourse of the rule of law and judicial independence, with much ambiguity attaching to it, becomes a built-in capacity of the EU judicial actors, who want to safely perform their political functions, while seeking for a kind of self-legitimation that could only be derived from the technical-neutral nature of their

[282] See, Attila Vincze, Judicial Independence and Its Guarantees Beyond the Nation State: Some Recent Hungarian Experience, Journal of the Indian Law Institute, vol 56, no.2 (2014), pp 202-215.
[283] I.d., at pp. 203.
[284] See, Case C286/12 Commission v. Hungary.
[285] Poland Plays Down Possible EU Budget Cuts, EURACTIV May 8, 2018, available at: https://www.euractiv.com/section/eu-priorities-2020/news/poland-plays-down-possible-eu-budget-cuts/.

professional identity (Burley and Mattly 1993; Kelemen; Stein, 1964; Lenearts). Rule of law and judicial independence, therefore, are both a cure and a pathology of the self-asserting EU judicial community.

Born in the need to transfer political power and authorities from national to supranational level, the discourse of rule of law and judicial independence encounters a dilemma today, when the rising populist and anti-EU movements are destroying the legitimacy of the divinely-ordained, elites-centered, and self-asserted legal realm. The entire judicial enterprise of the EU faces serious challenges at a stage of human history, when even the most devout adherent of liberal democracy and rule of law, such as the UK, are confronted with the anti-judicial, anti-elitist public distrust. The problems produced thereof could be impossibly settled by such a self-asserting strategy of legitimation, which was deployed to command legitimacy primarily from the legal and political elites, who are the architect of this supranational entity.

B. Judicial Mobilization, Network-Building, and Self-Governance:

In addition to self-legitimation, judicial professionalization is also deployed as a means of judicial network-building, self-governance and mobilization. This is very important for strengthening the judicial power in the EU, not only because the successful functioning of the CJEU depends on the cooperation of the national courts, but also because strengthening the judicial power is important for the supranational legal regime to go beyond the controls of individual member states, and thereby asserting a larger political role in the EU. Also, in terms of the supranational constitutional setting, the establishment and functioning of a multi-level constitutionalism in the EU depends on the interconnection between the national and supranational legal systems. Judicial professionalization provides an important *fori* for the creation of a system of both inter-judicial dialogues and institutional bonds, while attributing to the enlargement of the courts' political influence.[286]

Besides the official dialogues, various judicial professionalization programs are carried out in the EU today through the operation and functioning of inter-judicial professional associations, deploying various training, study and exchange programs, as well as by promoting structural reforms within the domestic settings of the member states. With respect to the European integration, judicial mobilization, network-building and self-governance lead to the kind of judicial power at the supranational level that is sufficiently powerful and capable of making effective legal decisions in

[286] For judicial dialogue, see, e.g., M. Amos, The Dialogue Between United Kingdom Courts and the European Court of Human Rights, ICLQ (2012), 557-584.

favor of European integration even when this is against the short-term interests of certain member states; they also foster a kind of functional legitimacy for the CJEU through promoting the so-called "EU values" and rule of law ideologies among the judicial communities in the EU.

The EJTN (European Judicial Training Network), for example, is one of the four major judicial networks in the EU today.[287] It has lauded various judicial exchange and training programmes for judicial authorities in all EU member states, aiming at fostering "new perspectives in areas of common interest, thus instilling amongst participants the feeling of belonging to a common judicial culture … and helping in the building of the identity of a European judge amongst the future judiciary".[288] And its stated objectives include "offering 1200 exchanges in courts per year as well as to enable half of the legal practitioners in the European Union to participate in European judicial training activities by 2020".[289]

Overall, the EJTN is financially sponsored by the European Commission and has both official support of many supranational institutions, such as the CJEU and the Council of Europe, as well as governmental supports from a variety of member states, who "provide the relevant expertise and active participation necessary to develop its offer of training activities". Judges and prosecutors as well as legal expert practitioners from both the EU and the member states are welcomed to participate in cross-border training, study visits and communication programs hosted by the ECJTN. It has Its main aim is to foster common values and promote solidarity and dialogues between supranational and national judicial actors.

The European Network of Councils for the Judiciary (ENCJ), another important network actively promoting inter-judicial cooperation in Europe, operates in a slightly different way. Its main focus is to promote the improvement of social and structural conditions for judicial cooperation as well as judicial independence in the EU. It does so primarily by conducting research and analysis and providing information as well as advices with regard to "the structures and competences of members", or "in relation to how the judiciary is organized and how it functions", and it also provides "expertise, experience and proposals" to EU institutions and other national and international organizations.[290]

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[287] The other three include the ENCJ, ???.

[288] See, Introduction of the EJTN Annual Report 2016, Published on April 21, 2017.

[289] I.d.

[290] See, the report of the ENCJ, July 2014.

The lack of any form of regular scrutiny of the rule of law and judicial independence post-accession has been a main focus of the European judicial networks as well as the Venice Commission, an advisory body for the Council of Europe.[291] After the EU enlargement, they have increasingly become a watchdog of the rule of law and judicial independence in the EU, while developing a variety of judicial professionalization initiatives to monitor and scrutinize the justice reforms carried out in the member states.[292] For instance, the ENCJ conducts investigations and evaluations on the performance of judicial professionalization and independence in European states,[293] and it produces various reports on the standards and principles of judicial professionalism and autonomy in order to guide national judicial reforms.[294] The Venice Commission also provides opinions on various issues relating to the development of judicial independence and professionalization in many European states, such as judicial appointments,[295] the independence of judges[296], as well as

[291] The Venice Commission was established in 1990 and was officially known as the European Commission for democracy through Law. Its main task is to provide guidance and advice to the Council of Europe with regard to the constitutional circumstances of its member states. It also conducts analysis and scrutiny over the national circumstances of the member states and issues opinions thereof. See, Steven Greer, The European Convention on Human Rights Achievements, Problems and Prospects 286-289 (2006).

[292] See, e.g., GRECO, Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention In Respect of Members of Parliament, Judges and Prosecutors for Spain, 15 Jan 2014, available at: http://www.coe.int/en/web/greco/evaluations/round-4.

[293] It produces the famous "EU Justice Scoreboard" on an annual base, which aims to ensure that "any justice reform must uphold the rule of law and comply with European standards on judicial independence". See, e.g., 2017 EU Justice Scoreboard, available at: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice_en.

[294] See, e.g., ENCJ, 2013-2014 Report on "Independence and Accountability of the Judiciary", available at: http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/encj_report_independence_accountability_adopted_version_sept_2014.pdf; ENCJ, Distillation of ENCJ Principles, Recommendations and Guidelines (2004-2016), available at: http://www.ejtn.eu/Documents/encj_distillation_report_2004_2016.pdf; ENCJ, Resolution of Budapest on Self-Governance for the Judiciary: Balancing Independence and Accountability (May 2008), available at: https://www.encj.eu/index.php?option=com_content&view=article&id=70:resolutionbudapest&catid=19:concils-for-the-judiciary&Itemid=239, etc.

[295] See, Venice Commission, Report on Judicial Appointments (2007), CDL_AD(2007)028-e, which was adopted at the 70th plenary session of the commission on 16-17March 2007, and is available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e; Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, CDL-PI(2015)001, 5 March 2015, http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)001-e.

constitutional reforms of a European state[297].

Similar efforts are abundant in Europe, e.g., the Judicial Group on Strengthening Judicial Integrity, which is an independent, voluntary NGO composed of heads of the judiciary and senior judges from various countries, adopted the so-called "Bangalore Principles of Judicial Conduct"[298]; the *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998) was adopted by the European Association of Judges[299]; The OSCE/ODIHR, a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law, has issued a variety of recommendations on practices of judicial professionalization ([300]e.g., judicial remuneration) as well as guidelines to guide judicial reforms in many European states[301]; the Consultative Council of European Judges (CCJE) also offers

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[296] See, Venice Commission, Report on the Independence of the Judicial System (2010), CDL-AD(2010)004, which was adopted at the 82th plenary session of the commission on 12-13 March 2010, and is available at: http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx.

[297] See, Venice Commission, 2014 Opinion on the Seven Amendments to the Constitution of the Former Yugoslav Republic of Macedonia; Venice Commission, Opinion on the Constitution of Serbia, 18 March 2007, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e; Venice Commission, Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary of Ukraine, CDL-PI(2015)016-e, 24 July 2015, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e; Venice Commission, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, 16-17 March 2012, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e; Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania, CDL-AD(2016)009, 14 March 2016, available at; http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)009-e.

[298] It was revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, available at: http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

[299] It was published by the Council of Europe [DAJ/DC(98)23] and is available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true.

[300] See, e.g., OSCE/ODIHR, Opinion on the Draft Act on an Independent National Human Rights Institution of Iceland, 6 February 2017, para. 76 refers for instance to the possibility to prescribe in relevant legislation that the budget proposal should in principle be included in the national budget without changes; in addition, legal provisions against unwarranted budgetary cutbacks could be introduced, including but not limited to the principle that compared to the previous year, any reductions in the budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government. This is available at: http://www.legislationline.org/download/action/download/id/6947/file/301_NHRI_ISL_6Feb2017_en.pdf.

[301] See, e.g., The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), available at: http://www.osce.org/odihr/kyivrec; OSCE/ODIHR, Opinion on the Law concerning the Judicial System, the Supreme Council of the

advices and recommendations with respect to a wide range of issues on the possible role and political structure of the judicial power in Europe.[302]

In effect, the activities of these judicial networks and groups of international law experts are of particular importance for changing the overall structural configuration and political influence of judicial power, creating consensus and common understanding of the community law, as well as fostering an amicable inter-judicial relationship in the EU. They try to achieve these goals by constructing a uniform discourse of professional standards and principles as well as through promoting institutional and structural reforms to improve the power and autonomy of national courts. First of all, a coherent and uniform set of professional ethics, norms and standards (e.g., judicial behavior and the specific forms of court administration) for European judiciaries are gradually established in the languages of these groups.[303] And they generally are in conformity with the development of prevailing international standards and practices.[304]

Judiciary, and the Status of Judges in Tunisia, 21 December 2012, available at: http://www.legislationline.org/documents/id/17846; OSCE/ODIHR-Venice Commission, Joint Opinion on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan, 17-18 June 2011, http://www.legislationline.org/documents/id/16560; OSCE/ODIHR-OSCE Mission to Serbia, Report on Monitoring of Peer Elections for the High Judicial Council and State Prosecutors' Council of the Republic of Serbia, 23 May 2016, available at: http://www.osce.org/odihr/242346; OSCE/ODIHR, Opinion on the Draft Law of Ukraine "On Public Consultations", 1 September 2016, available at: http://www.legislationline.org/documents/id/20027.

[302] See, e.g., CCJE, Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society, 23 November 2007, available at: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=F EF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true; CCJE, Magna Carta of Judges, 17 November 2010, available at: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=F DC864&direct=true; CCJE, Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, 23 November 2001, available at: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInte rnet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=tru;

[303] It is admitted that such development is also part of a global trend, in which judicial actors worldwide come to adopt a set of international standards, norms and practices as well as to make common political commitments. See, e.g., Andreas Follesdal and Geir Ulfstein, THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING? (2018); Ran Hirschl, The Judicialization of Politics, The Oxford Handbook of Law and Politics, Caldeira, Kelemen and Whittington, eds. (2008), etc.

[304] I.d.

For example, the technical, neutral identity of judges is commonly accepted, as stipulated by USIP, "a central goal of most legal systems, and system of appointment are seen as a crucial mechanism to achieve this goal. Judges are dependent in some way on the person who appoints them may not be relied upon to deliver neutral, high-quality decisions, and so undermine the legitimacy of the legal system as a whole".[305] the Preamble of the Bangalore Principles of Judicial Conduct (2002) similarly says, "Judicial Independence is a pre-requisite to the rule of law and a fundamental trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects".[306]

It then functions as an unselfconscious and pragmatic discourse pursued by judicial actors throughout Europe, especially when they are confronted with the rise of hostile political upheavals such as the coming to power of right-win political parties and the popular anti-EU nationalism and populism. Upholding these doctrines and principles enables judicial self-empowerment and self-governance; the assertion for independence from the legislative and executive powers leads to a variety of mechanisms to ensure judicial independence within different domestic settings, i.e., varying organizational structures and degrees of autonomy from other state powers in different European states. It thus helps strengthen the structural and power position as well as political influence and roles of the supranational and national courts in Europe. One clear manifestation of this effect is how judicial independence are used by national and supranational courts for defending the personal interests and institutional autonomy of judges.[307]

As pointed out by the CCJE's Opinion No.18, "Courts rule on issues of great economic and political importance. International institutions, especially the Council of Europe and the European Court of Human Rights (ECtHR), the European Union and the Court of Justice of the European Union (CJEU) have all had a considerable influence in member states, particularly in strengthening the independence of the judiciary and in its role in the protection of human rights. Moreover, the application of European and international rules and standards and the implementation of decisions of the ECtHR and the CJEU have provided new challenges for the judiciaries in the member states and sometimes their application by courts has been challenged by

[305] See, USIP, Judicial Appointments and Judicial Independence, Jan. 2009, available at: http://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf.

[306] See, the Bangalore Principles of Judicial Conducts (2002), available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

[307] See, Attila Vincze (2014), supra 92.

politicians or commentators".[308]

Viewed from the structural aspect, the activities and role of these intricate judicial networks and associations in the promotion of mutual agreements among European judicial actors have fueled the impetus for a series of structural and institutional reforms on national courts, aiming at improving the personal and institutional autonomy of national judiciaries. One particular example in this respect is the emergence of the so-called "Euro-model" of court administration, which has a clear bias toward the self-governing of the judiciary, *inter alia*, the establishment of "self-governing bodies", i.e., "assemblies of judges from different levels in addition to a central independent body".[309]

One may tend to think that there is no single best model of judicial self-governance, but it is now generally agreed that a judicial council should be set up at various levels, both national and supranational, as an entirely independent expert body to administer issues relating to the operation and functioning of the courts, i.e., it "should be endowed with broad competences for all questions concerning the status of judges, their appointment, promotion, capacity development and discipline as well as the organization, as well as the organization, the functioning and the image of judicial institutions, and should enjoy a leading role in that respect, in cooperation with other bodies as applicable".[310]

ENCJ (2008) provides the similar idea for European courts, "self-governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the efficient administration of justice", and "all or part of the following tasks should fall under the authority of a Council for the judiciary or of one or more independent and autonomous bodies: the appointment and the promotion of judges, the training, the discipline and judicial ethics, the administration of the courts, the finances of the judiciary, the performance management of the judiciary, the processing on of complaints from litigants, the protection of the image of justice…, setting up a system for evaluating the judicial system, drafting or proposing legislation concerning the judiciary and/or courts".[311]

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[308] See, CCJE, Opinion No. 18 (2015), The Position of the Judiciary and Its Relation With the Other Powers of State in a Modern Democracy, para 1, available at: https://rm.coe.int/16807481a1.

[309] See, OSCE/ODIHR, Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland (2017), para 25.

[310] I.d.

[311] See, ENCJ, Resolution of Budapest on Self-Governance for the Judiciary: Balancing Independence and Accountability (2008), pp.2, para 1) and 2), available at: http://www.encj.eu/node/271.

Professional competence and autonomy is a key feature for a judicial council, as stressed by the OSCE (2017), "It is the competences of a given body that are crucial when determining whether or not it may qualify as a 'judicial self-governing body' that should operate independently from the executive and the legislative branches, rather than its legal classification or definition under national legislation", and "the underlying key principle is that, in light of their role as safeguards of judicial independence and the management of the judiciary, judicial councils and/or other similar bodies should themselves be independent and impartial".[312]

Generally, there is a set of specific criteria that are deemed important for such a self-governing body in Europe, which include, 1) the legal basis for the existence and operation of the judicial council;[313] 2) it must be significantly composed by judicial representatives, such as former and senior national judges and court heads, selected by the judicial community;[314] 3) it must be organizationally and practically independent from conventional political powers, such as the legislative and executive authorities; 4) it makes decisions, or recommendations, with respect to courts (e.g., appointments, promotion and removal, remuneration, and disciplining of judges) based solely on professional criteria, and its decisions or opinions must have de jure, or de facto, binding forces.[315]

As a result of the consensus-building and advocacy of the European judicial networks, over the years, a Europe-model of judicial council is widely adopted in many European states as a procedural and institutional improvement of their judicial appointment processes. Since 2004, the enlargement of the EU also leads to the adoption of this model of judicial appointments in various central and Eastern states, including Poland, Czech, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania, Romania, and Bulgaria, as a pre-condition of their accessions.[316] The Venice Commission, for instance, has exerted great pressures on these states to adopt the Europe-model of judicial council in their judicial reforms, and it justifies its action by pointing out the immaturity of the judicial appointment mechanism of these countries:

"In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal

[312] Supra 119.

[313] See, CCJE, Opinion No. 10, the Judiciary at the Service of Society (2007), para 11.

[314] I.d., para 18.

[315] See, e.g., ENCJ, Budapest Resolution (2008), para 4; CCJE, Opinion No. 10, the Judiciary at the Service of Society (2007), paras. 42, 48, 49 and 60, etc.

[316] See, Bobek and Kosar (2013).

culture and traditions, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges".[317] Similar assertions are made by the OSCE/ODIHR, "while the OSCE/ODIHR recognizes the right of every state to reform its judicial system, any judicial reform process should preserve the independence of the judiciary and the key role of a judicial council in this context. In this regard, the proposed amendments raise serious concerns in this context".[318]

Besides inter-judicial network-building and self-governance, the eventual effect of these initiatives and networks is the creation of a "European judiciary", as an independent, self-organized, and substantially mobilized political force, playing a significant role in European politics.[319] This is hardly surprising, if one takes a close look at the emphasis put on the role that the judiciaries are expected to play in a given society in Europe by these initiatives. In this sense, judges might either be rational profits-maximizers (Posner 1993), who tend to "maximize money, leisure time, popularity, and prestige",[320] or act in a power-hungry manner, who "either ignored or assumed their political impact" (Burley and Mattli, 1993: ?) under the auspice of the rule of law.

Such self-asserted importance is vividly reflected in the declarations of European judicial elites, e.g., "the role of the judiciary has evolved. The number of cases brought to the courts and the number of legislative acts the courts must apply have increased dramatically. The growth of executive power in particular has led to more challenges to its actions in court and this in turn has led some to question the scope of the role of the judiciary as a check on the executive. There has been an increasing number of challenges in the courts to legislative powers and actions. as a result, the judiciary has increasingly had to examine and has sometimes even restrained the actions of the other two powers. Today, for parties in litigation, and for society as a whole, the court process provides a kind of alternative democratic arena, where arguments between sections of the public and the powers of the state are exchanged, and questions of general concern are debated".[321]

As such, as already noticed by many scholars, the courts and judges in Europe are

[317] See, Venice Commission, Judicial Appointments, CDL-JD(2007)001, March 14 2007, paras 4 and 5.
[318] OSCE/ODIHR, para 13.
[319] See, David Kosar, Perils of Judicial Self-Government in Transitional Societies (2016).
[320] See, Kosar (2016), at pp. 74.
[321] See, CCJE, Opinion No. 18, para 1.

increasingly gained political influence and voices and are absolutely no longer "the least dangerous branch" understood in classic Western political philosophy. As Kosar (2016: 1) points out, "The power of courts has increased worldwide at an unprecedented pace in the last few decades. Judges often clash with the executive and interfere with the agendas of parliaments. As a result, virtually all developed legal cultures now accept that judges are not like umpires whose job is just 'to call balls and strikes'". In terms of legal culture, the coming to power of judges in the Europe might seem quite surprising and counterintuitive, and it creates enormous possibilities for speculating how much more they could alter the traditional configuration of governmental powers; yet, it also produces a cautionary tale, with many normative defects, such as the lack of democratic accountabilities, and judicial self-governance might only turn out to be a different form of political peril (Bobek and Kosar 2016; Kosar 2013, 2017; Lasser 2018).

4. 255 TFEU Panel as an Effort for Judicial Professionalization

The EU's courts-driven, rules-based approach to integration is, therefore, highly unique in the sense that it relies heavily on a mobilized judicial force as the core decision-making power within the ambit of the rule of law. Judicial professionalization, therefore, is part of the EU's efforts on market- and furthermore, political- integration. The conclusion to be drawn from reviewing this distinct approach is that the EU's reliance on an independent, yet politically empowered, supranational judiciary supported by inter-judicial consensus, cooperation, and mobilization in Europe creates the possibility of a special form of 255 TFEU panel, which in its basic morphology exhibits the kind of organizational, professional and political features outlined before.

Firstly, the kind of independence and political isolation from the member state governments embedded in the organizational structures and composition of the 255 TFEU panel reflects the high demands for judicial independence at the EU level. As explained before, judicial independence plays a vital role in the effectiveness and functioning of the CJEU, and it thus contributes to how the 255 TFEU panel is composed and operationalized. The 255 TFEU panel is set up at the EU level, completely away from the political maneuvers of the member state governments, and thereby altering the pre-Lisbon situation where judicial appointments to the CJEU were completely subject to national governments' arbitrary discretions. Also, it is composed of seven members, all of who are former and senior supranational/national judges and legal experts; while six are nominated by the CJEU, only one of them is appointed by the European Parliament.

As many scholars acknowledged,[322] the establishment of this advisory panel on the suitability of judicial candidates to the CJEU is "positive development" in this respect,[323] since it avoids "past experience with member states appointing candidates with not only knowledge of EU law, and/or very little capacity to work in an international environment, but even without any decent knowledge of French and English" without usurping states' prerogatives in national nominations.[324] Past nominations are said to be mixed with political arbitrariness, e.g., Advocate General Jacob once remarked extra-judicially that 'from time to time the appointment of a particular judge or advocate general has not been renewed, for apparently arbitrary reasons'. A similar view was expressed more recently by a senior official of the Court, who acknowledged that 'in several cases members were not reappointed because of party politics',[325] severely undermining the effectiveness and legitimacy of the CJEU.

It explains why the 255 TFEU panel also put a strong emphasis on the manner, with which the national candidates to the CJEU are nominated. In 2010, for example, a Greek candidate nominated to the General Court by the Cabinet of the Prime Minister was given an unfavorable opinion by the 255 TFEU panel, because he was not one of the three candidates on the shortlist initially made by the Ministers of Justice and Foreign Affairs.[326] Same thing happened to a Swedish candidate to the General Court, who was selected not from the shortlist provided by the Swedish government, and was subsequently given an unfavorable opinion by the 255 TFEU panel.[327]

Second, the strictly merits-based and extensive, professional assessments over the suitability of national candidates performed by the 255 TFEU panel as well as the type of judicial self-governance embodied by its functioning and composition reflect the

[322] Exceptions exist, for example, some people think it would offer greater guarantee of judicial independence and competence, while respecting the member states' legitimate interests, if the panel was given the power to appoint members from a list of candidates put forward by the member states. See, Anthony Arnull, THE EUROPEAN UNION AND ITS COURT OF JUSTICE, Oxford EC Law Library, (2006), at p. 29.

[323] See, Alberto Alemanno, How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection, in M. Bobek, SELECTING EUROPE'S JUDGES, Oxford University Press (2014).

[324] Michal Bobek, Of Feasibility and Silent Elephants, in Judging Europe's Judges: The Legitimacy of the Case Law of European Court of Justice, (eds.) Maurice Adams, Henri de Waele, Johan Meeusen, Gert Straetmans, Bloomsbury Publishing (2013), at. pp. 233.

[325] See, Martin Trybus, Lucs Rubini, THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY (2012), pp 36-38.

[326] I.d.

[327] Tomas Dembrovsky, Biyana Petkova and Marijn van der Sluis, Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States, Common Market Law Review, vol 51, issue 2 (2015), at pp. 8, footnote 29.

impacts of the consensus-building and standards-setting activities of the European judicial communities on judicial transition (Bobek and Kosar 2013). More specifically, the judicial communities in Europe have generally come to agreements as to the manner with which courts should be organized and administrated so as to protect the independence, effectiveness and legitimacy of the judicial power, especially with respect to judicial appointments (Bobek and Kosar 2013).

These efforts have led to the emergence of the so-called "European model of judicial councils". For example, opinion No.1 (2001) of the CCEJ says, "every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria"; The European Charter on the Statute for Judges adopted in July 1998 (DAJ/DOC(98)23) states, "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary".

Regarding the specific institutional and procedural arrangements of the 255 TFEU panel, they generally echo the agreements made relating to the "European model of judicial councils". Before the 255 TFEU panel was established, there have already been a template about how such independent, self-governing bodies shall be organized and operationalized. Important features about the membership, basis of evaluations and appointments, powers and procedures of such bodies are reflected in the recommendations provided by the CCEJ Opinion no 1- (2007), ENCJ Budapest Resolution (2008), etc., in which it's generally provided that "the authorities responsible in member states for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency", [328] "the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges".[329]

The ENCJ also lays down specific recommendations in its Budapest Resolution (2008), which requires that the task of appointment and promotion of judges shall "fall

[328] See, CCJE Opinion No.1 (2008), available at: https://rm.coe.int/1680747830.
[329] I.d.

under the authority of a Council for the Judiciary or of one or more independent and autonomous bodies", "the independence of the judiciary should be guaranteed in the Constitution", "the Council can be composed either exclusively of members of the judiciary or members and non-members of the judiciary; when the composition is mixed, the Council should be composed of a majority of members of the judiciaries, but not less than 50 %", and "the Council for the Judiciary must manage its budget independently of the executive power".[330] As it concludes, "judicial self-governance calls for the professionalization of judicial administration".[331]

At the time when the Discussion Circle came up with its opinion of setting up an "advisory panel" in the EU, there has already existed a trend toward establishing such bodies in Europe. As reflected in its opinions, the creation of the 255 TFEU panel follows this trend in terms of the considerations behind its operation and its organizational arrangements, "The circle also felt it was appropriate to set up an 'advisory panel', which would have the task of giving the Member States an opinion on whether a candidate's profile was suited to the performance of his/her duties, particularly on the basis of objective criteria relating to professional qualifications. The panel- whose deliberations would not be public and which would not hold any hearings – might be made up of former members of the Court and representatives of national supreme courts, while the European Parliament might also appoint a legal expert".[332]

Moreover, once established, the 255 TFEU panel has exerted far-reaching influence on national selection procedures, not only in terms of scrutinizing the suitability of national candidates, but also in the sense that its assessments have led to a series of national judicial reforms, adopting such a European model of judicial councils in the national selection process of judges for the CJEU.[333] For example, in Finland in 2010, an amendment of the Act on Judicial Appointments introduced an obligation to publicly advertise vacancies for the CJEU and other international courts, and created an advisory board, composed of ministerial and legal representatives. the three current Finish members of the ECJ and the General Court were appointed in this

[330] See, ENCJ, Budapest Resolution (2008), available at: https://www.encj.eu/images/stories/pdf/opinions/budapestresolution.pdf.

[331] I.d.

[332] See, Final Report of the Discussion Circle on the Court of Justice, Brussels, 25 March 2003 (26.03), CONV 636/03, para. 5.

[333] See, generally, Tomas Dembrovsky, Biyana Petkova and Marijn van der Sluis, Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States, Common Market Law Review, vol 51, issue 2 (2015).

way.[334] Similarly, in Croatia, a government decision was adopted in 2012 establishing a selection commission responsible for suggesting to the government both first time and re-nominees. The commission is presided by the minister of justice with other members from the Croatian Parliament, Ministry of Foreign and European Affairs, Croatian Supreme Court, and the main law faculties of the country, and the commission will hold a widely advertised public competition, assess and interview the applicants.[335]

5. Conclusions and Reflections:

The potential stretch of this judicially-driven approach to market integration, as manifested in the operation and functioning of the 255 TFEU panel, is inherently limited, and at times, bears some of the most problematic results (e.g., political accountability, transparency, and the perils of judicial self-governance). The EU regime has long been known for its lack of "democratic roots" (Habermas 2015: 11). Such limitations and defects are magnified and enlarged in times of rising nationalism and populism, as evidenced by the constitutional crisis and the recent Brexit in the EU.[336] People are mobilized to challenge the technocratic orientation of the EU's rules-based regime, while negating the legitimacy derived from the technical competence and expertise of CJEU judges by labeling the latter as "unelected and unaccountable eurocrats".[337] Habermas' once famous assumption that the EU is largely made up of elite consensus and complacent/indifferent masses has been proved to be half wrong. It seems that the technical-neutral assumption underlying the self-asserted legitimacy of the European judicial elites has to be modified in order to take into considerations claims like the "technocratic bias", and the "the monopoly of professional politicians, economic elites, and scholars with relevant interests", etc.[338] In this regard, Anne-Marie Burley is right to have observed (2015:81), "Once only a catch-phrase for journalists, concern about the lack of accountability on the part of Community decision-making bodies has grown steadily with their continuing accretion of power. … those citizens wonder why the Community should not be subject to the same popular restraints imposed on their local, regional, and national governments.

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[334] *Supra* 325.

[335] *I.d.*

[336] See, e.g., See, Christopher Bickerton, Carlo Invernizzi Accetti, Populism and Technocracy: Opposites or Complements? (2015)

[337] See, e.g., Letter: UK Democracy Appears to Mean Unelected EU Judges, SHROPSHIRE STAR NEWS, Mar 16, 2011, available at: https://www.shropshirestar.com/news/2011/03/16/letter-democracy-appears-to-mean-unelected-eu-judges/;

[338] Supra 146, Bickerton (2015), at pp.4.

Part IV. Market Integration and Judicial Professionalization in China: The Case of the PJSCs

Political science and legal scholars tend to assume that judicial professionalization is a key strategy for enhancing judicial legitimacy and autonomy and thereby for generating willful mass compliance with the court's decisions (Easton 1958; Tyler 1990; Dahl 1957; Cann and Yates 2008; Gibson 1995, etc.). The evidence supporting such assumptions are overwhelmingly drawn from the experience of democratic states, such as the US and Europe, where the vigorous expansion of the judicial power is increasingly inevitable (Tate and Vallinder 1995; Hirschl, 2000; Vallinderj 1994; Huntj 2013; Stone Sweet 2000; Shapiro 1989). However, attentions are rarely paid to the development of professionalization in the judicial systems of authoritarian regimes, except for a few such studies (Moustafa 2007; Ginsburg 2008).

The experience of China is particularly worth of exploring. Although China is usually criticized for its lack of genuine judicial independence (Xu 1997; Ginsburg 2010; Peerenboom 2008, 2009), it has developed its own path to judicial professionalization during its post- reform and opening-up period as a way of modernizing its judiciary. Against this backdrop, judicial professionalization has become the central theme of the recent rounds of judicial reforms in China since late twentieth century, and it's characteristic of many new measures adopted in the current judicial reform, ushered by the adoption of the fifth five-year plan of the supreme people's court.

Despite the fact that courts in China largely remain the pawns of the party-state, upholding the interest and policies of the ruling party (Ginsburg 2008; He 2011), a main focus of the top-down reforms on the court system in China during the past decades is to reinforce the professional aspects of its judicial system. The 11th Central Committee of the CPC marks the beginning the new period of socialist legal construction, in which the rule of law starts to be inserted into the ruling strategy of the Chinese government, and since then one of the central theme of China's successive judicial reforms has been to modernize the judiciary.[339] Judicial professionalization, thus, is an indispensable part of judicial reforms in China, along with a series of rule of law reforms carried out to modernize the Chinese legal system (He 2005; Yu 2002; Fu and Cullen 2011; Liebman 2007; Zang 2010).

[339] Deng Xiaoping introduced the pragmatic approach to "socialist construction on the basis of four modernization". See, Alice Erh-Soon Tay and Eugene Kamenka, Elevating Law in the People's Republic of China, Bulletin of the Australian Society of Legal Philosophy 9(1) (1985), pp 82, 69-98.

Questions then become for a country that doesn't espouse formal judicial independence, why does it need judicial professionalization? This chapter argues that by way of judicial professionalization, China seeks to satisfy several conditions for market integration, i.e., enhancing market efficiency and eliminating regional economic barriers and local protectionism by protecting the administrative unity as well as rule of law, and enabling the free flow of goods, services and labor across different regions through maintaining certain measures for central control. To do so, the discourse of rule of law plays an important role. Law functions to rationalize the behavior of market and government actors, while enshrine the policies of market liberalization and political centralization by punishing those who do otherwise. That's why China needs to rationalize and improve the existence and functioning of its courts.

As such, judicial reforms centered on professionalization are aimed at reinforcing the concept that courts are not only competent, fair and independent arbitrator, but also platforms for specialized jobs, professional career tracks, and de-politicized working contexts.[340] Among various reform programs, China has recently adopted the so-called "judicial council" model in the process of appointing judges to local people's courts (i.e., basic and intermediate people's courts at the sub-provincial levels). According to the newest five-year plan of the Supreme People's Court, which reiterated key reform issues mentioned by the Deepening Reform Group Report following the 18th National Congress of the CPC, and the second and third plenary meetings of the 18th CPC Central Committee, China establishes the "judicial selection committees" at the provincial level ("PJSCs") to oversee the professional suitability of judicial candidates selected to work in the local people's courts.[341]

For the purpose of comparison, this chapter analyzes the existence and functioning of the newly established PJSCs in China, as a latest judicial professionalization initiative that copied, or at least incorporated, the experience of Western legal systems with the hope of emulating their success in terms of enhancing the legitimacy and effectiveness of the courts- as the Supreme People's Court ("SPC") points out in its working report (2014), "Under unified leadership of the Party Central Committee, the courts will press ahead with all reforms focusing on speeding up construction of a fair, efficient and authoritative socialist judicial system. The SPC will establish and implement the Fourth Five-Year Reform Plan of the People's Courts (2014-2018), to serve the modernization drive of the national governance system and

[340] See, Supreme People's Court, the fifth five-year reform plan (2014).

[341] I.d.

governance capacity".[342]

It is argued that a comparison between the PJSCs and the 255 TFEU panel produces important insights about the nature and development of judicial professionalization, a discourse that is guiding legal reforms in both China and EU today. Among the most powerful regimes in the world today, China and the European Union are the two, whose judicial systems are still experiencing important structural changes. Facing pressures from both the inside and outside, China and the EU simultaneously strive to articulate a good image of themselves as regimes that facilitate fair transactions backed up by impartial and trustworthy courts. And quite interestingly, although China and the European Union have developed quite different paths to enhance the legitimacy of their efforts on improving the competence of the judiciary, both jurisdictions chose to adopt similar type of judicial council in their judicial appointment processes while espousing the idea of judicial professionalization in their latest judicial reforms.

Specifically, the comparison between the operation and functioning of the 255 TFEU panel in the EU and the PJSCs in China represents similar programs of judicial professionalization while revealing interesting points of divergences and mismatches. A juxtaposition between the two expert bodies, thus, calls for reflections upon the relationship between market integration and judicial professionalization in the context of a fragmented, multilevel political structure, as well as how it affects the operationalization and institutional arrangements of judicial appointments in different ways due to differences in their organizational, professional and political aspects. Such differences reveal that China relies on another paradigm to market integration, which is marked by the centrality of the party-state in decision making as well as top-down reforms. The distinctive approach of China to market integration leads to different political and institutional conditions, in which the PJSCs are embedded, e.g., the marginalized roles of courts in Chinaeconomic liberalization and political centralization, the power and states of judges, and the different political implications of the rhetoric of rule of law and judicial independence.

I describe the Chinese approach to market integration as "state-centered", and "centrally-planned". It stresses the CPC's fundamental role in shaping the legal reform agenda as well as the top-down nature of the policy-making process, which means a certain degree of central control is always at issue. China is a unitary one-party state, with a highly centralized decision-making system responsible for most of political and

[342] See, Report on the Work of the Supreme People's Court (2014), available at: http://english.court.gov.cn/2015-07/15/content_21289242_8.htm.

structural issues, including delineating the role and powers of courts and judges in relation to other governmental bodies and actors. As Professor Zhu Suli (2007: 535) describes, the party-state, or more accurately called, a "party construction of the state", "party rule of the state", and "party above the state", is indeed "ubiquitous" at every level and "penetrates every aspect of society" in China. In a word, there is no such thing as out of control of the party-state, no matter it's about society or the state machinery, only at which levels. This fact alone suggests that China's approach to market integration is inevitably also "state-centered", and centrally-planned.

Due to such an approach, specific programs may be operationalized quite differently in the Chinese context, marked by the so-called "Chinese characteristics". That's why the PJSCs, initiated under similar banner of judicial professionalization that initially looks almost identical to the European model of judicial council, has turned out to be so different than the 255 TFEU panel. As I explain in this chapter, the PJSCs have not emulated many of the organizational, professional, and political traits and roles of their counterparts in the EU. To the contrary, there are subtle but significant differences in how the PJSCs are composed and interact with different levels of political authorities as well as what criteria they use in determining the professional "merits" of judicial candidates.

China's state-centered, centrally-planned approach explains how the PJSCs are operationalized in China's political and institutional settings. As mentioned before, judicial professionalization enhances market integration through improving the effectiveness and efficiency of the functioning of courts in protecting and enforcing property rights, de-localization of court administration, as well as tightened central control in China. Since judicial reforms usually reflect central policy agenda, and from a political economic perspective, professionalization programs are part of the central efforts for enhancing market integration, changes related to judicial administration tend to facilitate political control over local and judicial affairs.

Likewise, the professional scrutiny to be provided by the PJSCs must be tailored to the overall considerations of policy changes. As part of the efforts for de-localization, de-administrativation, and professionalization, the performance of the PJSCs must not be far reaching and provocative in terms of its assessment criteria, procedure and organization, etc.; rather, they are mostly passive policy-enforcers, and intermediaries situated between the central authorities and local administrative/judicial agencies implicated by state policies. The functioning of the PJSCs is, therefore, adhered to the policy intent, which emphasizes trial performance (e.g., numbers of completed cases and trial errors) and is highly efficiency-oriented; also, its assessments over judicial candidates help to surmount the rent-seeking behavior

traditionally embedded in judicial appointments to local people's courts and spurred the local judges to improve their working efficiency and manners in a competitive fashion by heightening central control.

The operation of the PJSCs in China thus provides new evidence to evaluate the effects of judicial professionalization in practice while arguing that creating a professional mechanism in the judicial appointment process is part of the efforts for market liberalization by way of improving efficiency and effectiveness of judicial activities, eschewing rent-seeking behavior in favor of economic growth (Pitman 2001; Zou 2001), eliminating local protectionism and enhancing centralized political control (Peerenboom 2002: 14; Keliher and Wu 2007), and consolidating the legitimacy and authority of the courts through the pursuit of uniformity with international standards[343] (Jiang 2010), etc. Such a link between market integration and judicial professionalization is evidenced by the Chinese case of the PJSCs, even though much of this perspective is unfamiliar. Also, as the two cases show, similar efforts on judicial professionalization may be different in nature and are supported by different political forces and their effects and outcomes are not always as consonant as theoretically assumed in a normative way.

The remainder of this chapter proceeds as follows. Part I briefly introduces the background of legal professionalization and judicial reforms aiming at professionalizing the judicial workforce in China and outlines the overall agenda of the current judicial reform in China. Part II describes China's approach to market integration, which is state-centered and centrally-planned, as well as its implications on the role, structural status as well as power of local courts. Part III outlines the nature of, and political agenda behind, judicial professionalization in China by taking into consideration the broader political, social and economic conditions. Specifically, judicial professionalization is used strategically to 1) demarcate and de-politicize the role of courts, 2) de-localize the power at the local levels while reviving central over local state agents, and 3) manage judges in an efficient-oriented manner, which equals to have a performance management system that exerts pressures on judges and force them to enhance their work efficiency and effectiveness.

Unlike courts in common law countries, Chinese courts are dependent state organs and usually play a relatively marginalized role in China's political landscape.

[343] For conflicts between pressures generated externally and internally, and how local courts manage to resolve them in practice, see, Sida Liu, Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court, 31 (1) Law & Social Inquiry, 75-106 (2006); Xin He, Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts, 31 (4) Law & Policy, 463-486 (2009).

Under Xi's leadership, courts are further marginalized in the political arena and more social functions rather than political functions are shifted to the courts, i.e., they are further identified as state agents who are tasked with solving local social disputes and remain largely "politically impotent" when compared to their Western counterparts.[344] Also, in China, courts are involved in the enduring balancing of central vis-à-vis local control over local affairs, and a series of recent judicial reforms are part of central authorities' efforts in monitoring local officials and judges, as well as in regaining influence over local party and governmental officials across a wide range of issues.

Moreover, due to heightened pressures exerted by the top-down reform regarding judges' appointments, rankings and promotions, neither the personal well-beings of judges, measured comprehensively according to leisure times, working pressures and salaries, nor their political influences and powers are enhanced through this round of judicial reform. This is evidenced by the fact that the most significant result of the reform is the growth of caseloads coupled with reduced judges, while other things remain relatively unchanged. Judicial professionalization, thus, amounts to a kind of performance management, forcing trials judges to enhance their trial performance and working efficiency.

In the context of the current judicial reform, the new judicial selection system aims to reduce the number of judges after evaluating their professional competence and skills. Such evaluations are made primarily on the basis of caseload and efficiency, and factors considered in assessments include case completion rates, rates of mistaken cases, as well as public opinions, etc., and thereby aggravating the long-standing problem of contradiction between the heavy caseloads and the shortage of professionally capable trial judges in local people's courts.[345] Judicial professionalization, therefore, amounts to a mechanism of performance management, turning judges into more productive, efficient, and obedient molecules. We argue that at play is a particular kind of legal culture in China, which tends to view governmental powers and authorities with discretion as "corruptive", while always stressing the concept of "accountability", or holding governmental officials "accountable".

Part IV illustrates how the relationship of market integration and judicial professionalization helps explain the particular organization and operation of the

[344] See, He Xin, Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China, The China Journal, no. 69 (Jan 2013), pp 20-42, at pp. 20.

[345] See, The President of Zhejiang's High Court Says Using Reform Measures to Solve The Heavy Caseload and Insufficient People Dilemma, SOUTHERN METROPOLIS, March 26, 2016, (saying that the ratio of judges should be decided based on courts' caseloads), available at http://www.oeeee.com/nis/201603/26/428785.html.

PJSCs by identifying the factors affecting the PJSCs' exercise of its professional scrutiny over judicial candidates to local people's courts. These factors include differences in national political and judicial structure, efforts by central authorities to enhance monitoring over local officials and to impel local judges to improve their professional skills and working efficiency, and complaints of individual judges about increased caseload, etc. Once these factors are uncovered, it's not hard to understand why the PJSCs is composed of both professional and governmental representatives, why it displays an inclination of adhering to reform policies in making professional assessments over judicial candidates, and why one of the most remarkable results of the judicial reform is that working efficiency of local courts has been clearly enhanced.

Part V briefly concludes that in the Chinese context, judicial professionalization has an entirely different nature because of China's "state-centered", "centrally planned" model of market integration, which tends to marginalize the role and functions of the judicial power, constantly adjusts the central-local relation by shifting responsibilities for court personnel administration, while monitoring local officials and judges by stressing the concept of "accountability". It then summarizes how these tendencies have influenced the practices and procedures of the PJSCs and their implications for understanding the complexity and political nature of judicial professionalization.

The analysis of this chapter could complement existing theories on judicial professionalization in the sense that first, there is more than one way for a professional body to influence the behavior of national/local authorities and officials. Whereas the functioning of the 255 TFEU panel emphasizes judicial self-governance as perhaps the most effective way of limiting national political arbitrariness and procedural informalities previously embedded in the appointment process for the CJEU,[346] our analysis presents a less progressive model. The PJSCs, although organizationally independent from other local authorities, can serve as a state agency and an intermediary, who applies state policies to local judicial affairs at the provincial level, i.e., eliminating local vested interests, albeit through professional and technical means; and labeled as a professional body, it's nevertheless a state agent, since its authorities to perform such professional tasks are granted by the central government. But accordingly, the political outcomes produced by the PJSCs are not as significant as its

[346] Some people think it would offer greater guarantee of judicial independence and competence, while respecting the member states' legitimate interests, if the panel was given the power to appoint members from a list of candidates put forward by the member states. See, Anthony Arnull, THE EUROPEAN UNION AND ITS COURT OF JUSTICE, Oxford EC Law Library, (2006), at p. 29.

EU counterpart generates.

Secondly, our investigation finds that judicial professionalization not always strengthens the power and political influence of the courts, contrary to conventional wisdoms, and neither does it necessarily enhances the self-interests of individual judges, if we assume that "judicial utility" points to factors like "income, leisure, and judicial voting"[347]- the Chinese case leads to a less hopeful conclusion. Drawing on the experience of the ongoing judicial reform in China, inter alia, the functioning and effects of the 255 TFEU panel, judicial professionalization leads to a performance-driven style of court administration, in which local judges are under greater workload and pressure, and caseloads keep increasing in local people's courts, since the court is now open to all kinds of complaints traditionally dealt with by governments at higher levels through the petition system. Yet, the political influence and autonomy of judges have not been enhanced, if not deprived further due to heightened central control.

1. The General Framework of Judicial Professionalization Reforms in China

This part provides a brief overview of the general framework of a series of judicial reforms currently carried out in China that aim at improving judicial professionalization, and in this way the establishment of the PJSCs can be viewed as a part of the overall project of judicial de-politicization, de-localization, central control over local cadres and officials, as well as performance management of judges. For the purpose of this study, we focus on changes that are related to the institutional and political arrangements of court administration at local levels.

The current judicial reform aims to change the previous system of court administration, which has been criticized for encouraging local protectionism and corruptions. Measures, including the system of judicial quotas, the new case filing-registration system, the establishment of the PJSCs, recording illegal intervention by officials and holding judges accountable to mistaken cases, etc., are introduced with a focus on judicial professionalization. With these measures, the central leadership mainly wants to do three things: First, to improve the professional ability, performance, and efficiency of local courts, i.e., reshuffling incumbent local judges in China following some merit-based selection methods, reducing the ratio of judges actually handling cases to other non-judicial personnel to a specified number, which

[347] See, Richard A. Posner, What Do Judges Maximize? (The Same Thing Everybody Else Does) (1993), at pp. 1, available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1616&context=law_and_economics.

should be less than 39% but can be adjusted to accommodate local variations, and increasing professional oversight over the professional skills and competence of judicial candidates and evaluating them in accordance to stricter standards. The overall strategy of judicial reform is to drive local judges to be more productive and efficient.

Second, to eliminate local protectionism and abuses of power by local party-state officials by transferring the power and responsibilities for court administrations from the local authorities to the provincial levels. The selection and administration of local judges will no longer be subject to local authorities' approval and influences, but will be conducted first by local courts themselves (e.g., evaluation of past trial performance, internal exams), and then scrutinized by the PJSCs ("lin xuan wei yuan hui"), which are set up at the provincial level and are composed mainly by legal professions, practitioners, court officials, and government officials. The PJSCs will evaluate the qualifications of proposed judges both by reviewing the materials about their past trial performance and by interviewing judges in person.

At the same time, in order to constrain the protectionist behavior of local party and government authorities, the Central Deepening Reform Group stipulated that any instructions and intervention in judicial decision-making by local authorities and officials must be recorded in case files, i.e., the so-called "Reporting and Holding Responsible Leading Cadres Interfering in Judicial Activities and Intervening in the Handling of Specific Cases", so that such kinds of political inference will be tamed in the future.

Thirdly, to enhance the credibility and authority of courts by holding local judges accountable for their judgements and strengthening central control over local judicial activities. In the Chinese culture, governmental officials must be subject to popular supervisions. Lack of institutional checks and balances, any form of governmental discretions is closely linked with corruption and abuses of power. The entrenched skepticism of government officials and public institutions has steadily aggrandized the concept of public "accountability", which emphasizes the need to always hold officials "accountable" to the citizens.

Since judges are traditionally viewed as civil servants in China, there have been huge mistrust against local judges for upholding political interests at the expense of social justice in the past, and such dissatisfactions have led to upgraded protest since 2003, as evidenced by the surge in the number of petitions brought to the state

petition bureau.[348] The new court administration system, therefore, emphasizes judicial accountability, for the purpose of controlling judicial behavior and enhancing popular support for the courts.[349] Under the new system, judges are subject to the "accountability system for mistaken cases", which holds judges responsible for each case that they decide, and will hold individual judges accountable for any mistaken cases that they handled.

A. Overview of the Current Reforms on Court Administration

Since 1979, China has launched a series of legal reforms, as the country's leaders resolutely committed themselves to establishing the market economy and opening the country to the world (Lubman, 1999). After the market economy was officially established, the country has realized the imminent need to improve the quality of its adjudication system and subsequently launched a process called "judicial professionalization". As a result, in 2002, the Unified State Judicial Examination was introduced, following the enactment of the Judges' Law. After a series of efforts and setbacks, the overall quality of Chinese judges has already been raised dramatically, in terms of the legal education and professional training that judges receive. Nevertheless, it seems that now the level of professional quality and expertise is still uneven among local judges, and meanwhile problems, such as localization (Liu, 2003; Alford, 2007; Peerenboom, 2002) and the administrativation of local courts (Xu, 1999; Gu, 2000), still exist, undermining the independence and professionalization of the judicial system.

In response to such situations, and after President Xi Jinping took office, China has set in motion another bout of judicial reform. China's Supreme People's Court released its newest five-year reform plan in July 2014, which reinforces the principles and measures announced by the Group for Judicial Reform Affairs under the Central Committee of Chinese Communist Party ("zhong yang si gai xiao zu"). The principles and measures contained in the reform plan were reiterated in the Fourth Plenum of the 18th CPC Central Committee. Whereas "the rule of law" was set up as a central theme of the 18th Fourth Plenum, the session has developed detailed plans of a series of court reforms, relating to case management, trial evaluation, judicial accountabilities, and judicial appointments and so on, aiming to promote the rule of law across the

[348] See, Margaret Y. K. Woo, Mary E. Gallagher (eds.), Chinese Justice: Civil Dispute Resolution in Contemporary China (2011), at pp. 44.

[349] See, Xu Xianming, Deepening Studies on Judicial Reforms and Improve Judicial Accountability System ("深化司法改革研究完善司法责任制度"), available at: http://www.spp.gov.cn/spp/zdgz/201803/t20180314_370711.shtml (last visited on June 16, 2018).

country more comprehensively.

For example, the Central Leading Group for Comprehensively Deepening Reforms ("zhong yang shen hua gai ge ling dao xiao zu") has issued the Opinion on Reform for People's Courts to Promote Case Filing Registration System in April 2015, promoting a reform of the courts' case acceptance system in order to make acceptance of cases less demanding; and subsequently, the Supreme People's Court has stipulated a change of the old case-filing-review system into a new case-filing-registration system in its fourth Five-Year Reform Outline (2014-2018) ("the five-year plan"). By reforming the case acceptance system, the five-year plan essentially removes the procedural obstacles for people to register their cases at the people's courts, and thereby making lawsuits easier and less costly. It is reported that the total caseload of the people's courts nationwide increased by 29%, one month after the new case-filing system had been put into effect.

With respect to court personnel, one remarkable change stipulated in the five-year plan is the new court personnel management system, or the so-called "System of Specified Number of Judges" ("yuan e zhi") (hereinafter "SSNJ"). According to the five-year plan, the number of judicial personnel for the four levels of courts should be determined scientifically "[i]n accordance with basic jurisdictional data, such as the economic and social development conditions, population numbers (including the temporary population), case numbers, and the type of cases", and the number of judicial personnel can be adjusted "according to changes in the number of cases and changes to the personnel structure".

In order to "uphold the hearing as the center and the judges as the center" ("yi shen pan wei zhong xin, yi fa guan wei zhong xin"), the new five-year plan also stipulates many other reform measures in order to improve the judicial appointment process as well as the overall court administration system, and these interconnected measures include, e.g., establishing an independent "professional sequence" for judges, which distinguishes the professional status of judges from that of other court officials, separating judges from non-judicial roles by determining "a numeric ratio" of judges and ancillary judicial personnel in courts, unifying and professionalizing the appointment criteria (e.g., trial experience and test results) and procedures for judges, establishing judicial selection committees at both the provincial and national levels, as well as improving the appraisal and training systems for judges.

More specifically, under this system, current judges in local courts will have to be reshuffled according to a new selection system. Upon selection, incumbent judges will be divided into two groups, i.e., "trial judges", who have the power to hear and

decide cases, but are simultaneously held responsible for the cases that they have handled, and "non-judges", who include both administrative staff and ancillary judicial personnel, such as judicial assistants and clerks. Such categorization of court personnel is based on the combined results of inter-court examinations, evaluation of judges' trial performance, as well as the provincial selection committee's assessments. Those who are retained will be full-time trial judges, be paid and promoted according to a separate professional sequence and will be accountable for the cases that they have decided for a lifetime. Whoever falls into the second group will no longer be treated as "judges" and will lose both the status and the compensations as a judge. In the future, the selection procedure for local judges will no longer be controlled by local governments, but will be conducted by local courts, provincial high courts and the judicial selection committees.

That said, it is against such backdrop that the provincial judicial selection committees ("PJSCs") are established as one component of the overall political arrangements to enhance judicial professionalization. According to the SPC's Fourth Five- Year Reform Plan (2014-2018) [FA (2015)No.3], there should be "differentiated criteria for appointments to courts at different levels", and "judicial selection commissions shall be set up at the national and provincial levels, respectively, and shall be composed of by judicial representatives and relevant social actors, in order to make a open, public, and fair judicial appointment procedure, ensure that people with great integrity, rich experience and high professional skills are selected to become judges, and achieve effective combination between the judicial appointments mechanism and the legal appointment system".[350]

Also, in December 2017, the thirty first meeting of the standing committee of the twelfth national people's congress reviewed and passed the draft amendment to the Judges' Law, which officially stipulates the establishment of the judicial selection committees.[351] Specifically, the draft act says, "the supreme people's court shall set up a judicial selection committee to scrutinize the professional competence of judicial candidates for the supreme people's court", whereas "judicial selection committees shall be set up at the level of provinces, autonomous regions, as well as municipalities directly under the central government and tasked with assessing the professional competence of judicial candidates for the first-term of office to the people's courts".

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[350] Supreme People's Court, Opinions on Comprehensively Deepening Reforms on People's Courts-the Fourth Five-Year Reform Plan of the People's Courts (2014-2018), [LAW(2015)No.3], para. 50, available at: https://www.chinacourt.org/law/detail/2015/02/id/148096.shtml.

[351] China About to Amend Judges' Law and Clarifying the Establishment of Judicial Selection Committees ("我国拟修改法官法 明确设立法官遴选委员会"), XINHUA NEWS 2017-12-23, available at: http://www.npc.gov.cn/npc/cwhhy/12jcwh/2017-12/23/content_2034477.htm.

Moreover, the draft amendment to the Judges' Law provides more details to the establishment of the provincial judicial selection committees. For example, it stipulates that the PJSCs shall be composed by judicial representatives coming from local people's courts at each level as well as relevant social representatives, whereas judicial representatives shall be no less than one third of the entire membership; also, PJSCs shall set up an executive office at the Supreme People's Court, responsible for daily works of the judicial selection committees.[352] It also states that the PJSCs are only responsible for assessing judicial candidates for their first-terms of offices, because judges who are appointed for the first-term of office should most often work in the basic people's courts, whereas judges working in upper-leveled courts and above should be chosen from courts at lower levels.[353]

It is expected that by establishing an expert body at the provincial level to scrutinize judicial appointments to local people's courts, future judges in local courts would be sufficiently knowledgeable and experienced to carry out effective adjudications. Although Chinese society traditionally honors the value of "judicial populism", which is believed to have run in the opposite direction from "judicial elitism", now it's generally agreed that judging is a profession, characterized by "trained expertise and selection by merit, a selection made not by the open market but by the judgment of similarly educated experts". From this perspective, the PJSCs becomes a crucial measure for increasing judicial professionalism in China, as is said by Meng Jianzhu, the Chief of the Central Politics and Law Affairs Committee ("zhong yang zheng fa wei") (hereinafter "CPLAC"), that the reform on judicial appointments "is allocating court personnel in accordance with the specific characteristics of judicial activities; and is important for achieving judicial standardization, specialization and professionalization; and is a cornerstone of judicial accountability".[354]

Despite the alleged positive effects of the SSNJ reform, as seen in the official language, ever since the five-year plan was released, the official proposal of implementing the SSNJ has evoked a series of practical concerns among Chinese legal professions, including concerns about the heavy caseload and lack of sufficient capable judges in local courts, unemployment, division of labors, and regional

[352] I.d.

[353] I.d.

[354] See, Meng Jianzhu, Steadily Promoting Reforms on the Judicial System ("坚定不移推进司法体制改革"), available at: http://www.xinhuanet.com//politics/2015-04/17/c_1115009008.htm (last visited on April 29, 2018).

differences, etc.

First of all, concerns are expressed that reducing the number of trial judges may further aggravate the long-existing problem of contradiction between the heavy caseloads and the shortage of capable trial judges in local courts. In response to the prevailing skepticism, Jiang Wei, the Deputy Secretary General of the CPLAC, said in the contrary, in a seminar on the reform of the judicial system held by the Group for Judicial Reform Affairs under the Central Committee of the CPC, together with China's Supreme People's Court and Supreme People's Procuratorate in December, 2015, "since the implementation of the System of Specified Number of Judges, it's evident that trials have now gained strength and the contradiction between the amount of caseloads and the number of judges has been mitigated". This represents a typical official discourse, which reasons that because under the SSNJ, the number of judges is determined more scientifically, and because the quality of judges ultimately selected improves, the SSNJ will eventually enhance the efficiency of the courts.

Second, whereas the SSNJ is claimed to elevate the status of judges in China generally, beginning from 2015, complaints have been frequently heard from incumbent judges who are worried about losing their jobs. According to the SSNJ, if incumbent judges and officials in the courts want to obtain new judgeships, they must face inter-court examinations, accept further evaluations, and pass interviews with the provincial judicial selection committee before they can be appointed. Stricter standards for becoming a judge will be used with an emphasis on trial experience ("xiang yi xian qing xie"). This furthers aggravates the burden on incumbent judges, who have already felt under enormous work pressure.

As a result, two kinds of judges are prone to lose their jobs: on the one hand, incumbent judges lacking enough legal education would probably have to get another law degree; on the other hand, young judges who have relatively less trial experience are more likely to lose their jobs or become judge assistants with no hope of ever becoming judges again, since the new selection criteria require that judges have had trial experience for a lengthy period of time. Facing uncertainties and challenges, the number of judges quitting their jobs and switching to private practices has increased even more rapidly.

Meanwhile, debates have been triggered among both scholars and officials as to what extent the seniority of judges should override other performance considerations ("lun zi pai bei") and determine who will be appointed after the SSNJ is in effect. Many people have expressed concerns that since the ratio of judges to non-judges under the SSNJ is reduced, if priority is first given to the heads of local courts,

it will deprive highly qualified young judges of their job opportunities. For example, He Xiaorong, the Director of the Office for Judicial Reform of the Supreme People's Court, said in an interview, "the quota of judges should not be reduced to a ranking based simply on seniority".

In response to such concerns, some local courts have put forward a "double-layered" assessment system, in which the Vice-President and other officials of local courts are evaluated by higher level courts, whereas other people in local courts are assessed by the pilot courts themselves, thereby separating the evaluations of young judges from those of court officials. Moreover, the SSNJ reform is associated with the proper relationship between judges and non-judges as well as the division of labor in the daily work of local courts, since the SSNJ also aims at enhancing the efficiency of courts by reducing the miscellaneous works of judges apart from their trial works.

That said, such an idea was influenced by the judicial practices in the West, such as the U.S.. In many Western countries, non-judicial personnel include two types of people: one refers to ordinary staff, who help courts to carry out efficient oral hearings by managing facilities, assisting with case systems, and facilitating the presentation of evidence and witnesses, and so forth; the other refers to legally trained non-judge staff, such as judge assistants or law clerks, who do very important work to support judges in their decision-makings by conducting research, doing translations, and helping judges draft judicial opinions, etc.

Because of the important coordinate roles that non-judicial personnel play in courts, the intimate relationship between judges and non-judges is frequently discussed in the West. Although some people have expressed concern that the swelling proportion of non-judicial personnel produces bureaucratic relationships within the courts, which "threatens the integrity of the judicial process", the division of labor between judges and their assistants or clerks is still a common practice adopted by countries worldwide, because it's empirically believed to have enhanced the efficiency of the judicial process. Nevertheless, how to divide works among different types of court personnel so that it enhances the courts' efficiency is still not clear for Chinese courts, given the deeply-rooted tradition of judicial administrativation.

Furthermore, the SSNJ reform requires decision-makers to adjust reform policies to local conditions, allowing a certain degree of local flexibility. According to statistics provided by the Supreme People's Court, up to now, the new personnel reform has begun to be implemented in eighteen pilot areas across the country, including Shanghai, Guangdong, Hainan, and Qinghai, with a total of 10,094 local

judicial officers "categorized as judges". With the "third batch" of pilot provinces, comprising 14 provinces, about to officially launch the reform, it's said that judicial reform will be started in all Chinese provinces in 2016. Meanwhile, courts that are currently undertaking reform measures are in a tough struggle for pushing through the SSNJ reform. Courts in different regions have faced many different obstacles, and it's hard for them to adjust the reform policies to the difficult reality by adopting a "sweeping approach" ("yi dao qie"). Identifying the difficulties faced by different local courts in implementing the SSNJ, for example, judges' inability to speak local dialects, lack of well qualified judicial candidates, low income of judges, and the need to "deliver justice to the countryside" ("song fa xia xiang"), implies that China's judicial reform will be significantly marked by a combination of central planning and local adaptations.

Last but not least, in terms of the nature of judicial power, the current judicial reform is believed to be a progressive but incomplete attempt due to the imbalance between judicial independence and accountability imposed upon individual judges at the local people's courts. By allowing the provincial high people's courts to be uniformly responsible for the hiring of new judges for lower courts, and by establishing judicial selection committees at the provincial level, the SSNJ reform also intends to allow judges to conduct independent trials without being pressured by the local authorities, who used to possess the power of managing court personnel and financial resources. However, judges are not independent from the party's leadership, as is stipulated in the supreme people's court's five-year plan, "people's courts deepening judicial reform shall adhere to the Party's leadership throughout … to ensure that judicial reforms maintain the correct political orientation throughout."

What's more, the current reform has strengthened the judicial accountability system by establishing the so-called lifetime responsibility system ("zhong shen ze ren zhi"). In September, 2015, the Office for Judicial Reform of the Supreme People's Court has issued the Supreme People's Court's Several Opinions on Improving the Judicial Accountability System of People's Courts ("zui gao ren min fa yuan guan yu wan shan ren min fa yuan si fa ze ren zhi de ruo gan yi jian"), emphasizing that judges should be accountable for his conduct when exercising judicial functions, and shall be held accountable for the outcomes of the cases that they decide within the scope of their functions and duties for a lifetime.

The lifetime responsibility system gives individual judges a "lifetime responsibility" for their roles in each case that they have adjudicated. Cases that are wrongfully decided have significantly eroded the credibility of Chinese courts in the past. However, the establishment of the lifetime responsibility system has evoked

skepticism among scholars and incumbent judges. On the one hand, given the fact that Chinese people's courts in the past were often influenced by external causes and sometimes could not control the outcomes of the cases, and that courts will remain subject to the ruling party's leadership, many judges have started to complain that giving them a lifetime responsibility for the outcomes of all the cases that they have handled might impose unfair burden upon them.

On the other hand, reform efforts are considered inadequate in terms of eradicating judicial corruption. Aiming to offer a solution to the courts' woes, in 2015, the CPC Central Politics and Laws Commission published the Provisions on Recording and Holding People Internal to Judicial Office Who Interfere in Cases Responsible, whereas the CPC Central Committee General Office ("zhong gong zhong yang ban gong ting") and the General Office of the State Council ("guo wu yuan ban gong ting") have published the Provisions on Recording, Reporting and Holding Responsible Leading Cadres Interfering in Judicial Activities and Intervening in the Handling of Specific Cases. Together, the two provisions require that in cases where government officers unduly intervene in judges' decision-making process, their interventions shall be duly recorded in the case files, and anyone who tries to influence the outcomes of cases shall be held responsible.

Nevertheless, the provisions were immediately met with strong doubts and concerns about whether they could indeed put interventions and briberies to an end. For example, many questioned why the provisions did not specify how judicial interference would be reported and punished, and many suspect that judicial interference will simply be turned from open to secret. In any event, the provisions did not get to the root of the problem, so they cannot empower vulnerable judges to say 'no' to those government officers, who want to meddle in judicial activities.

It is against the backdrop of these difficulties that this article attempts to show the current state of judicial reform in Xi'an. The reason that Xi'an is chosen is because, first, it represents a situation different from what we can observe mostly in coastal areas like Shanghai and Shenzhen, i.e., the local legal culture, socio-economic and institutional environment of Xi'an is different from the economically more developed regions of China. Because most research on judicial reform now tends to focus on the more developed regions, regions like Xi'an deserve special attentions for understanding regional differences. Second, existing studies largely neglect the pre-reform experience of a region that carries out reform, but it's argued in this article that the pre-reform period is an important part of the institutionalization process. Since Xi'an is among the third, i.e., the last, batch of regions to carry out the pilot judicial reforms in China, researchers can get a special angle for observing the pre-reform

reactions of local courts to state-mandated reform policies, and thereby gain a better understanding of the nature of the institutionalization process of the SSNJ reform.

2. Market Integration, the "State-Centered" and "Centrally-Planed" Approach, and the Judicial Power

Rule of law is usually thought of as an essential condition for economic growth. According to political and economic theories, rule of law either provides institutional supports for securing property rights and the integrity of contract (Coase 1960, Alchian 1965, Demsetz 1967, Alchian & Demsetz 1973, Williamson 1971, 1985; North 1981, 1990; Acemoglu et al. 2001), or offers institutional checks and balances that impose restraints on the state (Hayek 1978; Dicey 1982; Cass 2001; Weingast and North 1989) through mechanism like judicial independence (Weingast 1997). Rule of law institutions are linked to economic growth through the incentives provided by the legal protection over property rights and contracts to make investments and carry on economic transactions (La Porta et al. 1998; Djankov et al. 2002), as a number of studies have found that better property rights protection leads to more long-run economic development (Kaufmann 2003a, b, Barro 1997; Keefer 2007).

Likewise, judicial reforms, as part of the overall legal reforms in China, are usually linked with the fact that the demands for economic growth and are often carried out in a top-down fashion. To be fair, most of the legal reforms in China are state-led and centrally-planned, which reflects the awareness of the central leadership that "law is useful not only as a tool to regulate the economy and society but also to restrain abuse of state power by government bureaucrats", and they are indeed concomitant with rapid economic growth that China has achieved during the past decades.[355]

However, this study distinguishes itself from conventional wisdom on the link between judicial reform and economic growth by focusing instead on the party-state's consistent efforts to achieve market integration. Due to decades of political and fiscal decentralization, numerous problems are hindering the prosperity of the market economy and distorting the equal development of regional economies in China. For example, local governments were found to have interfered with local private interests and distorting local fair competition by granting favorable tax rates to local SOEs,

[355] See, Jamie P. Horsley, The Rule of Law: Pushing the Limits of Party Rule, in Joseph Fewsmith (ed.), CHINA TODAY, CHINA TOMORROW: DOMESTIC POLITICS, ECONOMY AND SOCIETY (Rowman & Littlefield Publishers, 2010).

leading to the decline of economic growth; regional disparities were enlarged due to various local protectionisms, which is usually detrimental to economically less developed regions, and this is because local governments were incentivized to pursue their own local interests by maximizing local revenues, e.g., through enlarging tax bases to local enterprises such as distilleries and cigarette factories; local protectionisms and self-interested economic behaviors stirred distrust between central and local governments, which forced the central government to cut local budgets and shift more spending responsibilities to the local levels.

A. The State-Centered Approach to Market Integration and Legal Reforms in China

The beginning of the story is marked by the historic Third Plenum of the 11th Central Committee in 1978, where the CPC officially announced its "reform and opening-up" agenda with the stated goals of "democratic institutionalization and legalization". It marks the fact that China turned away from the political arbitrariness of the Cultural Revolution while embarking on a new path to "governing the country in accordance with law" and with a modernized system of law and courts. As Deng Xiaoping stated at the plenum, "there must be laws to follow, these laws must be observed, they must be strictly enforced, and lawbreakers must be dealt with".[356]

In order to restore its economy and social stability, China carried out a series of legal and judicial reforms to build the so-called "socialist rule of law" since 1978. A new constitution and numerous legislatives were adopted in the following years, which are necessary for promoting the "socialist market economy". The 1982 PRC Constitution stipulates that the state shall uphold the "socialist legal system", and articulated the rights and duties of Chinese citizens, while formally endorsing the "open-door policy" for foreign investments and trade. The National People's Congress of PRC also adopted new criminal and criminal procedure laws, civil procedure law, contract and tax regulations, trademark and patent laws as well as laws and regulations aiming to attract foreign investment and spur economic transactions.

Massive legal transplantations occurred during the period, when economic developments called for new legislations to regulate and facilitate China's transition into a market economy, especially in the areas of economic laws. Apart from legal borrowing, China also joined a large number of inter-state and international treaties

[356] See, quoted by Jamie P. Horsley, The Rule of Law: Pushing the Limits of Party Rule, in Joseph Fewsmith (ed.), CHINA TODAY, CHINA TOMORROW: DOMESTIC POLITICS, ECONOMY AND SOCIETY (2010), at 1.

and agreements. In 2001, China officially joined the WTO agreements, committing to improve the legal conditions in China.[357] Such bilateral and international activities enabled China to engage in the international economic and legal order and to benefit from international transactions and investments. From 1979 until 2010, China's average annual GDP growth was 9.91%, and quickly become the world's third largest economy.[358]

Over the years, China's legal reforms have focused primarily on regulating and facilitating the socialist market economy, and in the recent two decades, it has directed the emphasis slightly to also on adjusting social relations and achieving greater social justice for the people. Central leaders came to embrace a broader notion of political legitimacy, measured not only on economic achievements but also on social fairness and welfare.[359] For example, the political slogan and governance theme created during Hu Jintao's leadership was to create a "harmonious society" in China.[360] Laws and regulations were thus made more in relation to social security, health care, labor relations, food safety as well as environmental protections.[361]

As such, during the past decades, the Chinese central government has used law as a political tool to achieve its goals in achieving economic developments and maintaining political legitimacy. In this process, the governing paradigm of China shifts further away from that of "rule by men" to "rule by law", and the central leadership gradually relies on the legal machinery to monitor and supervise state bureaucracy and restrain abusive behavior of state power by holding government officials accountable to the public and punishing corruptions in accordance with law. The enactment of the anti-corruption law in 2008 is an example of this trend.[362] Public dissatisfactions are, however, still widespread, because Chinese government keeps using extralegal mechanism to suppress political incidents and citizens' freedom and rights are not sufficiently protected by the law.

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[357] See, China in the WTO: Past, Present and Future, available at: https://www.wto.org/english/thewto_e/acc_e/s7lu_e.pdf (last visited July 2, 2018).

[358] See, The Rise of the RMB (2012), available at: https://www.theglobaltreasurer.com/2012/04/10/the-rise-of-the-renminbi/ (last visited August 1, 2018).

[359] See, Bong-ho Mok, Social Welfare in China in An Era of Economic Reform, International Social Work, vol 30 (1987), 237-50.

[360] See, Manoranjan Mohanty, "Harmonious Society": Hu Jintao's Vision and the Chinese Party Congress, Economic and Political Weekly, Vol. 47, No. 50 (DECEMBER 15, 2012), pp. 12-16.

[361] See, Wu Fenghong and Yan CHI, Regulatory System Reform of Occupational Health and Safety in China, Ind Health (2015 May) vol. 53(3), pp. 300–306.

[362] See, Daniel C.K. Chow, How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws, University of California, Davis (2015), Vol. 49, pp. 685-701.

Since President Xi Jinping takes office, China starts to change their strategy and policies by subtly deviating from the post-Mao policy orientations, and the party-state is working through judicial professionalization reforms to transform the "law vis-à-vis politics" relations. Specifically, it aims to improve judicial mechanisms to solve social conflicts and to help ordinary citizens to achieve better legal protections through courts. This requires the courts to enhance the professional competence and efficiency of judicial personnel. At the same time, the central party leadership uses the course of action of judicial professionalization to regain control over party cadres and officials, to downplay the courts' role in this aspect while strengthening monitor, oversight and disciplines over government officials through mechanism inside the party system, as evidenced by the establishment of the national supervision system, which in essence is a party disciplinary organ responsible for corruptions and abuse of power of government officials and party cadres.

The Xi's reform differs from previous judicial reforms in that past judicial reforms are more likely to be resulting from the dramatic changes in Chinese society due to economic reform and openness to the international society; the current judicial reform therefore is more derived from the need for an internal structural reform of the political regime. A number of challenges face China's central government, such as increased tension between central-local governments, rising public dissatisfactions, as well as the internal frictions of the central party organ. All of these problems hinder the development of its domestic market economy, which requires an overhaul of China's trial system. The old judicial administration system is proved to be unable to cope with the problems resulting from the economic and political decentralization during the 1990s, while the current Chinese central government expected a high quality and efficient, yet obedient, judiciary to take on more social responsibilities like addressing social disputes and aggrievances.

B. Implications on the Judicial Power:

Despite the widespread belief that the Chinese legal reforms will result in nothing without establishing genuine judicial independence, i.e., resetting the status of the courts and their relations to other party-state organizations, China's judiciary continues to be implicated by a paradox between the central government's proclaimed commitments to the "rule of law", as well as the prevalent party control over the judiciary (Peernboom 2010; Liebman 2007; Zhu 2006). To many scholars, this is because the party only permits a robust judiciary in so far as it does not conflict with

the party's leadership.[363]

Traditionally, judicial power Chinese judges do not enjoy independent judicial decision-making, both internally and externally. Internally, other judges, senior judges and court leaders and officials, as well as higher courts, tend to review and affect the cases before a judgment is issued.[364] Upper-level courts may assert their power over a lower court in order to determine the decisions of cases with high public exposures or attentions in their jurisdictions. In this way, the local judiciary in China is primarily managed like a state administrative agency because judges must follow the instructions of senior judges and court heads, especially those in the adjudication committees, in deciding important cases.[365]

The adjudication committee usually consists of the president, vice-president of a court, the heads of each chamber as well as other senior judges.[366] They gave advices to trial judges regarding judgements in cases that are complicated or involve important issues, a fact that further impinges on the independence of judges because political considerations always influenced the eventual results of legal decisions in this process.[367] Apart from this, trial judges have to ask for opinions and instructions from upper-level courts with respect of a particular case, when they were unsure about legal interpretations and applications and were afraid of delivering a decision that were later turned down by higher courts.[368] These factors have continued for a long time in judicial practices due to concerns of trial judges that their decisions would not satisfy other senior judges or officials and until recently, the new round of judicial reform begins to put an overhaul on them.

Also, Chinese judges have faced many external influences, which have been a major source of distrust and lack of credibility for local courts. These external forces usually come from local governments and party officials, because judges are limited by the structure of the judicial system in which each level of courts should be responsible to the people's congress at the equivalent level and local authorities (relevant governmental offices, and party organizational departments) used to control the personnel, financial and material resources of local courts.[369] Unlike judges in

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[363] See, Liebman (2007).

[364] Stanley Lubman, Bird in A Cage: Legal Reform in China After Mao 260 (1999).

[365] See, e.g., Seth Carz, The Chinese Communist Party's Leadership and Judicial Independence, 2003.

[366] See, Reinstein, at pp 49.

[367] Lubman.

[368] Lubman, at pp. 263.

[369] Randall Peerenboom, The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China, 1 Asian-Pac. L. & POL'Y.J. 12:q, 12:8 (2000).

democratic states, Chinese judges have no security of tenure and are appointed, funded, and removed by the local government and party authorities.[370] Local judges, therefore, are beholden to the equivalent-level government and party authorities not only in terms of their employment but regarding their finances as well.[371]

Local party and government organs control every aspect of court administrations, including personnel, funding/budgets, benefits, housing, facilities, rankings of judges, salaries and bonuses.[372] Local governments use their power over courts to exercise influence in particular cases, facilitating the kind of "local protectionism" in judicial activities because local governments and local businesses often had exchanged interests with each other.[373] While local businesses rely on local governments for opportunities and policy benefits, local governments protect local business for concerns about revenues and employments, so the local governments tend to fear that their financial interests will be jeopardized by adverse judgements against the business.[374] Frequently, firms are fun by local political officials or their relatives and friends so they can exert influence over the courts to protect their businesses.[375]

As such, judicial independence and autonomy is further eroded by the judiciary's connections to various local organs of the party-state. Although the people's congresses have the final power to appoint judges, in practice it was the CPC's organization departments on each level who actually selected judges to be ratified by the people's congresses.[376] Also, due to the particular structure of the Chinese political system, most of senior judges and court heads are themselves party members and must follow party rules, disciplines as well as political linages in addition to court rules and procedures.[377] Moreover, although direct intervention by the CPC is increasingly rare, judges in practice still follow instructions of seniors and court leaders by discussing cases involving political or difficult legal issues with the political-legal committee of the CPC at local levels.[378] Such committees are highly-empowered to determine administrative affairs of local courts at all levels and "to ensure that courts and judges act in accordance with party mandates".[379]

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[370] See, Lubman, at pp 256.

[371] Clarke, at pp. 42.

[372] Chen Youxi and Xue Chunbao, The Three Major Reasons Why Courts Have Difficulty in Execution, ZHEJIANG FAZHI BAO[ZHEJIANG LEGAL SYSTEM NEWS], Aug 16, 1990, at pp.3.

[373] Clarke, at pp. 41.

[374] Clarke, at pp. 41-42.

[375] Clarke, at pp. 42.

[376] *I.d.*

[377] Peerenboom, Evolving Regulatory Framework, at pp.9.

[378] I.d.

[379] Avino, at pp. 381.

The Chinese judiciary, therefore, used to face various internal and external interventions, which have affected the operation and functioning style of the Chinese courts in many aspects. Such a profound paradox between the declared upholding of the rule of law and prevalent political intervention have for a long time been characteristic of the Chinese judiciary, and it can be better illustrated with the distinction between "rule by law" and "rule of law" made by the Chinese central government. For decades, China's efforts in judicial reforms have displayed a shifting back and forth between these two concepts, reflecting somewhat different goals of China's legal reforms. While the 16th Congress of the CCP in 2002 accelerated a new momentum towards the "rule of law"- as former President Jiang emphasized in his report "No organization or individual enjoys any privilege above the Constitution and laws", the current party leadership seems to drift away from this end towards the "rule by law", although officially declaring to uphold the spirit of rule of law, there is a greater emphasis on central control and party leadership over state affairs at every level.

This explains why the central leadership recently declared to "guarantee the independent and fair exercise of the courts' judicial powers", while firmly dismissing the idea of judicial independence.[380] This remains the underlying tactic that underlies the current central leadership's agenda when it announces its plan to "deepen reforms on courts and the rule of law". As long as the courts follow the party leadership, Chinese courts do not enjoy the kind of judicial independence as their counterparts in the West do. On Jan 14, 2017, the current SPC President, Zhou Qiang, delivered a high-profile speech, in which he explicitly rejected the idea of embracing the kind of democracy, separation of powers, and judicial independence in the West, by declaring to "pull out the sword" to the so-called "erroneous" Western notions and ideologies that would undermine the party's leadership in the judicial system.[381]

C. The Concept of Judicial Accountability in China's Legal Traditions

A common assertion in the literature on Chinese legal system is that China has traditionally lacked a self-regulating body of adept legal professionals. General impressions on the Chinese society prior to the modern era are typically that there were no "specialized institutions whose main task is adjudication", and no "profession

[380] See, the SPC's newest Five-Year Reform Plan, available at: http://news.xinhuanet.com/legal/2015-02/26/c_127520462.htm.

[381] See, China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince, New York Times 2017-01-18, available at: https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html.

of lawyers, as distinct from policy makers and experts in statecraft" , which are "analogous to those of post-feudal Europe" . According to such observations, a fundamental reason for the "inability", or "failure" , of feudal China to produce a formidable legal profession is due to the enduring political centralization as well as the lack of "suitable ground" in the Chinese civil society, on which such a profession would land. Thus, absent of the necessary premises of professional development, a Western form of legal profession was not introduced into the traditional Chinese society, and the idea of "legal professionalism" was not imported from the West until China commenced its efforts to modernize its legal system.[382]

A cautious reading of Chinese history will show that it is one thing to say that China did not have the tradition to fashion a Western-styled legal profession, and another to say that China did not have the tradition of developing its own legal profession. The term, "legal profession", now commonly employed in the legal and social science literature, typically refers to one that is conceptualized in the West (Alford and Winston, 2011: 3). A widely-held thesis in the West emphasizes the functional aspect of the legal profession, arguing that it earns "sufficient independence to exercise complex judgment in exchange for a commitment to serve an important public value", and that it is "enjoined to seek the 'best', the most 'efficient' way of carrying on his function" . The other thesis, which has become especially popular in recent decades, underscores the self-interestedness of the legal profession, which is organized in a "cartel"-like form, enabling its members to maintain monopolized market privileges (Dingwall and Fenn, 1987; Larson, 1977; Posner, 1996).

Despite of such disagreements, a consensus in the Western literature is that the legal profession refers to a notion that highly emphasizes its ability to maintain autonomy, owing to either its professional competence, or its ability to monopolize the market. In other words, a legal profession must be composed of skilled professionals, who are independent, self-regulated, with highly specialized legal expertise and a professionally distinguished collective identity. Such a legal profession is a desirable product for the society, because it performs "vital constitutive functions in modern society", although its lack of social concern and indifference to the welfare of society have drawn increasing attentions. To be sure, it is in this sense that the Chinese tradition differs from the West. Just as the famous social scientist, Talcott Parson, proudly puts "[c]omparative study of the social structures of the most important civilizations shows that the professions occupy a position of importance in

[382] See, Xi Jinping Promised Legal Reform in China, But Forget About Judicial Independence, QUARTZ 2017-Jan-18, available at: https://qz.com/886665/xi-jinping-promised-legal-reform-in-china-but-forget-about-judicial-independence/.

our society which, in any comparable degree of development, unique in history". However, it would be inaccurate to claim that China did not have any tradition of legal profession in history.

While not questioning the difference between the legal profession envisioned in the Western tradition and that envisioned in the Chinese tradition, it is nevertheless important to acknowledge that legal profession is not a distinctive feature for the West. A legal profession with a quite different nature did exist in the traditional Chinese society, both in theory and in practice. In fact, among the three major schools of thoughts in ancient China, Confucianism, Taoism, and Legalism, the Legalists actively promoted the idea of governing with unambiguously defined law. According to one of the most well-known Legalist Classics, The Book of Lord Shang, such law should be interpreted, promoted, and administered by specialized officials, who were trained in law to understand its contents. Similar ideas have been expressed by other famous Legalists, including Han Feizi and Guanzi.

Moreover, before the Western ideas of the legal profession was introduced into China, the traditional Chinese society had its own concepts of "lawyer" and "judge" in practice. The existence of specialized legal officials in China might be traced far back to the pre-imperial era, during the Western Chou Dynasty, based on the historical records provided by the famous Chinese historian, Si Ma Qian [司马迁], in his monumental work, The Historical Records [史记]. Wang Zhiqiang, in his paper on the practices of case precedent in imperial China, mentioned the judicial practices during Qin dynasty, the first feudal dynasty of China, when the officials designated to take charge of justice were called "tingwei" (廷尉).

According to Karen Turner, written guidelines produced in Qin Dynasty for public officials in charge of investigating crimes and determining punishments were also discovered at "Shui Hu Di" (睡虎地), together with "examples of enacted laws with explanations, an essay that outlined a code for proper bureaucratic behavior, and sample cases and punishments serving as precedents". The manuals also expressed the expectations of the Qin's central authority upon the qualities of the officials: "a clear knowledge of the laws, wide-ranging competence, honesty, and public-spiritedness". Philip Huang's study on China's civil justice practices in Qing dynasty also provides evidence on the functioning of local "magistrates", who were given specific instructions to resolve local civil disputes.

Traditional Chinese lawyers were not officially approved by the state to practice, while often denounced as "litigation abettor" ("suo song zhe") in literature

and officialdom. They didn't participate in court hearings, and their primary role was to help litigants draft compelling arguments in the complaints. Henry R. Zheng further comments on the "informal" nature of Chinese lawyers as a group prior to the modern time that "[a]lthuogh there had previously been instances for monetary compensation, such a practice had never been institutionalized or become a system, nor had there ever existed an independent profession of lawyers". Although developed in a drastically different fashion, convincing studies based on historical facts have shown that traditional Chinese lawyers, or the so-called "songshi", did manifest a special kind of vocational knowledge, expertise, and professional skills in legal works, despite of the hostile social environment in imperial China. As William Alford points out, "[a]lthough clearly lacking many of the indicia of the modern professional - songgun … developed informally whatever expertise and ethos they may have shared – it is also evident that they intermediated between state and society, developed a craft that blended technical expertise and hands-on judgment".

Given the informal existence of Chinese lawyers in ancient society, their organization remained loosely bound, and their functions were not always consistent. Also, Chinese traditional legal profession was organized as an autonomous group but was formed as part of the governmental structure. Hence, the legal profession was not internally developed among litigators, but was organized into a system of centralized direction and control. As a result, scholarly researches on China's legal tradition often pay more attention to traditional legal officials, who were recruited through civil examinations into the state bureaucracy to perform administrative and legal functions and were promoted within the bureaucratic ranks. As a matter of relevance to the topic at hand, this part of the study will also focus on the latter group, i.e., the legal profession within the imperial civil service system.

The questions immediately can be raised include: First, what are the differences between the Chinese indigenous legal profession and the skilled legal professionals developed in the West? What kind of ideals and visions are behind the professional life in each side? What factors can explain such differences? Second, how do such differences get reflected in the development of the modern legal profession in China today? How does a modern legal profession, which is envisaged in line with the Western ideals, arise in a country like China, where forces of tradition and modernity frequently collide?

In a broader sense, early concept and practices of legal profession offers a fascinating glimpse into the antecedents of the modern development of Chinese legal profession. since there can be different types of legal profession, and different ways of defining this concept – be it Western or Chinese, traditional or modern- and since all

these types of legal profession might be simultaneously influencing the actual reform practices, it seems extremely meaningful to examine their different social and cultural roots. This is especially true for a country that has witnessed an unprecedented exchange of norms and ideas between the East and the West, like China. Also, the same discourse about legal profession, like the one prevailing in China today, may lead to the creation of different types of constituencies, and not all of them are equally powerful in terms of power, resources, and social status. In other words, given how fragmented China's legal profession has been today, it's hardly surprising to find that the professional discourse, which promotes the liberal concept of legal profession, cannot produce the exactly expected result in China. As a result, understanding the interactive dynamics between tradition and modernity will shed lights on the heterogeneous nature of the legal profession developed in China now , thus explaining the discrepancies between the "legal professionalization" discourse and the actual results of specific projects carried out to promote such a discourse.

That said, this part will first show that while China has its own tradition of legal profession, i.e., the one developed in the pre-modern era, the conceptualization and practices of the traditional Chinese legal profession are largely inconsistent with the Western idea of legal professionalization, which places much importance on the autonomy and independence of the profession. Compared with the Western ideals, the traditional Chinese legal profession displays two major differences: on the one hand, the condition for existence of the legal profession in the traditional Chinese society is that it was not separated from the state. The traditional legal profession in China didn't form a source of "pluralism" and "autonomy", standing against the state; nor did it symbolize the "breakdown of stable hierarchical relations among social ranks".

On the other hand, the official ideology embodied in the tradition of Chinese legal profession, which heavily emphasizes the notion of "accountability" ("zeren"), reveals the cultural foundation for the modern control of the activities of the legal community in China. This tradition of always holding legal officials "accountable" stands in contrast to the alleged "disinterestedness" and lack of "social concerns" of an independent profession in the West (Gordon and Simon, 1992). Moreover, one can find accentuated topics related to "judicial accountability" that are emphasized in the current judicial reform in China, as partly influenced by the prevailing traditional political culture. The idea of "judicial accountability" of the current reform policies are strongly reminiscent of those in the ancient Chinese society, which characterized legal officials as an integral part of the imperial bureaucratic system.

The way that imperial China maintained control over the legal profession rested upon the concept of bureaucratic accountability. As discussed in the previous

section, the traditional legal profession in China was deeply embedded in the imperial state bureaucratic system, and they were structured as an integral part of the Chinese civil service system. Since the entire governmental structure of imperial China formed a triangle model that ensures "a system of centralized direction and control while at the same time offering scope for discretion and policy-making throughout the administrative ranks", the administration of the legal officials was also centered on the "working out of an accommodation between bureaucratic policy-making and the existence of a centralized control over the administration".383

Within the context of imperial China, such an accommodation occurred on two dimensions: on the first dimension, the imperial power dominated bureaucratic policy-making; and on the second dimension, policy adjustments by local bureaucracies were carried out under centralized direction and supervision. In order to strike a balance between bureaucratic policy-making and the imperial power on both dimensions, centralized controls over the bureaucratic system took the form of a strong administration system centered on the concept of "bureaucratic accountability". The key to the operation of the imperial administrative system lies in its ability to hold officials at various levels accountable for their administrative actions, largely because such an "accountability" system could serve as a tool of centralized control.

From a comparative perspective, however, the concept of "accountability", as applied in the case of imperial China, is different from the kind of "accountability" that we find in democratic institutions in the West today. On the one hand, the concept of "accountability" in the traditional Chinese society was designated as an instrument of social control that ensures the monarch has absolute rule 384, whereas its counterpart in the democratic regime refers to democratic institutions designed to facilitate popular control on the government, i.e., to enable the citizens to check on the political power and to monitor and sanction officials effectively385. On the other hand, "accountability" took on a variety of forms in the imperial Chinese society (for example, there were legal, moral, and social means of holding officials accountable), while democratic accountability usually emphasizes formal institutional designs.386

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383 Lawren J. R. Herson, China's Imperial Bureaucracy: Its Direction and Control, 17(1) Public Administration Review (1957), 44-53, at pp. 44.

384 Id.

385 See, e.g., Susan Rose-Ackerman, FROM ELECTION TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND (2005), Chapter One, Policy-Making Accountability and Democratic Consolidation; Guillermo O'Donnel, Horizontal Accountability in New Democracies, 9(3) Journal of Democracy (1998), 112-124.

386 See, Lily L. Tsai, Solidary Groups, Informal Accountability, and Local Public Goods Provision in Rural China, 101 (2) American Political Science Review (May 2007), 335-372.

3. Judicial Professionalization in China as A Means of De-Politicization, De-Localization, and Performance Management of Judicial Personnel

In this part, I explain the implications of the state-mandated, centrally-planned approach on the nature and practices of judicial professionalization in China, and part of the analysis are based on information obtained from interviews with relevant officials and local judges. Again, in the context of state-centered, centrally-planned approach to market integration, judicial reforms are carried out in a top-down fashion, and the party dominates the policy-making process at each domestic level. Together with these empirical observations, the analysis reveals some interesting aspects of judicial professionalization in China.

First, unlike the situations in the EU, judicial professionalization does not enhance the power and political influence of the courts; rather, viewed comparatively, Chinese courts remain quite passive political actors, i.e., they are tasked with dealing mundane issues (e.g., solving civil and commercial disputes, sentencing crimes, preserving social order and stability) whereas matters of greater political significance are usually handled through extrajudicial means (e.g., party discipline, political bargaining). Judicial Professionalism provides a source of distinction of the role of courts as isolated from politics. Under the current party leadership, the political functions of courts are further compressed, despite the long-standing expectation[387] that courts may be increasingly empowered to handle more "rights-based grievances", like "administrative litigation, class actions" and even "cases filed directly under the Constitution".[388]

At the same time, more disputes and grievances are directed away from traditional social and informal mechanism (e.g., the letters and visits system) to be addressed through litigations, leading to a significant increase in the total number of court cases since 2014. For example, the number of new cases brought to the Supreme People's Court and that of completed cases were 15985 and 14135 respectively, i.e., 42.6% and 43% more than the previous year; the numbers of the local people's courts were 19.51 and 16.71 million and it means 24.7% and 21.1% increases compared with

[387] Many scholars think China will develop a more robust administrative litigation system due to external pressures, like globalization. On this issue, see, e.g., Randall Peerenboom, Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the PRC, 19 Berkeley J. INT'L Law 161 (2001).

[388] See, Benjamin L. Liebman, China's Courts: Restricted Reform, China's Legal System: New Developments, New Challenges (Sep 2007), The China Quarterly No 191, pp 620-638, at pp. 620.

2014.[389]

Second, the rebalancing of central and local control over local cadres and officials and regaining influence on their behavior is at the core of the ongoing reform of judicial professionalization. For a vast unitary socialist country like China, finding a proper balance between centralization and decentralization of political control for the state to better and more effectively monitor its local agents is a fundamental question. Over the years, many institutional mechanisms are deployed to help the central authorities control, oversee and monitor the activities and behavior of local authorities, but local judiciaries remain a blind point for central control and oversight. Obstacles to central leadership have been deemed as creating "tremendous additional challenges to building rule of law in China".[390]

This long-running shift of power between central and local authorities is also underlying the current judicial reform in China. Together with other measures, the establishment of the PJSCs marks a wave of centralizing political control over local judicial affairs, i.e., promoting the so-called "uniform administration of local courts' personnel, financial and material resources at the provincial levels" ("*sheng ji tong guan*"),[391] which to some extent can be viewed as responding to the demands generated from the fiscal and administrative centralization that was started in the early 1990s.[392] Efforts of judicial professionalization also are aimed to strengthen central control over local government officials and judges, such as shifting the power of administrating and managing local courts' personnel, finance and materials from the local to provincial level.[393]

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[389] A significant increase in court caseloads coincides with the establishment of the new "case filing registration system", which was formally adopted in May 2015. See, Supreme People's Court's President Zhou Qiang, Working Report of the Supreme People's Court (delivered in the fourth meeting of the 12th NPC on March 13 2016), XINHUA NEWS March-20-2016, available at: http://www.npc.gov.cn/npc/dbdhhy/12_4/2016-03/21/content_1985710.htm.

[390] See, Murray Scot Tanner and Eric Green, Principals and Secret Agents: Central versus Local Control Over Policing and Obstacles to "Rule of Law" in China, The China Quarterly, vol. 191 (Sep 2007), 644-670, at pp. 644.

[391] Centralizing political control is an important goal of the current judicial reform, see, The White Paper of the Supreme People's Courts on Judicial Reform (2016), available at: http://m.chinadaily.com.cn/en/2017-02/27/content_28361584.htm.

[392] For discussions on Chinese judicial reform from this perspective, see, Jiang Feng, Judicial Reform under the Perspective of the Central-and-Local Relations: Impetus and Challenge ("央地关系视角下的司法改革：动力与挑战"), China Jurisprudence, vol 4 (2016).

[393] See, The Supreme People's Court Issues its Newest Five Year Reform Plane for the Courts, Supreme People's Court Monitor, July-10-2014, available at:

Thirdly and interestingly, the actual outcomes of judicial professionalization in China, as evidenced by the ongoing judicial reform, overwhelmingly concern the improvement of the work efficiency of local courts through the new mechanisms of selection and ranking, etc., notwithstanding the fact that judicial professionalism spans a wide array of professional issues from the professional skills and career path to the independence and even the political voice of judges.[394] In this respect, judicial professionalization operates as a performance-enhancing mechanism, i.e., judges are compelled to vindicate their devotion to professionalism by striving to enhance their trial performance, primarily measured in pretty simplified terms (e.g., case completion rate and rate of mistaken cases) under the current system of court administration.

As a result, a series of measures taken effect since the Supreme People's Court issued the newest five-year reform plan have led a significant increase in the total number of court cases in 2014. According to the latest report of the supreme people's court, in the commercial area for instance, the Chinese courts have tried a total of 16.438 million first instance cases during the past five years, almost 54% more when compared with the previous five-year period.[395] As such, after the reform takes place, despite a small amount of salary increase (up by about 30% according to two officials responsible for judicial reform in Shanghai and Beijing) and limited improvement of the working conditions of judges, judges face increased pressures, coming from stricter standards of selection and ranking as well as the growth in caseloads, and their social status and political influence are not enhanced. This is evidenced by the interviews conducted with local judges throughout the reform period in three big cities in China (Xi'an, Beijing, and Shanghai).

A. Judicial Professionalization as A Means of Demarcating/Depoliticizing the Roles of the Chinese Courts

Recovering from the Culture Revolution, China is trying to build a more law-based social order to maintain regime legitimacy and ensure economic growth, and it does so by carrying out a series of post-Mao legal reforms. However, under the CPC's leadership, the Chinese courts do not play a great role in policy-making, and other than having the power to resolve disputes, it remains a state bureaucracy with less

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https://supremepeoplescourtmonitor.com/2014/07/10/the-supreme-peoples-court-issues-its-newest-five-year-reform-plan-for-the-courts/.

[394] For a connection between professionalism and judicial behavior, see, e.g., Fabiana Luci Oliveira, Justice, Professionalism, and Politics in the Exercise of Judicial Review by Brazil's Supreme Court, Brazilian Political Science Review, vol 2, no. 2, (July/Dec 2008).

[395] See, Signals in Supreme People's Court President Zhou Qiang's 2018 Report to NPC (part 2), available at: http://supremepeoplescourtmonitor.com/tag/npc-work-report/.

political significance. Despite a few positive remarks, perhaps many scholars now would agree that "Chinese courts are not designed to so, and should not do, the things Western" (Clarke 2003: 164). Such situation is not changed after a series of judicial reforms were implemented by the central state authority to strengthen the courts' professional ability to resolve an increasing amount of cases and disputes.[396] Judicial professionalization, therefore, means de-politicization of the judicial power in the Chinese context.

1) Demarcating the Technical Role of People's Courts

It is still true today that courts are meant to undertake a less important political role in China, and the current judicial reform settings reflects a further trend of depoliticization of the role of the courts, accompanied with a modest increase in the use of the courts for solving economic disputes and maintaining social stability. The growth in the total number of court cases since 2014 is remarkable, and the increase in court caseloads (including both new cases and completed cases) coincided with the change in the case filing system in 2015.[397] In April 1 2015, the Central Leading Group of Deepening Reforms ("CLGDR") issued the *Opinion on Reform on Promoting Case Filing-Registration System in People's Courts*, which was affirmed by the SPC later on.[398] Accordingly, in May 2015, the "case filing-review system" ("立案审查制") was officially changed into the "case filing-registration system" ("立案登记制"), which means that litigants can easily bring cases to the courts and the courts no longer get to choose which cases they want to hear any more.[399]

The new case fling registration system has led to a dramatic influx of new cases since May 4 2015, the first day of its implementation. According to official reports, by 3:30PM, May 4 2015, Beijing courts had had a total of 1963 new cases, whereas Shanghai courts had 2866 new cases, breaking the record of the number of new cases filed to the courts per day.[400] Courts nationwide have experienced a massive increase in caseload, i.e., according to the president of the case filing chamber of the SPC, by August 31 2017, there are more than 39 million new cases brought to the Chinese courts, 41.23% higher than before the case registration system was

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[396] See, in general, Benjamin L. Liebman, China's Courts: Restricted Reform, The China Quarterly, no 191, China's Legal System: New Developments, New Challenges (Sep 2007), 620-638.

[397] The caseloads of both the SPC and local courts have increased dramatically since 2014. See, https://supremepeoplescourtmonitor.com/tag/npc-work-report/.

[398] See, SPC Issuing Opinion on Reform of Promoting Case Filing-Registration System ("最高法印发《关于人民法院推行立案登记制改革的意见》"), CHINA COURT, 2015-04-15, available at: https://www.chinacourt.org/article/detail/2015/04/id/1585051.shtml.

[399] See, Chen Guangzhong, http://www.xinhuanet.com/2017-11/15/c_1121957234.htm.

[400] See, The First Day of the Case Filing-Registration System at People's Courts ("人民法院立案登记第一天"), SPC's official website, May-05-2015, available at: http://www.court.gov.cn/zixun-xiangqing-14402.html.

established, and more than 95% new cases are duly registered in the courts.[401]

While the SPC itself also dealt with a big growth in cases (e.g., in the year 2017 it has had 42.6% more cases than 2016),[402] local people's courts are the biggest witness of such a dramatic increase in caseload. For example, the total court cases that a district court in Beijing had in 2015 was more than doubled when compared with 2014,[403] and the numbers of new cases, resolved cases, and monetary values of claims have increased by 18%, 18.3%, and 23.1% in 2016 than 2015.[404] From 2013 to 2017, courts in Henan Province have handled a total of 5.17 million new cases and completed a bit more than 5 million cases, which marks an increase in percentage of 98.9% and 98.2% respectively.[405] Compared with the previous five years, many local courts in China experienced a more than 50% increase in both new and completed cases during the period of 2013 to 2018.

Such a remarkable growth in court cases suggests that the central authorities *do* want to enhance the professional capacity, and accordingly, the responsibilities, of the courts, and by doing so, they hope to turn the courts into a panacea for more social ills. This is in response to the long-standing difficulties in getting access to courts as well as the problematic functioning of other forms of dispute resolution, especially the letters and visits system. Before the current judicial reform, people used to complain about the high costs of litigations and inaccessibility of courts, because courts could turn down their claims based on various legal reasons of nonacceptance.[406] But since the procedure of reviewing the acceptability of claims was not open to the public, courts could reject claims in a quite arbitrary manner, which severely undermines the credibility of courts.[407]

When this happens, people are more likely to find other forms of remedies, such as using the petition system, or "*Xinfang*", and "letters and visits". For decades, the petition system has been "the most important ways for the Chinese government to settle social conflict and to keep society stable".[408] Traditionally, Chinese governments let the petition system play a a very important role in resolving social

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[401] Case Filing Registration System Provides Opportunities for Enhancing Judicial Credibility (""立案登记制"为提升司法公信力带来契机"), XINHUA NET 2017-11-15, available at: http://www.xinhuanet.com/2017-11/15/c_1121957234.htm.

[402] See, https://supremepeoplescourtmonitor.com/tag/npc-work-report/.

[403] Interview data obtained as of June 2015 between the author and the head of a district court in Beijing.

[404] See, https://supremepeoplescourtmonitor.com/tag/npc-work-report/.

[405] See, Court Cases Increase and Staff Reduced But Completed Cases Increase ("立案增长人员未加结案反升"), CHINA COURT, 2018-02-12, available at: https://www.chinacourt.org/article/detail/2018/02/id/3207320.shtml.

[406] See, Article 12 of the old Organizational Law of People's Courts.

[407] See,

[408] Xujun Gao and Jie Long, On the Petition System in China, 12 U.St. Thomas L. J. 34 (2015), at pp. 34.

disputes, addressing complaints and grievances, and maintaining social control and stability.[409] That why the Chinese State Council has promulgated two regulations on the petition system in 1995 and then in 2005, and the Central Committee of CPC and the State Council also issued the *Opinions on Letters and Visits* in 2007. And this petition system indeed provides a great opportunity for ordinary people to seek remedies in cases of grievances and to address incidents of abuses of power by governmental officials, as evidenced by the "huge number of annual petitions", which even outweighed the annual litigation rate.[410]

However, the petition system itself has become increasingly problematic over the past years. First, the state bureaus receiving petitions and visits by citizens have had discretion with respect to the specific way of handling specific complaints, leaving ample room for maneuvering, rent-seeking and briberies at the local levels. Also, citizens seeking to solve their grievances through the petition system usually go to the petition bureaus at higher levels for holding certain cadres and officials responsible politically, instead of through law.[411] Since cadres and officials are managed mainly through a cadre responsibility system called "party manages cadres" ("党管干部"), the threats of holding officials responsible for a particular grievance or disruption would seriously jeopardize their careers and titles.[412] Knowing this, people who don't trust law turn to upper-level governments in the hope that they could address their grievances caused by local authorities.[413]

The popularity of the petition system, therefore, signals a "lack of legal resources" in China.[414] It becomes increasingly linked with incentives to bypass judicial means in order to punish local officials through "complaints and causing disturbances", which leads to various violent counter-measures on the part of the government, such as suppressing petitions for the fear of losing one's jobs and titles. Such conducts in effect deprive the rights and freedom of the petitioners in raising their complaints at higher authorities, and examples of using violence to restrict the freedom of the petitioners and to prevent them from raising petitions include the methods of "compulsory mental health treatment" and "re-education through labor",

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[409] I.d.

[410] Annual rate of petitions to the party and government xinfang bureas at the county level and higher levels is 11.5 million per year in 2002. See, Carl Minzner, China's Citizens Complaint System: Prospects for Accountability (statement prepared for the Congressional-Executive Commission on China delivered on December 4, 2009), at pp. 2, available at: https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/roundtables/2009/CECC%20Roundtable%20Testimony%20-%20Carl%20Minzner%20-%2012.4.09.pdf.

[411] See, Corruption At Top Rung of China's Ancient Petition System Sparks Calls for Reform, REUTERS April 11-2017, available at: https://www.reuters.com/article/us-china-petitioners/corruption-at-top-rung-of-chinas-ancient-petition-system-sparks-calls-for-reform-idUSKBN17D0QR.

[412] Minzner (2009).

[413] See, Yu Jianrong, Problems and Solutions of China's Petition System, ½ Strategy and Management (2009).

[414] I.d., at pp.1.

etc.[415] Various incidents of suppressive actions, especial illegal detainment of petitioners in "black jails" have severely undermined the image and credibility of the Chinese governments, and they also injures the authority and legitimacy of the Chinese judiciary.[416]

Viewed from this way, the dramatic growth in court cases seems to reflect a conscious intent of the central state authorities to further delineate the role and functions of the courts in solving social disputes and maintaining social order and stability. More social disputes and grievances can then be solved by litigations, which in turn generates more pressure on the courts to enhance their professional capacity and working efficiency. Statistics show that the increase in court caseloads coincided with a decline in the total number of petitions since 2014, meaning that between 2013 and 2017 more disputes are directed away from the peitition system to be solved by litigation: for example, the total number of petitions in China dropped by 7.4% since 2013 to 2015, petitions brought to Beijing in 2015 were 6.5% less than the previous year;[417] also, by 2017, the total number of petitions in Shanxi Province had dropped for 34.4% compared to the number before 2013, among which the total number of petitions brought to the provincial level decreased 52.8%, whereas that number at the municipal and county levels was reduced by 28.6%.[418] .

Zhou Qiang, President of the SPC, summarizes in the working report of the SPC in 2015, by pointing out the positive effect of the case registration system. "courts nationwide begin to implement the case registration system, changing the review system into the registration system enables every case to be legally filed and heard. 95% claims are filed instantly at the registration site, which basically solves the difficulties of getting heard by the courts and enables citizens to protect their rights and interests according to the law. … together with the case registration system, measures are taken to improve the petition system including online petition and petitioning through videos, … the total number of petitions brought to the SPC has subsequently reduced by 12%".[419]

2) De-politicize the Role of the Courts:

In the Chinese context, judicial professionalization also means depoliticize the courts. The implications of depoliticization are twofold: first, to reduce the political

[415] Minzer (2009), at pp. 38.

[416] Yu (2009)

[417] See, State Petition Bureau: 2015 National Petition Rates Were Reduced On Two Fronts ("国家信访局：2015 全国信访增量存量实现'双下降'"), available at: http://www.xinhuanet.com/legal/2016-01/24/c_1117876355.htm.

[418] See, The Statement Of Shanxi People's Government in a news public conference on Nov 15, 2017, available at: http://xfb.beijing.gov.cn/bjrcsc/simpleChinese/hyyt/c135-ar3207.html.

[419] See, The SPC Working Report ("最高人民法院工作报告") (in Chinese), XINHUA NET 2016-03-20, available at: http://www.npc.gov.cn/npc/dbdhhy/12_4/2016-03/21/content_1985710.htm.

attachments of courts to other political forces, and second, constraining the political influence and importance of the judicial power. On the one hand, Chinese courts used to be viewed as the pawns of the authoritarian regime, serving primarily as a political tool of the government to combat political rivals and suppress opponents.[420] However, over the years, the Chinese courts have been gradually transformed into an upgraded version that measures up favorably to the requirements of the rule of law, emphasizing overwhelmingly on legal technicality and neutrality (Peerenboom 2002). As some scholars have already found, "Court rhetoric has changed over the past decade, reflecting a modest attempt by the courts to shift from being a tool for enforcing Party policy to being a neutral forum for dispute resolution. Many judges have replaced their military-style uniforms with robes – a change viewed as a step forward by some commentators who see it as a signal that judges and courts are not simply another brance of the party-state".[421]

Such a modest transition has led to a variety of optimisms. Peerenbooms (2010), for instance, once suggests that the Chinese courts would act like other self-asserting political institutions, purposively engaging in expanding their own political influence and powers while attempting to strengthen its structural positions and legitimacy; Li Cheng (2013) examines the "rapid rise of lawyers' and legal professionals in both Chinese higher courts and the leadership of the Chinese Communist Part'", while linking "the trend of professionalization of the court judges and the emergence of legal professionals in the CCP leadership with the paradoxical developments regarding the rule of law"; Cai Congyan (2013) focuses on "the subtle manner", with which China's courts have begun to play a greater role in foreign relation policies; Yu Xiaohong (2009) concludes that there is a "rise of local courts in China"; He Xin (2007) observes that "there is room for courts to maneuver in the current political structure" and "under the seemingly peaceful surface of iron control exists dynamic turbulences of conflict, repression, resistance, competition, compromise and cooperation", etc.

While others caution against such a tendency,[422] recent developments in China reveal important deviation from such positive outlooks. In striking contrast, the roles and influences of the Chinese courts in supervising bureaucratic actions and shaping state policies are extremely limited, and this situation was reinforced by the current legal reforms in China. A notable example of the constraining of the judicial power is the establishment of the National Supervision Committee system (SPC). With its establishment, the anti-corruption function was separated from the judiciary and absorbed by the SPC, which therefore becomes a only political organ tasked with anti-corruption issues.[423] The SPC was founded on the basis of both Chinese constitution

[420] See, Tamir Moustafa, Law and Courts in Authoritarian Regimes, Annu. Rev. Law Soc. Sci. 2014. 10:281–99.

[421] Liebman (2007), at pp. 627.

[422] See, e.g., William Alford, PROSPECTS FOR THE PROFESSIONS IN CHINA (Routledge 2011).

[423] See, China Inaugurate National Supervisory Commission, XINHUA NET 2018-03-23, available at: http://www.xinhuanet.com/english/2018-03/23/c_137060883.htm.

and law as well as the Party's constitution and regulations.[424] Its job is to investigate and handle corruptive activities of any government agency, including employees working in schools, hospitals, universities and state enterprises.[425]

A key feature of the SPC is that it works outside the court system to investigate and discipline wrongful conducts of government employees and party members. Since a large number of state employees are at the same time party members-China has more than 80 million CPC members by far, making the SPC the only anti-corruption agency in effect shifts the control over officials and cadres away from other governmental branches and back to the hands of the CPC. As some scholars rightfully points out, this shows that "[t]he party center has taken several steps to maintain its control in the new model, rather than relinquishing control or necessarily promoting the rule of law", and due to the lack of formal means of supervisions and incentives, "the SCs still rely on strong political leadership and the supervision against manipulation of their anti-corruption power is urgent".[426]

Evidences, therefore, point to the flip-side of depoliticization, and that is, despite improvements of structural conditions and court infrastructures as well as expanded range of judicial activities, the status and political significance of Chinese courts remain still quite limited. Under the party's leadership, courts depend primarily on the state for authority and legitimacy (He 2007; Liu 2006), and it must show its loyalty to the party by adhering to the order of the "socialist rule of law", while carefully observing the boundaries of its authorities and roles granted by the central authorities. The party state permits the judicial power to exert limited influence on social and political affairs only to the degree that it's safe and necessary for its rulership (Liebman 2007). Courts, thus, continue to rank well below other state organs in terms of its structural position and political significance. This is not to negate the growing importance of courts in affecting social life, but one needs to remember that the court is like a flying kite, who is always constrained and pulled by its principal, and there is always a limit of how far it can go.

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Changes outlined above demonstrate that factors including the rising social demands for judicial remedies as well as the central state's intent to downplay the political significance of the judicial power are responsible for the various measures aiming at reinforcing the technical status of the courts as well as enhancing the performance and working efficiency of judges. Scholars on authoritarian legal systems will hardly be surprising at this finding that conditions of rule of law and judicial

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[424] See, Six Questions Help You Understand What is SPC? ("六个问题带你读懂监察委到底是啥？"), CPC NEWS NETWORK 2018-03-26, available at: http://fanfu.people.com.cn/n1/2018/0326/c64371-29889434.html.

[425] See, China Expanded Its Controversial Anti-Corruption Probe to Focus on Every Official in the Country, Mar 20, 2018, available at: https://www.businessinsider.com/how-china-deals-with-corruption-national-supervision-commission-2018-3.

[426] See, Jinting Deng, The National Supervision Commission: A New Anti-Corruption Model in China, International Journal of Law, Crime and Justice, vol 52 (2018), 58-73.

professionalization continue to be improved in China, albeit in a pragmatic and limited fashion. Stated differently, a first, cursory impression on the activities of judicial professionalization in China seems to imply that the judicial power will be strengthened to play a greater political role as they did in Europe. As we just explained, however, a deeper examination shows a very different situation.

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B. Judicial Professionalization as a Means of De-Localization and Central Control

A second factor that reinforced the specific nature of judicial professionalization in China concerns its multi-layered structure of governmental powers. As previously introduced, China implemented a series of policies, decentralizing political and fiscal decision-makings in the 1980s. Such decentralizations have created many problems regarding the central-local relationship, as a number of existing literature have illustrated. For example, Yang (1997) and Young (2000) find that fiscal decentralization fragmented the national market, encouraged local protectionism, induced duplicate investments; Lorentzen, Landry, and Yasuda (2014) show that large local industrial companies in China used to stand in the way of local governments who wanted to implement environmental policies; Mattingly (2015) argues that local elites in China engaged in maximizing self-interests by using their influence to collect rents and confiscate property; Shen and Zou (2008) uncovers huge regional disparities in economic prosperity and poverty distribution due to decentralization, etc.

Aware of the dangers and problems of decentralization, since 1990s China's central authorities began to implement a series of measures to take back controls over a wide range of local affairs, from the establishment of a new tax sharing system and withdrawing a significant portion of local fiscal incomes to reasserting the prerogative to appoint top provincial and local officials, effectively re-configurating the central-local relations.[427] Over the years, China continues to centralize their political systems in order to correct "local protectionism", and its "rule of law" reforms and efforts for judicial professionalization should be understood under such circumstances as the central leadership's political strategy to retain control over local judicial affairs while also strengthening their oversight on local state agents, as some scholars point out, "the CCP announced a 'rule-of-law' reform package in 2014 to centralize the political and fiscal management of the judicial system, which has been blamed for protection

[427] See, e.g., Angela Fraschini, Fiscal Federalism in Big Developing Countries: China and India, Jan 2006.

local vested interests".[428]

The current professionalization reform in China reinforces the idea of political centralization through unifying the local court administrative systems and transferring power of control over personnel and finance from the local level to the provincial level. As the SPC's working report in 2017 states, one of crucial goals of the ongoing judicial reform is to "implement the unified management of courts' personnel, finance and materials at the sub-provincial levels in accordance with the unified deployment of the central authorities".[429] By the time of the report, it is said that "the unified management system had already been implemented in 21 provinces, in which the court personnel at basic and intermediate courts are managed uniformly at the provincial level and the presidents of these courts are appointed and managed by the provincial party committees (organizational departments of the party); whereas in 13 provinces, the finance and material of local courts had been uniformly managed at the provincial level, and the funding support and salaries are enhanced in several local courts."[430]

So, the problem of political centralization is that it creates another paradox for the judicial power in terms of some normative assumptions associated with the idea of judicial professionalization. Working in the context of centralized political leadership in authoritarian regimes, Chinese courts are vulnerable and weak institutions who are "scarcely able to serve as the last bastion for upholding rights when the rest of the constitutional order had been marginalized".[431] As a matter of fact, this means that projects of judicial professionalization are ushered by the central authority as a component of its rulership strategy (Peerenboom 2002), and when judicial professionalization is combined with political centralization and strengthened central control, the functions of the courts are further contracted, rather than expanded, whereas the power and political status of the judicial power are further weakened, rather than strengthened, as we would normatively expect.

A reflection of this paradox is another reform policy also implemented during the current judicial reform, i.e., the establishment of the "circuit courts" of the Supreme People's Courts. In accordance with the new five-year reform plan, the SPC established its first circuit court in Shenzhen on Jan 28 2015, which is tasked with hearing trials across the country so as to provide easy accesses to the highest court to

[428] Yuhua Wang, Relative Capture in the Judiciary: Evidence from Corporate Lawsuits in China, at pp 3, available at: https://www.law.berkeley.edu/wp-content/uploads/2016/10/Paper-Wang.pdf.

[429] See, the Working Report of the SPC, 2017-, available at: http://www.court.gov.cn/zixun-xiangqing-66802.html.

[430] I.d.

[431] Tom Ginsburg, Rule by Law, at pp. 3.

citizens while helping release the burden and caseload on the supreme people's court.[432] Following this and up till now, there are six SPC circuit courts now and they are established in Guangdong, Liaoning, Jiangsu, Henan, Chongqing, and Shaanxi provinces respectively.[433]

As two sides of the same coin, the circuit courts of the SPC produces two effects: on the one hand, they expand the jurisdiction of the SPC to hear cases in almost the entire country, thereby facilitating citizens in the country to file claims to the top court, a reinforcement of the court's function in "social control", as previously mentioned. The six circuits have been put into practice and already heard a total of 11751 cases by Sep, 2017, and from 2017 Jan to Sep, the cases that the circuit courts dealt with accounted for 45.4% of the court's total caseloads.[434]

But on the other hand, the new circuit tribunals are also deployed as an extension of the central authrotity's control into local judicial affairs, and although not made explicitly, they are meant to ensure that the central authority regains a tighter control over the judicial power. As the SPC itself states, the core idea is to establish a new, cross-jurisdictional litigation system so that litigations are no longer subject to local biases, or the advantages and disadvantages produced by the distinction between the so-called "host vis-à-vis guest forums"[435] To do this, a notable feature of the circuit courts of the supreme people's courts is that they are not "straddled" by provincial boundaries and "can assume jurisdiction over disputes with national political and economic weight in several adjacent provinces" while making decisions that are "final and binding and carry the same weight as a ruling by the Supreme Court".[436]

As this policy shows, in addition to the party-state's focus on satisfying the social demands for resolving disputes and addressing social grievances, these judicial reforms do not necessarily lead to "a trend toward an increased role for the courts in comparison to other institutions".[437] The establishment of the circuit courts provides a

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[432] See, Circuit Courts in China, CHINA DAILY, available at: http://www.chinadaily.com.cn/china/2017chinacourt/index.html.

[433] See, China: Supreme People's Court Adds Four More Circuit Courts, available at: https://www.loc.gov/law/foreign-news/article/china-supreme-peoples-court-adds-four-more-circuit-courts/.

[434] See, Working Report of the SPC 2017.

[435] See, Working Report of the SPC 2017.

[436] See, George G. Chen, China's New Circuit Tribunals Allow Tighter Control of Judicial, March 6th 2017, OXFORD HUMAN RIGHTS HUB, available at: http://ohrh.law.ox.ac.uk/chinas-new-circuit-tribunals-allow-tighter-control-of-judiciary/.

[437] Liebman, at pp. 10.

further evidence that by strengthening the courts' ability to solve increasing number of social disputes, the legalization and professionalization are closely associated with the central leadership's intention of centralizing power and control over local judiciary.[438]

In the same vein, one core function of other measures aiming at enhancing the professionalization of the court administration system is the also providing various mechanisms for central control. Among the sixteen meetings of the central comprehensively deepening reforms commission ("CCDRC") since 2015, eleven were congenial to judicial reforms, and these meetings produced proposals for carrying out a series of reforms to professionalize the court administration sytem in China, including the distinguishing the order of judicial posts from those held by other kinds of public servants and unifying the salaries of judges nationally,[439] recording, reporting and holding accountable cadres and officials intervening judicial activities and interfering the handling of specific cases,[440] etc.

All of these measures have a common element of centralization of power and control and they provide parallel instruments that can be used to accomplish this goal- for example, setting up a unified salary system for judges and prosecutors as well as adding a new component to the officials' accountability apparatus. Centralizing political control is thus a crucial aspect underlying the overall professionalization reforms, whereas the only variable that matters is the scope of political control. Judicial professionalization becomes a common technique of the central authority to exercise control over the behavior of local judges and cadres by channeling different types of behavior and matters to different systems of unified administration, aka, centralized control.[441]

C. Judicial Professionalization as a Mechanism of Performance Management:

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[438] See, Bin Liang, THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT, CENTRALIZATION OF POWER AND RATIONALIZATION OF THE LEGAL SYSTEM (2007), chapter 3.

[439] On Sep 15, 2015, the sixteenth meeting of the Central Comprehensively Deepening Reforms Commission issued the Opinions on Pioneering Reforms on Establishing a Separate Order of Post for Judges and Prosecutors as well as the Opinions on Reforming the Salaries of Judges and Prosecutors.

[440] On February 27, 2015, the tenth meeting of the CCDRC issued the Opinions on Recording, Reporting, and Holding Accountable Cadres and Officials Intervening in Judicial Activities and Interfering with Specific Cases.

[441] A similar insight is offered by Toharia (1975), who argues that by establishing specialized security courts, rulers of the authoritarian regimes sought to exercise control over the scope of judicial power and limit their involvement.

Based on the interviews, a clear trend can be identified: local judges in Xi'an generally think the SSNJ reform will not enhance the performance of local courts as much as it declares it will do, and this is because: (1) the SSNJ reform does not solve many fundamental problems that local courts confront, including unreasonable salaries paid to judges, lack of judicial authority, unreasonably heavy workload, and so on; (2) the SSNJ not only discourages young judges, but also tends to aggravate the problem of contradiction between the heavy caseload and insufficient number of trial judges, despite the official rhetoric saying the conflict would be eliminated by the SSNJ reform; and (3) many judges think the kind of meritocratic judiciary, which the SSNJ is aimed at creating, is incompatible with local needs.

Overall, the situation presented by the interview data suggests that the pre-reform reactions of local judges to the up-coming SSNJ reform are not positive, and judges' skepticisms about the potential effects of the reform are not only due to concerns about their own well-beings (e.g., loss of employment, heightened pressure, and greater responsibilities), but also due to concerns about the efficiency of the courts (less capable judges vis-à-vis increasing number of cases). And since the state-mandated SSNJ reform is not seen by local courts as a means of improving their performance, but merely as a way of maintaining their legitimacy (i.e., enforcing the policies made by central authorities), local courts tend to carry out activities to mitigate the potential undesirable outcomes that they perceive. Therefore, at least during the initial period of institutionalizing the SSNJ reform, there might be a gap between the actual activities of local courts and the formal structures that they declare to adopt.

1） Reform, Career Choice, and Salary

The incentive effects of public agents' compensation is a hotly debated issue among economic scholars. As for courts, existing legal theories generally argue that high salary is key to maintaining the quality of judges' performance and independence. As a saying of Justice Samuel A. Alito goes, "the real cost of not granting adequate salaries to our federal judges must be calculated, not in today's dollars, but by the drain on our judiciary that will be caused by the loss of qualified, seasoned judges. … A new judge cannot be expected to be as efficient as an experienced judge." For better or for worse, the level of wages affects judges' career choice in a very down-to-earth way, and judges' leaving the bench to enter the private practice of law or other better paid governmental positions is not uncommon.

Xi'an City is located in an area in West China, which has a modest economy.

The financial resources of courts, like other governmental branches, depends on the net fiscal inflows from the upper levels. Currently, the local governments at similar levels control the financial, material, and personnel resources of local courts; however, after the judicial reform takes place, the power of managing these resources will be transferred to the high court at the provincial level, the so-called "unified management system" ("tong yi guan li"). What effect this change will have on the level of salaries, is still unknown, although rumors claim that judges' salaries will be raised by 43% in the near future.

Nonetheless, most judges interviewed express concerns that they would have to come up with different career plans for the future, if they are still paid poorly. While it's still not clear if judges' salaries will increase after the reform, local judges nevertheless are likely to face greater pressure, due to the newly established "lifetime responsibility system" ("zhong shen ze ren zhi"), "mistaken case investigation system" ("cuo an zhui jiu zhi"), and the "case-filing registration system" ("li an deng ji zhi") . As a result, many of incumbent judges feel increasingly stressed by their work, and if they are not rewarded by a pay rise, they will very likely choose to leave the bench. Apart from concerns about salaries, most judges think that many young judges might resign, if their employment is jeopardized by the SSNJ reform. An important factor that makes young judges change careers is that the SSNJ reform will downside the local judicial community by re-evaluating incumbent judges based on, among other things, their trial experiences. Therefore, young judges are most threatened with losing their current positions.

Judge C1 is a senior male judge with extensive trial experience. He explains the factors that may drive him to change his career: "As a judge, I'm certainly very concerned about things going on in this reform, because it affects our personal choices, like whether to leave or stay, and whether to continue to be a judge or to become a lawyer. Also, I care about if things will really change after the reform, including social welfare, salaries, who gets to leave the courts, how to decide cases in the future, and so on. For example, there are ninety-one judges in our court now, but after the reform, only sixty can stay while thirty-one will be removed from the judgeship."

According to Judge C1, the SSNJ reform particularly influences young judges' career choice. "Many young judges will lose their judgeship, because after all they are still young and lack sufficient experience. But, from their perspective, they will be turned from a judge into a non-judge, while their work will probably stay the same. There will be a huge mental gap for them, so some of them, mostly from 30-32 years old, are considering leaving." He adds that it's always been hard to raise judges'

wages, since other governmental departments thought it's unfair, and after the reform is implemented this time, "the vertical management system (i.e., the high court of Shaan'xi province will manage the payroll system of intermediate and basic courts, not the local government) will make no difference to us in terms of the amount of salaries that are paid to us. Even if our wages were really raised, say by 43% according to the rumors, it only means we could get an increase of something like RMB1,300 to 1,400 (around US$220) at most".

Judge Y1 is a female judge with six years' experience. She used to work in the administration office of the court, taking charge of information and propaganda work for four years, before she transferred to the civil tribunal to become a judge and to hear and decide cases. She says if she cannot be a judge anymore, she'd like to go back to the administration office. "Actually, it's better to work in the administration office in the sense that you're not under high pressure and you can get relatively good pay there. For judges, we are always busy winding up unsettled cases and they are endless, but sometimes we're not even paid as well as the administrative personnel in the court. I'm married, and I have a kid. So, going back to the administration office is a good deal for me. Now, I'm paid RMB 4,000 (around US$600) per month, and I will probably continue to receive the same amount. It doesn't matter if it's the High Court of Shaan'xi Province who pays me."

Judge Y2 is a male judge with excellent trial experience. He reveals that since judges used to be paid according to China's administrative ranks, just as other civil servants, policies restraining government spending also affect their salaries. For example, before 2013, judges working in their court could get around RMB120,000 (around US$18,540) a year, including salary and additional bonus, (e.g., year-end bonus, rewards for those having settled a large number of cases, and some royalties of litigation fees); but, after the "Eight Provisions" ("ba xiang gui ding") were put into force, they stopped getting bonuses and the average income of a judge per year has been reduced to around RMB 50,000 (around US$7,726). And he doubts whether after the SSNJ reform takes place their salaries would really be substantially increased to a satisfactory level. Also, "as a man, after I got married, I have been constantly thinking if I should leave the court to earn more money to support my family", and he says, "there is an associate chief judge in our court, who resigned recently. Now, she's a lawyer and she looks great and happy."

2) Increased Workload and Responsibilities

The reform of establishing the "case-filing registration system" has had an instant effect of dramatically increasing the number of cases filed in local courts.

According to the interview data, in many district courts in Xi'an, the number of cases filed in the first half of 2015 was already equal to the total amount of filed cases in 2014. Apart from this, the newly proposed "lifelong responsibility system" has generated fear among local judges, who are constantly struggling with endless unsettled cases. Under such high pressure, mistakes can be easily made. Moreover, many of them reveal that in cases where they receive instructions from court leaders or other officials, such cases are not decided completely based on their own deliberation; therefore, the "lifelong responsibility system" makes judges feel unreasonably stressed. Although in order to eliminate such a situation, the reform measures require local courts to register in the judgements the names of the leaders and officials who have taken an interest in particular cases ("ling dao gan bu da zhao hu deng ji zhi") , judges doubt that such problems will be eliminated. Many of them think officials would be less likely to intervene, but their interference would not be eliminated completely, and will probably take place in disguised forms.

Among the fifteen judges interviewed, almost all of them reported that both the heavy workload and increased responsibility make their work more difficult. First of all, although the claim settlement rate ("jie an lv") varies among different courts, the caseloads are generally very heavy among local courts. Judges always face a large number of unsettled cases, and the claim settlement rate of individual judges remains a key performance evaluation indicator. So, most of them are worried that enforcing the SSNJ reform will worsen their situation, not only because the number of trial judges will be reduced, but also because after the new "case-filing registration system" has swelled the caseload of the courts.

Secondly, judges often have to undertake many non-trial tasks, despite the fact that they are constantly striving to settle more cases, such as conducting mandated research, doing trivial clerical works by themselves (e.g., printing, scanning, and drafting), and occasionally, serving the case acceptance notices and other notices as well. However, they are generally skeptical that the SSNJ reform will reduce the unnecessary burdens that have long been imposed upon them.

Thirdly, the SSNJ reform emphasizes the principle of independent adjudication, which also will increase judges' accountability by holding judges accountable for life for the cases that they decide. As such, many interviewees expressed a fear to conduct independent trials, given the increased responsibility.

Judge Y3 reveals that each judge in his court handled 200-300 cases in 2014. However, he says there're not enough judges to handle all cases filed in their court, especially given the fact that the number of cases filed in the court is growing rapidly

after “the case-filing registration system” was put into effect. “Last year, our court had a huge backlog, nearly 6,000 unsettled cases. As of June this year, we’ve already got 10,000 newly-filed cases. By 8:30 every morning, people have already stood in long lines outside the case-filing tribunal, waiting to register their filings. Starting recently, we ask people to draw lots to determine the filing order, and after the eightieth case is filed, we stop registering any more cases that day. In such way, we try to prevent the number of case-filings from skyrocketing”.

Similarly, Judge W1 says “unlike District Court Y, we don’t ask people to draw lots. So, we register every case filed to us. We have been super busy lately, especially last week, when each one of us had to deal with thirty cases. Caseload had grown by 20% since 2013 to 2014. To make things worse, we used to have ten judges in our tribunal, but a former judge in my tribunal resigned this year, another judge has taken sick leave, and one judge has been temporarily transferred to another site; all of them left their work to the rest of us. Last year, I dealt with 195 cases in total; but as of early June this year, I’ve got 203 new cases. The total number of cases in my tribunal has doubled this year. And there is an upper limit to the backlog, which means we have to finish most cases by the end of year. So, now I’ve made up my mind to dismiss the cases, which I can’t come to a judgment.” Judge W2 adds, most of judges in their court always have to meet with litigants during the daytime, and each judge has to hear at least ten cases per week, so they usually draft judicial opinions (10–15 opinions per month) after work or on weekends. This means working extra hours is very common.

Judge W3 describes how difficult it is to deal with some litigants: “there are people who won’t cooperate with judges. Some people bring cases to the court before they get all the necessary evidence. I’ve told one of the litigants to make up for the missing evidence. When he couldn’t get it, he came to me again and accused me of deliberately delaying hearing his case. Then I suggested he agree to mediate, but the mediation failed, so I asked him again to get the evidence so that we could hear his case. Angry with the result, he filed a complaint against me with the president of the court for deliberately making things difficult for him and preventing his case from getting heard. Although I won’t be punished for his complaint, because I didn’t do anything wrong, the frequency of such disrespect has made me really upset about my work.”

According to Judge I1, the “case-filing registration system” became effective in 2015, and since then, the number of cases filed in their tribunal has increased sharply; however, there are some other tribunals within the Intermediate Court that handle even more cases. He says, “last year, we received a total of 1,400 cases, but up

until now (i.e., June 2015), we've already had 1,000 cases this year." Judge I2 adds, "there's a serious conflict now between the large number of cases filed and the insufficient number of judges we have. Based on my observation, in our tribunal, each of the six judges has to handle 100 cases each year, and there is a time limit of six months for each case to be settled. It's extremely unreasonable, because we have too much work to do every day, like hearing cases, drafting opinions. Cases we've got here are usually more complex than what the basic courts get, and it's hard for us to settle each case within six months. We're lucky, though, because our court leaders are nice and don't push us too much."

Judge I3 is a senior judge in his fifties, and he told us, "sometimes, we don't even have enough clerks. Many of them resign to earn more money. Now I'm already over fifty-years old, I work very hard, but I earn just 5,000 each month, including other subsidies. Young people can choose to resign, but I don't have that option, because I'm too old to start doing other things." Judge I4 adds, "we don't have enough time to spend on each case. Usually, I have to handle two cases in the morning, and two in the afternoon. When I'm busy, I don't even have the time to fully elaborate on contract provisions in my verdict. It's hard to become a judge when you are a graduating student, but once young people become judges, they begin to struggle with whether or not to leave the bench."

Besides dealing with cases, however, judges sometimes have to handle other business in the court as well. For example, Judge Y4, who is a young female judge working in the economic tribunal, complains that she's having trouble with fulfilling the mandated task of doing research: "each judge has many research tasks, but we just don't have time. Some of the research is relevant to our daily work, while some is not. This year, we were all assigned to do criminal law-related research, a field I am not very familiar with, so our chief judge assigned it to others." Moreover, some basic courts have relatively poorer infrastructure, and judges often have to handle everything by themselves. According to Judge C1, in the district court, the common practice is to assign each judge with one clerk ("yi shen yi shu") and several judges usually share one or more assistants; however, due to a lack of judicial assistants in the dispatched tribunal, he not only decides cases, but also undertakes all the accessory works by himself: "I have one clerk. I hear cases, and he take notes for me. But that's all he does. I have to do everything else by myself, like delivering cases, scanning files, and even binding files, because we don't have assistants."

Furthermore, based on the interviews, the SSNJ reform doesn't seem to be able to mitigate these long existing problems, but only seems to worsen the situation by imposing too much responsibility upon judges. Judge Y5 says, "after the reform, we

will feel more stressed, not only because the work is tiring, but also because we have to undertake more responsibility. The 'lifelong responsibility system' requires judges to be responsible for all cases that they decide for a lifetime, which puts judges under extreme pressure, because sometimes they can't determine the outcome of certain cases. Also, after the SSNJ reform, the court's heads will surely become judges, but they are always very busy with meetings and other administrative work during the day, so they will probably keep asking us to do most of the trial work for them. Anyway, I don't think things will get any better."

Judge Y6 told us, many judges have already signed, using fingerprints, "the letter of lifetime commitment" ("zhong shen cheng nuo shu"), agreeing to hold themselves accountable to the cases that they undertook for a lifetime. "We used to share the responsibility, if there were mistakes in our decisions, and minor mistakes didn't affect our job", Judge I5 explains, "now, however, if there appears to be any error in a case, the highest provincial court will send the case back to us; the court, the presiding judge, as well as the collegial panel will have to discuss together whether the error is factual or legal, and then decide whether the judge and the panel should be held responsible for it. The pressure is extremely intense, because sometimes we're very busy, which naturally enhances the possibility of making mistakes."

Because of the greater responsibilities that the new policies have imposed on judges, many judges in the interviews, especially young female judges, told us they didn't want to be judges anymore, after the SSNJ reform is put into force. For example, W1 says, "I prefer to be an assistant. On the one hand, I'm not confident enough to be judging to independently handle cases. But as an assistant, I won't be held responsible for the cases that I decide. I will feel much relieved and less stressed. On the other hand, if I can assist a good and experienced judge, it's good for me to learn more trial experience from her. Many judges now have a similar mentality."

3) Limits of Reform as a Means of Improvement, Local Legal and Organizational Environment, and Strategic Activities of Local Courts

As described above, when asked about the prospect of the SSNJ reform, almost every judge was not optimistic that the reform would actually improve the situation of the local courts; also, some local courts in Xi'an have already come up with countermeasures to buffer the potentially undesirable effects that they perceive of the SSNJ reform. Such activities carried out by the courts during the pre-reform period might create a gap between the courts' actual activities and the formal structures to be institutionalized in the reform.

First of all, most judges don't agree with the proposition that the SSNJ reform will be an effective means of improving the current local justice system, and they tend to think that local courts embrace the reform merely as a way of carrying out state-mandated policies. Many fundamental problems of the local courts, such as low esteem, lack of authority, and the heavy caseload vis-à-vis a shortage of capable judges, will remain unsolved. Secondly, most judges believe some of the reform measures are in conflict with the local social and legal environment, in which the courts are embedded. Lastly, the interviews revealed that some local court leaders have already come up with informal plans before the pilot reform takes place in their courts, so that they can eliminate some potential outcomes that they do not want to face. From the perspective of institutionalization, at least during the initial adoption period, these countermeasures tend to create a gap between the courts' ongoing activities and the formal structures to be institutionalized.

Having described how pessimistic the Xi'an judges are about the upcoming reform, it's understandable that most of them don't regard the SNS reform primarily as a means of improvement; instead, for them, embracing the reform means no more than legitimizing the courts by adopting state-mandated policies. Judge C1 thinks that court leaders will not spend much time deciding cases, even after the SSNJ reform takes place, and that "the SSNJ reform is just a formality, the court leaders will not be removed from the judgeship, but they will still be busy with their administrative works even after the SSNJ is in effect. At that time, they will ask another judge, or the presiding judge to handle their cases, while the only thing that they do is sign their names on the judicial opinions. Nothing will change, just formality" (emphasis added).

Judge Y1 adds, "for us, the reform is mainly a lip service. We will still be paid very poorly, we will still be subject to other governmental departments, and we will never be respected by the rank and file. Also, judges will still face many difficulties in their work. The SNS reform seems to be nothing but a means of dividing current judges into a different pecking order, in which some judges are paid relatively more and some are paid relatively less". Judge Y4 reflects upon the SSNJ reform by saying, "after all, the leadership of our province is not particularly concerned about enhancing the overall conditions of the justice system, and they don't care if judges are paid poorly. Only when the reform involves their interests, will they do something. They will ask the local courts to adopt it only because it is required by the central authority". Judge I2 offered another example, "One of the reform policies is to record the leaders or officials who have taken an interest in certain cases in judicial opinions. The aim is to deter the officials from intervening in judicial decisions. The amount of intervention is indeed smaller now than many of us used to experience; however, actual intervention still exists, albeit in different forms. Now, only officials at, or above, the

vice bureau level dare to command us to participate in the coordination meeting ("xie tiao hui"). After the reform is put into force, we will very likely still be pressured by interventions from the higher-level officials occasionally."

Moreover, based on the feedback of judges, it's been observed that in the local conditions of Xi'an some of the reform policies simply won't work well. Therefore, Xi'an first needs to cultivate the conditions for the new order that is envisioned by the SNS reform. Xi'an, to some extent, still remains "a society of human relationships" ("ren qing she hui"), as Judge C1 says, "I'm working in the suburban area of the city. The people I deal with everyday represent the situation that courts at the very basic level face, who are nonetheless the object of this reform. Here, most cases that I handle are not complicated, but the difficult part for me lies in too many extralegal factors. For example, people threaten judges, cursing and even hitting judges, repeatedly petitioning for settled cases, sometimes engaging in fighting and suicides. Not all of such situations occur frequently, but we spend a lot of time dealing with them. We have a saying, 'only the ones who can always balance each side are good judges' ("bai de ping cai shi shui ping")".

According to Judge C1, so far the suburban and rural society of China doesn't need the kind of elite judges that the SSNJ reform aims to create: "in my court, senior judges are already deeply rooted in the local society, and they know how to solve problems skillfully, instead of mechanically applying the law. On the contrary, some young and well-educated judges simply couldn't communicate with the litigants, because they don't understand or speak the local dialect; when dealing with a dispute over a real estate, some of them couldn't even tell the north from the south, which makes them untrustworthy in the eyes of local people". As a result, Judge C1 thinks the SSNJ reform will probably exacerbate some of the problems in lower level courts, by forcing capable judges to leave: "the kind of judges that people need here is similar to the so-called 'countryside judges'".

Unlike Judge C1, Judge W1 thinks that the problem of the SSNJ reform for her court is that the number of judges that the court has now might be smaller than the quota assigned to the court according to the SSNJ policies. Moreover, Judge Y6 reveals that local people don't respect judges very much: "there was an occasion, in which I went to the power supply bureau to do an investigation, and I was shut outside of the door for nearly fifty minutes. I told them I was dispatched by the district court to do some investigation and I was a judge, but they yelled at me to go away, otherwise they'd unleash their dog on me. I got very angry at that time. And now, I don't believe that carrying out the SSNJ reform will solve this kind of problem". Judge I3 talks about the idea of setting up a judicial selection committee ("lin xuan

wei yuan hui") on the provincial level, which he thinks is unrealistic: "It will be just a formality. There are more than 10,000 judges in Shaanxi Province. It's impossible for a committee to know everyone very well. According to the SNS policy, the committee has to determine in minutes who should be among the 6,000 – 7,000 judges that stay in their current positions, and who should be sent off from their current positions. It seems really unrealistic" (emphasis added).

4. The Case of PJSCs

The foregoing analysis facilitates us to derive some observations of comparison with the case of the PJSCs, in particular how does the relationship between judicial professionalization and China's particular state-centered, centrally-planned approach to market integration affects and explains the specific functioning and operation of the PJSCs in China. I focus on the organizational, professional and political features of the PJSCs i.e., 1) their structurally independent but politically centralized organizational arrangements, as evidenced by their institutional positions and compositions, 2) how they interpret professional standards and which factors influence their assessments over judicial candidates, and 3) the political implications of their activities and their limited political significance in changing the landscape of the judicial power in general.

A key factor facilitating the establishment and functioning of the 255 TFEU panel is the consensus-building activities and inter-judicial dialogue and communications in Europe.[442] The practice of the PJSCs is strikingly different. The PJSCs are established in accordance with the decisions of the central deepening reform group in 2014, as a way of enhancing judicial professionalization in local courts. The PJSCs, therefore, are political results of the central decision-making, and in essence are a different kind of state agent, which is structurally independent from local governments but are motivated to excise central control over local judicial administration issues.

Organizationally speaking, the PJSCs are established at the provincial levels and tasked with scrutinizing the professional competence of judicial candidates for local people's courts. They thus have quite independent institutional position and are formally separated from other government branches and party organs. Such an institutional arrangement enables the PJSCs to carry out independent assessments over judicial candidates without being influenced by political considerations that might explain the decisions of relevant government and party departments regarding judicial

[442] For discussions on this point, see, e.g., Carrubba & Murrah, Stone Sweet 2000, etc.

selections in the past.[443] For example, court officers used to be automatically appointed to the bench because of their political status and connections to the local authorities; however, the Shanghai PJSC uses the same standards to assess the professional qualities of both junior judges and court officers who seek to be appointed.[444]

A closer look at the way that the PJSCs are composed, however, reflects a less progressive reality. According to the draft amendment to the Judges' Law, the PJSCs shall be composed by two kinds of people, "professional representatives", i.e., judicial representatives and senior legal practitioners and scholars, and "social representatives", who are mainly relevant governmental officials and heads of the courts and procuratorate; and the draft law stipulates that judicial representatives shall constitute no less than one third of the entire membership of the PJSCs.[445] Such composition reflects that the PJSCs maintain a political tie with the government and central decision-makers, because most of the social representatives are relevant government officials who are responsible for personnel and cadre management.

Some senior court officials explain that the PJSCs present a different type of judicial councils because judicial representatives are not the majority of the membership.[446] This is because the composition of the judicial councils should "both respect judicial self-governance and reflects value diversification", "which is mainly embodied by the diversification of the identities and sources of the committee members", and the committee members "shall include not only judges but also social and legal representatives".[447] "If dominated entirely by judges", He Fan says, the judicial council would "become an internal division of the courts", essentially leading to a problematic kind of "judicial monopoly".[448]

Also, in terms of professional practices, the PJSCs apply the concept "judicial professionalism" in a narrower, more specific and policy-oriented manner. For example, during the first round of assessments of the Shanghai PJSC, a major factor that the committee would consider was the type and lengthen of trial experience of

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[443] Interview with Shen Guoming, 2015-07-20.

[444] Interview with Shen Guoming, 2015-07-20.

[445] China About to Amend Judges' Law, Claim to Establish Judicial Selection Committees, XINHUA NEWS, 2017-12-23, available at: http://www.npc.gov.cn/npc/cwhhy/12jcwh/2017-12/23/content_2034477.htm.

[446] He Fan, Five Key Words of the Judicial Selection Committees ("法官遴选委员会的五个关键词"), available at: http://law.cnki.net/yfzg/wenxian/renwu/05/法官遴选委员会的五个关键词.pdf.

[447] I.d.

[448] I.d.

judicial candidates, i.e., people who "actually participated in trial hearings" in the past were more likely to be selected whereas people who used to be responsible for extrajudicial matters would not be appointed.[449] As such, judicial assistants and other civil servants must also "take part in evaluations, exams and assessments in order to be qualified as trial judges", and "so do court officials who had not heard trial cases for more than five years".[450] The fact that the PJSCs inserted policy stipulations into the interpretation of professional qualifications of judicial candidates distinguishes the PJSCs from the 255 TFEU panel.

In addition, the PJSCs take into consideration a variety of factors when evaluating the professional candidates' qualifications, and factors like case completion rate and the rate of mistaken cases are especially important. Such factors are in accordance with the concept of "judicial accountability" that is at the center of the reform policies made by the central leadership. As a result, a major effect of the functioning of the PJSCs, together with other measures taken to reform the judicial selection process, is heightened pressures and increased workload on trial judges. In order to be selected and promoted, they must work for longer time and with more efficiency; also, they must be careful in making legal decisions in order to avoid misjudgments. Together the slight increase in judges' salaries, such mechanisms are effectively placing trial judges in an efficiency-oriented performance management system; judges are civil servants while managed in a business manner.

Moreover, viewed politically, although organizationally independent, the PJSCs are nevertheless political bodies that are created according to central policies and function as an intermediator that facilitates central control over local cadres and affairs. Due to such political identity, the PJSCs rarely issues far-reaching opinions but make purposive assessments over judicial candidates by adhering to the policy orientations of the central leadership. For example, since the current policy emphasis is on enhancing the efficiency and accountability of local courts by reducing the number of trial judges, classifying them into different rankings, as well as by increasing the accountability of trial judges, the PJSCs tend to assess the professional qualifications of judicial candidates in accordance with the purposes of such policy agenda.

Given the fact that the PJSCs operation in accordance with central planning, their assessments over judicial candidates are likely to have legally binding effects. As an official of the Shanghai judicial selection committee says, "we changed 9.2% of the

[449] Interview with Shen Guoming, 2015-07-20.
[450] Interview with Shen Guoming, 2015-07-20.

rankings submitted from the basic and intermediate courts, meaning we changed the rankings of 40 out of 152 judicial candidates. We make downright decisions and our decisions are therefore very credible", and according to him, the decision-making of the PJSCs is fully supported by local government authorities, "Heads of the Shanghai Politics and Law Committee told us, you can interview judicial candidates and then make independent rankings".[451]

Similarly, the decisions made by the PJSCs are less provocative and politically irrelevant. This marks a sharp contrast with the 255 TFEU panel, whose opinions have produced far-reaching influences on national selection procedures and in some way seek to change the overall status of the judicial power. The PJSCs' opinions might affect the employment, rankings and promotion of individual judges, but they don't have the same political significance that might elevate the political status and influences of judges and they could hardly change the structural positions of the judicial power in the overall political system.

5. Conclusions

A deeper investigation of the political and social foundations of the two judicial councils, therefore, reveals two patterns of configurations of the judicial councils as well as the underlying relationship between market integration and judicial professionalization. The two judicial councils, i.e., the 255 TFEU panel and the PJSCs, play similar role in terms of professional scrutiny but have produced fundamentally different political implications, when viewed from the deeper political underpinnings of the two political systems. A cursory analysis of the PJSCs provides some complementary factors in addition to the ones provided by their European counterparts, such as the diversification of the membership and the fact that they tend to emphasize judicial accountabilities. These factors might provide different angles and some insights to view the difficulties faced by their European counterparts today.

[451] Interview with Shen Guoming, 2015-07-20.