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Soft law with a hard impact in local China: The role of judicial activism in reducing rural–urban discrimination during traffic casualty litigation

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ABSTRACT

China's *hukou* (household registration) system has undergone reforms aimed at addressing the large rural–urban divide. Importantly, it no longer distinguishes between agricultural and nonagricultural *hukou*. However, this reform is widely interpreted as being 'soft' and having little impact on reducing the rural–urban divide due to its symbolic nature. Still, this study takes a legal perspective and conceptualizes the reform as being in the form of soft law. It then applies the theory of judicial activism and proposes that soft law can be actively utilized by local courts in China as a means of reducing the rural–urban divide. Based on a novel dataset of court judgements in traffic dispute lawsuits between 2005 and 2019, this study shows that many local courts, especially in Guizhou, Zhejiang, and Jiangsu Province, have generated a substantial impact of the soft *hukou* reform: they invoked this reform as the reason for their decision to grant rural traffic casualties equal personal injury compensation rights as urban residents, despite no formal legislation from the national government at the time. These findings underscore the importance of investigating judicial activism at the local level and studying how local courts can creatively utilize soft law to engage in judicial activism and reduce discrimination.

1. Introduction

China has a huge rural–urban divide not only in income, but also in education, healthcare, and many other key social welfare benefits and rights (Whyte, 2010). One key factor behind this rural–urban divide, is China's household registration system, commonly known as the *hukou* system, which restricts rural residents' access to urban social welfare benefits and rights. Indeed, the *hukou* system is widely portrayed as 'invisible walls' (Chan, 1994) or even 'a quasi apartheid pass system' (Alexander and Chan, 2004). For decades, urban residents have enjoyed privileged access to various social welfare benefits and rights, such as education, healthcare, housing, and employment opportunities (Andreas and Zhan, 2016; Chen and Fan, 2016). In contrast, rural migrant workers are often treated as inferior second-class citizens (Chan and Buckingham, 2008) deprived of equal urban-relevant rights, despite their significant contributions to the urban development. This rural–urban divide is illustrated clearly by a traffic accident back in 2005. On December 15, 2005, a loaded truck in Chongqing crushed a trishaw carrying Yuan He and her two friends to school. All three perished in the accident. Her two friends, registered as urban residents, were compensated 200,000 RMB each. Yuan He was registered as a rural resident; as a result, she was compensated only 80,000 RMB (Congressional-Executive Commission on China, 2006). This tragic incident epitomizes the unfair treatment of rural residents under the *hukou* system and the need for its reform.

The Chinese government has implemented several reforms to the *hukou* system with the aim of addressing various issues, including the rural–urban divide. Most notably, since the late 1990s, the agricultural/nonagricultural distinction has been gradually abolished in favor of a unified classification of all Chinese citizens as residents (Chan and Buckingham, 2008; State Council, 2014). However, scholars tend to perceive this reform as 'soft' and having little impact on reducing the rural–urban divide (e.g., Chan, 2019; Chan and Buckingham, 2008). Despite the change in name, rural migrant workers are still provided with significantly lower levels of protections and services than urban residents (Chan, 2019; Chan and Buckingham, 2008), leaving the underlying rural–urban divide largely unchanged. In other words, a rural resident, even if registered as a 'resident' instead of an 'agricultural resident', still belongs to the 'non-local' group and cannot access to a city's social welfare benefits and rights without obtaining the city's local *hukou* status. Ultimately, the link between *hukou* status and social welfare benefits and rights remains tight.

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Still, as will be clarified later, the 'softness' of this reform can also be understood from a legal perspective. Indeed, the *hukou* unification reform is largely based on soft law, namely rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects and also legal effects (Snyder, 1993; Ştefan, 2017). By conceptualizing the *hukou* unification reform as soft law, and by integrating the concept of soft law with the theory of judicial activism, this study helps generate new insights onto the reform's impact on China's rural–urban divide. Based on a novel dataset of 3,314 local court judgements in traffic dispute lawsuits between 2005 and 2019, this study shows how the unification of agricultural and nonagricultural *hukou* classifications has produced an unnoticed but significant impact on reducing discrimination against rural residents in China. More specifically, a large number of Primary People's Courts and Intermediate People's Courts,[2] especially in Guizhou, Jiangsu, and Zhejiang Province, have invoked the unification of *hukou* classifications as a valid reference and, on that basis, have granted an urban compensation standard to rural litigants in all 3,314 traffic dispute lawsuits. Crucially, the judges in these local courts asserted that due to the *hukou* reform, the rural–urban geographic divide is now inconsequential in determining the standard for personal injury compensation. They maintained that all residents are entitled to the same compensation standard, which is the higher standard for urban residents. This study considers this phenomenon as a unique form of judicial activism in local China, whereby judges employ soft law to reduce discrimination against rural residents, even though no formal legislation at that time granted equal personal injury compensation standards to rural and urban residents.

This study makes the following contributions. Empirically, while much research has produced valuable knowledge of the influence of the *hukou* system on rural population (Andreas and Zhan, 2016; Chan, 2019; Chan and Buckingham, 2008; Chen and Fan, 2016; Kuang and Liu, 2012; Nguyen and Locke, 2014), the legal consequences of the *hukou* system and its reform on the rural–urban divide are still poorly understood. This study provides new and important insights into the impact of the *hukou* reform on reducing discrimination against rural residents in terms of traffic injury compensation. Theoretically, this study draws on valuable insights from the concept of soft law (Cheng, 2021; Luo and Song, 2013; Snyder, 1993; Ştefan, 2017; Terpan, 2015) and integrates them with the theory of judicial activism, thus enriching the conceptualization of judicial activism and allowing it to expand beyond its previous focus on hard law (Choundhry and Hunter, 2003; Kmiec, 2004; Mathebe, 2021; Munir and Khalid, 2020; Pereira, 2022; Sathe, 2001; Terpan and Saurugger, 2019). Methodologically, this study employs the court judgements database as a way to explore judicial activism in China, thus highlighting how such databases can be helpful for investigating legal development in China (Ahl and Sprick, 2018; Liebman et al., 2020).

In addition, this study uses the Chinese case to enrich the understanding of judicial activism in two important aspects. Firstly, by invoking soft law from the party-state to reduce discrimination, the Chinese local courts demonstrate that judicial activism can be practiced beyond the reliance on hard law (most importantly in the form of constitutions), which has been well recorded in countries or regions such as the US (Lindqquist and Cross, 2009; Yung, 2011), the European Union (EU) (Terpan and Saurugger, 2019), India (Sathe, 2001), and South Africa (Mathebe, 2021). Secondly, while previous studies have shown how a certain level of judicial activism can even exist in authoritarian regimes, their focus is usually on the national level, such as the Supreme Court (Munir and Khalid, 2020; Pereira, 2022) or the Constitutional Court (Rodriguez-Garavito, 2010). In comparison, the Chinese case highlights the agency of local courts in the party-state to use their discretion and protect the rights of vulnerable groups.

The article is organized as follows. The next section introduces the *hukou* reform and the *hukou*-based personal injury compensation system in China. Then, it reviews the literature on judicial activism and its relevant debates in China. After that it presents a detailed case study of how judges reduced discrimination against rural residents by invoking the *hukou* reform. This is followed by an exploratory analysis of 3,314 court judgements in the traffic dispute lawsuits. The last section concludes and gives a few implications.

2. 'Same life, different values': The rural–urban divide in China's *hukou*-based personal injury compensation system

2.1. The abolishment of agricultural and nonagricultural hukou classifications

Since the proclamation of the Household Registration Regulation in 1958, the *hukou* system in China has been the foundation of the government's efforts at migration control and resource allocation. Specifically, access of Chinese citizens to government support services has been governed by two criteria: socio-economic eligibility and residential location (Chan and Buckingham, 2008; Chan and Zhang, 1999). The first classification differentiates a citizen into agricultural or nonagricultural *hukou*, while the second classification makes a distinction between local *hukou* and non-local *hukou* (Chan and Buckingham, 2008; Chen and Fan, 2016). Changing one's registration from one *hukou* to another used to consist of two steps, namely, changing from agricultural to nonagricultural *hukou*, and then changing from a non-local to a local *hukou* (Chan, 2019; Chan and Buckingham, 2008). Between this two-step process, the former was usually the more critical conversion and much more difficult to obtain, while the latter process would usually follow automatically (Chan, 2019). Still, while the *hukou* conversion used to be popular among rural residents in the 1990s, since the 2000s more and more rural residents have been reluctant to give up the social security that is attached to rural *hukou* status, which still grants them access to lands. Urban *hukou* status once came with guarantees to benefits such as jobs, but no longer does so, which makes *hukou* conversion a risky proposition for migrants in face of rising living expenses in cities (Andreas and Zhan, 2016; Chen and Fan, 2016; Chuang, 2015).

Historically, the administrative agricultural/nonagricultural differentiation originated from a de facto occupational division in the 1950s, when the urban residents were primarily working in the industrial sector and the rural residents were in charge of agriculture (Chan and Zhang, 1999, p. 822). Especially from the 1960s to the 1980s, nonagricultural status entitled the bearer to state-provided housing, employment, grain rations, education and access to medical care as well as other social welfare benefits, while the agricultural population was largely left on its own (Chan and Buckingham, 2008, p. 588). During this period, the central government maintained tight control over the conversion of *hukou* status from rural to urban by imposing specific quotas to each locality (Chan, 2019).

However, the Reform and Opening Up in 1978 and the followed economic development allowed more and more rural residents to make a living in the cities. Indeed, when China's export-processing industry moved into high gear in the mid-1980s and the 1990s, deployment of rural labor to the cities to supply the industry's demand became a major state strategy (Chan, 2010). Since then, millions of rural residents have become the so-called migrant workers in big cities, making a living by working in industries or services while leaving their families behind (Ye et al., 2013), but still depending on the village land when economic conditions or age made it difficult to find urban jobs (Andreas et al., 2020). The occupation-based agricultural and nonagricultural distinction thus seemed to become increasingly meaningless. At the same time, the central government stopped imposing quotas and delegated the management of the *hukou* system to local governments from the late

[2] The courts in China are divided into four levels in accordance with the descending order of powers, i.e., the Supreme People's Court, High People's Courts, Intermediate People's Courts, and Primary People's Courts. Courts at the latter three levels are collectively referred to as local courts, and this study focuses on Intermediate People's Courts and Primary People's Courts.

1980s, allowing each government to set its own criteria for the *hukou* conversion process (Chan, 2019; Chan and Buckingham, 2008). Gradually, local governments shifted their criteria distributing social welfare benefits and rights from being nonagricultural to being local, thus the agricultural and nonagricultural distinction gradually lost its actual as well as symbolic importance (Chan, 2019).

Accordingly, from the late 1990s, a few provinces started experimenting with abolishing the agricultural and nonagricultural *hukou* distinction within mostly towns and county-level cities, such as Guangdong, Zhejiang, Guangxi, Shanghai, Hebei, Henan and Jiangsu (Chan and Buckingham, 2008, p. 593). In 2005, the Ministry of Public Security stated that 11 provinces had begun or would soon begin to implement a unified urban–rural household registration system, namely removing the administrative distinction between agricultural and nonagricultural households (Chan and Buckingham, 2008, p. 594). These local experiments culminated in 2014, when the State Council abolished the distinction between agricultural and nonagricultural *hukou* nationwide (State Council, 2014). At the same time, the central government adopted a multi-tiered plan for the *hukou* reform to promote urbanization, which proposed different restrictions of *hukou* conversion for different types of cities while granting local governments much discretion over implementation. In general, cities with larger population sizes have more restrictions than smaller cities. Specifically, the so-called first-tier cities (such as Beijing, Shanghai, Guangzhou, Shenzhen) and second-tier cities (such as Chengdu, Hangzhou, Nanjing, Jinan) usually set high criteria for local *hukou* conversion, while the third-tier cities (such as Dongying, Taizhou, Jiaxing), fourth-tier cities (such as Chuzhou, Baoji, Chifeng), and even smaller cities have fewer and even no restrictions for the *hukou* conversion (Zhang et al., 2019).

As scholars have rightly pointed out, the abolishing of agricultural and nonagricultural distinction is rather nominal (Chan, 2019; Chan and Buckingham, 2008). Local governments simply shifted the *hukou* management focus from the agricultural/nonagricultural distinction to the axis of local/non-local status. Therefore, while the former distinction was abolished, the latter distinction remains intact and becomes even more significant in big cities where there are the highest level of social welfare and benefits, such as Shanghai, Beijing, and Shenzhen (Chan, 2019). Since China has a largely decentralized welfare regime, local governments, in particular the first-tier and second-tier cities with large population sizes, tend to dispense social benefits and rights for the local residents and set up protectionist barriers that exclude non-locals from claiming local social benefits (Shi, 2017). Consequently, it is evident that the unification of agricultural and nonagricultural *hukou* classifications is hardly relevant for the great majority of the migrant workers, who do not hold local *hukou* status (Chan, 2019). Reforms to the *hukou* system are merely migration management strategies for the local government to 'allow flexible movement and encourage circulation, but restrict belonging and possibilities for migrants to settle in urban areas.' (Johnson, 2017, p. 98).

In addition, the 'softness' of the *hukou* reform can also be understood from a legal perspective. More specifically, the *hukou* reform policy documents are usually in the form of legally non-binding normative documents (*guifanxing wenjian*, also known as red-headed documents, *hongtou wenjian*). Therefore, these policy documents on the *hukou* reform can be placed in the category of soft law (Luo and Song, 2013), as opposed to hard laws that have direct legal effects and take the form of laws, regulations or Supreme People's Court (SPC) legal interpretations. For instance, a court judgement from Intermediate People's Court of Liupanshui Municipal in 2016 stated clearly in a traffic dispute case that:

> *Opinions of the State Council on Further Promotion of Reform of the Household Registration System and Implementing Opinions of the People's Government of Guizhou Province on Further Promotion of Reform of the Household Registration System* are neither laws nor judicial interpretations. They shall not be used as valid legal bases. (Translated by the author)[3]

Another court judgement from Intermediate People's Court of Tongren Municipal in 2019 held a similar view on the aforementioned two party-state documents:

> Both documents are in the category of *hukou* reform measures, so they are not the legal bases for calculating personal injury compensation. At the moment, concerning the cases of personal injury compensation, one needs to apply *Tort Law of the People's Republic of China* and *Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury*. (Translated by the author)[4]

However, it is important to note that legally non-binding soft law in China can be politically binding and becomes very 'hard'. For instance, a local government leader failing to comply with a central soft law (e.g., a party mandate) may be politically sanctioned, such as being removed from a position. Still, as will be shown later, conceptualizing the *hukou* unification reform as being in the form of soft law can help generate new insights on its impact on the rural–urban divide.

2.2. The hukou-based personal injury compensation system

The previous section shows how the agricultural and nonagricultural *hukou* distinction became increasingly irrelevant and was abolished gradually during the *hukou* reform. However, this distinction remained firmly connected to the judicial system and had huge implications for rural residents' personal injury compensation rights for a long time. Since the 1980s, *General Principles of the Civil Law of the People's Republic of China* (National People's Congress, 1986) has granted citizens' rights to get personal injury compensation. Still, the needed clarification for how to calculate the compensation became only available in the early 2000s, when the SPC (2003) established two different compensation standards in its *Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury* (hereafter referred to as the SPC 2003 Interpretation). The SPC 2003 Interpretation provided clear rules for the local courts to compute the lump-sum award for loss of future income for life, which must be paid by the person (typically together with the insurance company of the person) who caused the death or injury (Chan et al., 2017). In general, the calculation of both the compensation for disability and the compensation for death should be based on 'the per capita disposable income of the urban residents or the per capita net income of the rural residents at the locality of the case-accepting court of the last year' (Supreme People's Court, 2003). Here, the locality is the provincial-level unit where a case happens. Undoubtedly, the huge income gap between rural residents and urban residents within each locality would create significant disparity in the compensation. For instance, in Sichuan Province, the per capita disposable income of urban households was 38,253 RMB in 2020, while for rural households it was only 15,929 RMB (The People's Government of Sichuan Province, 2021). Still, the SPC rationalized that, on average, rural residents are likely to earn and spend less than urban residents, thus less compensation is needed for personal injuries and is sufficient to enable them or their progeny to follow their expected life paths. Then, in the case of Yuan He, as introduced in the beginning, it is not surprising that she was granted only 80,000 RMB in compensation while her two urban

[3] This court judgement is available from China Judgements Online by searching the following case number: (2017) qian 02 minzhong 616 hao.

[4] This court judgement is available from China Judgements Online by searching the following case number: (2019) qian 06 minzhong 1423 hao.

classmates got 200,000 RMB each.

However, Yuan He's case aroused huge criticism in China as a phenomenon of 'same life, different values' (Sun, 2021). Perhaps as a response to the huge outcry, the SPC partly loosened the connection between personal injury compensation and the rural–urban *hukou* status in 2006. In a reply to the High People's Court of Yunnan Province, the First Civil Tribunal of the SPC clarified that, calculating the compensation for personal injury should take into factors besides the *hukou* status, such as the victims' domicile and habitual residence (Supreme People's Court, 2006). Since then, many Provincial High Courts have issued local judicial guidelines permitting a more flexible interpretation of the residence status of the claimant. According to those guidelines, rural residents who have already left their original registered locations, and have been continuously working, studying or living in the urban areas for a period of time (normally at least one year) before the trial is held, may be considered as having urban status and be compensated based on the urban income standard (Chan et al., 2017). However, these guidelines were non-binding for local courts. Moreover, for those rural residents who did not meet the requirements, or those who could not provide evidence for such requirements, their personal injury compensation was still calculated based on the much lower rural income standard. Therefore, the fundamental link between the rural–urban *hukou* status and personal injury compensation remained intact.

While the Chinese government has abolished the agricultural and nonagricultural *hukou* distinctions administratively, the rural–urban divide remained in the judiciary in terms of personal injury compensation for a long time. Indeed, it was not until the late 2019 when the SPC started to experiment with unifying the compensation standards for rural and urban residents in a few provinces (Sun, 2021). The experimentation eventually led to a decision from the SPC to revise its 2003 Interpretation and grant rural residents the same compensation standard as urban residents in early 2022 (Supreme People's Court, 2022).

However, as this study is about to show, many local courts in China have been aware of this problem even before the SPC began the experimentation. Instead of following the SPC 2003 Interpretation, judges in those courts have invoked the abolishment of agricultural and nonagricultural *hukou* classifications as a valid reference to grant rural residents the same personal injury compensation as urban residents. Before presenting a detailed case study and some interesting exploratory statistics from traffic dispute lawsuits, the next section introduces the theory of judicial activism and explains how it can help illuminate this phenomenon in China.

3. Judicial activism in China

Judicial activism has been widely discussed around the world. In the US, judicial activism has five main understandings: (1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial legislation, (4) departures from accepted interpretive methodology, and (5) result-oriented judging (Kmiec, 2004). In the EU, judicial activism is widely understood as the political role of the European Court of Justice in promoting 'integration through law' (or judicial integration) (Burley and Mattli, 1993; Garrett, 1995; Terpan and Saurugger, 2019). This is because the decisions of the European Court of Justice may produce broad policy changes at both the national level and the EU level (Martinsen, 2015). In Africa, the Constitutional Court of South Africa has created a 'living constitution' to expand the legal basis for the rights it protects (Mathebe, 2021), and judges from other African countries are encouraged to learn from South Africa and strive for more expansive interpretation and application of the constitutional provisions on the protection of human rights (Okogbule and Brown, 2019). In Latin America, judicial activism has been increasingly prominent from the Constitutional Court (Rodriguez-Garavito, 2010) or the Supreme Court (Pereira, 2022) to redress structural human rights violations and implement permanent judicial monitoring of the policy process. In South Asia, India has been well-known for its judicial activism, where the Supreme Court has used judicial review extensively to help protect fundamental rights and has promoted public interest litigation to improve access to justice (Sathe, 2001). In South East Asia, growing judicial activism has been observed in Thailand and the judiciary has dissolved major political parties, banned their senior executives from politics, toppled prime ministers, and directly challenged major government policies (Dressel, 2010, p. 672).

Similarly, the concept of judicial activism has also been hotly discussed in China. For instance, Wang (2006, p. 524) noticed that judicial interpretations of the SPC constitute an important source of law in China despite their ambiguous legislative foundation. Judicial activism in China received huge attention after 2009, when then-Chief Justice of the SPC, Shengjun Wang, began to promote it (National People's Congress, 2009). Wang and others understood judicial activism to be a way for the local courts to help realize party-state policy goals (Gong, 2010; National People's Congress, 2009; Zhao et al., 2020). This is largely because courts in China are not independent from the party-state (Carpenter-Gold, 2015; Minzner, 2009; O'Brien and Li, 2004). Judicial activism is thus considered as a way to fulfill the judicial administrative competence of the local courts (Zhao et al. 2020, 398). In addition, proponents of judicial activism in China highlight its potential to improve judicial credibility, maintain social stability, and overcome the shortcomings of a delayed and cumbersome legislative process (Gong, 2010). Still, critics of judicial activism in China warn that it might jeopardize the weak rule of law in China (Zhang, 2012), or generate inappropriate intervention of the judiciary into politics (Su, 2010).

Notably, while the Chinese discussions of judicial activism highlight the role of local courts, studies from other countries tend to focus on the Supreme Court (Kmiec, 2004; Munir and Khalid, 2020; Pereira, 2022; Sathe, 2001; Terpan and Saurugger, 2019) or the Constitutional Court (Dressel, 2010; Mathebe, 2021; Rodriguez-Garavito, 2010). This is largely due to the fact that China lacks a constitutional review system (Yu et al., 2022) that has been key to the rise of judicial activism in other countries, because China's Supreme Court has no power to interpret the constitution (Lin and Ginsburg, 2015).

Still, while all studies have provided much useful conceptualization and discussion of judicial activism, they have largely focused on hard law. However, as numerous recent studies have found out, soft law has become increasingly important in both international and national legal systems (Cheng, 2021; Saurugger and Terpan, 2021; Ştefan, 2017). For instance, soft law was extensively used by China, England, Finland, Germany, Greece, Hungary, Italy, Spain, Sweden, and the EU as a tool to manage the COVID-19 pandemic (Eliantonio et al., 2021). The distinction between soft and hard law is particularly important for understanding China's judicial activism. Indeed, as Luo and Song (2013) argue, soft law plays a crucial role, as hard law is just like an island in a sea of soft law in China's legal systems. The fact that no constitutional review exists in China does not exclude the possibilities for the local courts to actively use soft law. Therefore, the discussion of judicial activism must go beyond the focus on the hard law and consider the potential use of soft law by courts to protect the fundamental rights of the citizens.

Accordingly, this study defines judicial activism in China as the action of the local courts to adjudicate disputes and protect the rights of the citizens by invoking soft law, such as the party-state's policy documents, instead of strictly following hard law, such as binding laws, regulations, or SPC interpretations. This conceptualization helps differentiate China's judicial activism from other countries by highlighting the importance of the local courts and soft law in China's legal systems. Indeed, the following case - the Zhan vs He case - will show how soft law can be invoked by the local courts to grant a rural resident equal personal injury compensation as an urban resident. In contrast to the Yuan He case, the local courts did not take into account the geographical distinction between rural and urban areas as a relevant factor in establishing the compensation standard for the Zhan vs He case. Note that the case is chosen not due to its representativeness, but because it clearly

presents the local courts' judicial reasoning in terms of invoking soft law. The full court documentation of the case is available from China Judgements Online by searching the following case number: (2016) qian 03 minzhong 5106 hao.

3.1. The Zhan vs He case

On the evening of June 2, 2016, a traffic accident happened in Wangcao Township, Suiyang County, Zunyi Municipal, Guizhou Province. Mr He's truck crashed into Mr Zhan's motorcycle, and Mr Zhan died on the spot. The police from Suiyang Public Security Bureau determined that Mr He and Mr Zhan were equally responsible for the accident. Because Mr He's truck was insured, the Suiyang Branch of People's Insurance Company of China (Suiyang PIC) was required to pay some wrongful death compensation to Mr Zhan's family, but, as both parties had been held responsible, the exact amount was to be negotiated. When the relevant parties could not agree on the sum of compensation, Mr Zhan's family filed a lawsuit against Mr He and Suiyang PIC with the People's Court of Suiyang County.

On August 11, 2016, People's Court of Suiyang County ruled in favor of Mr Zhan's family. It noted that in this case, death compensation should be based on the per capita disposable income of Guizhou's urban residents in 2015, namely 24,580 RMB, instead of the province's per capita disposable income of rural residents in 2015, namely 7,387 RMB, because:

> The *hukou* reform has been implemented in Guizhou Province. Since June 1, 2015, the distinction between agricultural and nonagricultural *hukou* classifications has been abolished and all citizens in Guizhou are registered as resident *hukou* (*jumin hukou*). (Translated by the author)

Suiyang PIC appealed the ruling to Zunyi Intermediate People's Court. It argued that:

> The death compensation for Mr Zhan should be calculated based on the rural income standard. The *hukou* reform opinions issued by the Guizhou government cannot be used as the reference for unifying death compensation standards for rural and urban residents. Indeed, in the first instance the plaintiff did not manage to provide evidence that Mr Zhan have been lived in urban areas for over one year. Therefore, the death compensation should be based on the rural income standard. (Translated by the author)

However, Zunyi Intermediate People's Court rejected the complaint, maintaining that the calculation from the first instance was right, for the following reasons:

> According to *Implementing Opinions of the People's Government of Guizhou Province on Further Promotion of Reform of the Household Registration System* (2015: Document 16), the distinction between agricultural and nonagricultural *hukou* classifications has been abolished. All citizens are registered as resident *hukou*. Since June 1, 2015, under the column of '*hukou* category' there has been no more registration of agricultural or nonagricultural *hukou*, but a unified registration of 'family *hukou*' or 'collective *hukou*'. Accordingly, the ruling from the first instance calculated the death compensation based on the urban income standard. This is an implementation and enforcement of the *Implementing Opinions*. This demonstrates the principle of social equality and justice. Therefore, the ruling from the first instance is right, and the appellant's argument does not hold. (Translated by the author)

In the end, Suiyang PIC lost this case, and Mr Zhan's family was compensated based on the urban income standard, even though all parties would have agreed that he was a rural resident and had lived most of his life in a rural area.

This case demonstrates how judicial activism can occur through the use of soft law in local courts. Indeed, during the lawsuit the Suiyang PIC contended that the *hukou* reform policy was merely a soft law and not a valid legal reference. Instead, it argued that the rural compensation standard set up by the SPC 2003 Interpretation (hard law) should be strictly followed, because Mr Zhan could not prove to have lived in an urban area for over one year. However, neither the County People's Court nor the Intermediate People's Court even mentioned the SPC 2003 Interpretation. Instead, they invoked the *hukou* reform policy as a valid ground for granting Mr Zhan death compensation on a par with urban residents. To some extent, these two local courts hardened the *hukou* reform soft law by giving it de facto legally-binding power. This is precisely why their act can be considered as a form of judicial activism: they helped protect the rights of Mr Zhan not by invoking any hard law, but by creatively interpreting the promises from the *hukou* reform policy that is widely considered as soft law.

As the next section is about to show, this is far from the one and only case where a local court has invoked the abolishment of agricultural and nonagricultural *hukou* distinction as a valid foundation for equal personal injury compensation for all residents. A number of primary and intermediate courts in China, especially in Guizhou, Jiangsu, and Zhejiang provinces, have acted in this way between 2005 and 2019.

4. Exploring judicial activism in local China: Equal personal injury compensation for rural residents in traffic dispute lawsuits

4.1. Data

In order to get an overview of the extent to which local courts grant rural residents equal personal injury compensation based on the *hukou* reform, this study has compiled a novel dataset. The dataset is drawn from the Pkulaw (*beida fabao*) judicial judgements database, maintained by the Peking University School of Law, which is believed to have one of the most comprehensive collections of court judgements in China. Three steps were carried out to collect all available judgements from local courts across China. First, a large corpus of raw data was compiled on the bases of several combinations of the following Pkulaw search queries for cases:

- Case Reason: Vehicles traffic accident responsibility disputes (*jidongche jiaotong shigu zeren jiufen*). Traffic accidents occupy a major part of disputes over personal injury compensation standards in China. Indeed, since 1990, China has ranked first in the world for traffic fatalities (O'Meara, 2020). The huge number of traffic accidents thus leads to many disputes over personal injury compensation.
- Entries in the full text: [Huji system (*huji zhidu*) or Huji reform (*huji gaige*)] and [rural residents (*nongcun jumin*), or rural *hukou* (*nongcun hukou*), or rural standard (*nongcun biaozhun*)]. In other words, there are six different combinations of the five key words to search in the full text, such as 'Huji system' and 'rural residents'. The first two key words were chosen to capture whether or not the court judgement mentioned the *hukou* reform. The second three key words were used to capture the debates over the *hukou* status of the traffic casualties. The combination of one of the first two key words and one of the second three key words thus allowed a rough capturing of a case where rural residents may be granted equal compensation by invoking the *hukou* reform.

The first step produced over 10,000 judicial judgements from Pkulaw's database. The second step then filtered out the relevant judicial judgements from the previous corpus based on a list of criteria. First, judgements after 2019 were removed, because in late 2019, SPC guidance invited local courts to experiment with unified injury compensation for rural and urban residents (Sun, 2021). Indeed, a few judgements from late 2019 were already referring to the SPC experiment guidelines as they issued rulings that were consistent with a unified compensation

standard; these rulings were removed as well. This is because this study is mainly interested in local judicial activism that has not yet been openly supported by the central government, as the previous case shows. Second, because the same cases could be found in several search query combinations, duplicate cases were removed. Third, this study is limited to court judgements that contain an explicit reference to the *hukou* reform as a rationale for granting death or disability compensation, based on the urban income standard, to a rural resident. Accordingly, the following types of judgements were deemed irrelevant and removed:

- Cases where rural residents were not granted urban compensation standards, even though the plaintiff presented the *hukou* reform as an argument. In these cases, the judges either directly rejected the claim or ignored this argument in their judicial reasoning.
- Cases where rural residents were granted urban compensation standards, but for reasons other than the *hukou* reform, such as the plaintiffs' having lived or worked in urban areas for over one year.
- A number of second instance court judgements did not address the issue of compensation standards as they assessed cases in which rural casualties, due to the *hukou* reform, had been granted compensation based on the urban standard in the first instance. In China, all court judgements from the second instance contain the content of the first instance court judgements, so deleting the appeal cases avoids double counting.

During the third step, a student assistant read through the proceedings of all cases selected through the first two steps and removed those that did not fit the study's criteria. In total, 3,314 court judgements in traffic dispute lawsuits were identified, including 2,309 first instance court judgements, and 1,005 second instance court judgements.

To emphasize, this study does not aim to produce a comprehensive collection of local court judgements that have granted compensation to rural victims of traffic accidents based on urban standards. This is beyond the capacity of the current research for a few reasons. First, despite the efforts to disclose court judgements in China since 2014, there are still a huge number of missing data (Ahl and Sprick, 2018; Liebman et al., 2020). Many local courts do not or only disclose a tiny number of court judgements online, not to mention the records before 2014. Second, it is possible that it has become a norm for rural residents to be granted equal traffic injury compensation as urban residents due to the *hukou* reform. Accordingly, there is no need to specifically mention it during the court judgements. Since this study relies on search queries based on the five key words, such court judgements were not identified.

There is another important caveat. To protect personal data privacy, court judgements normally do not contain the residential or *hukou* information of traffic accident victims. Therefore, this study cannot verify whether the traffic casualties involved were indeed rural residents. Instead, it assumes that no dispute over the death or disability standard would arise if the victim was not a rural resident. After all, the right of urban residents to the urban compensation standard is guaranteed by the SPC 2003 Interpretation.

Still, despite these limits, the compiled dataset of local court judgements proves to be very helpful for exploring judicial activism in reducing discrimination against rural traffic casualties, as shown in the following section.

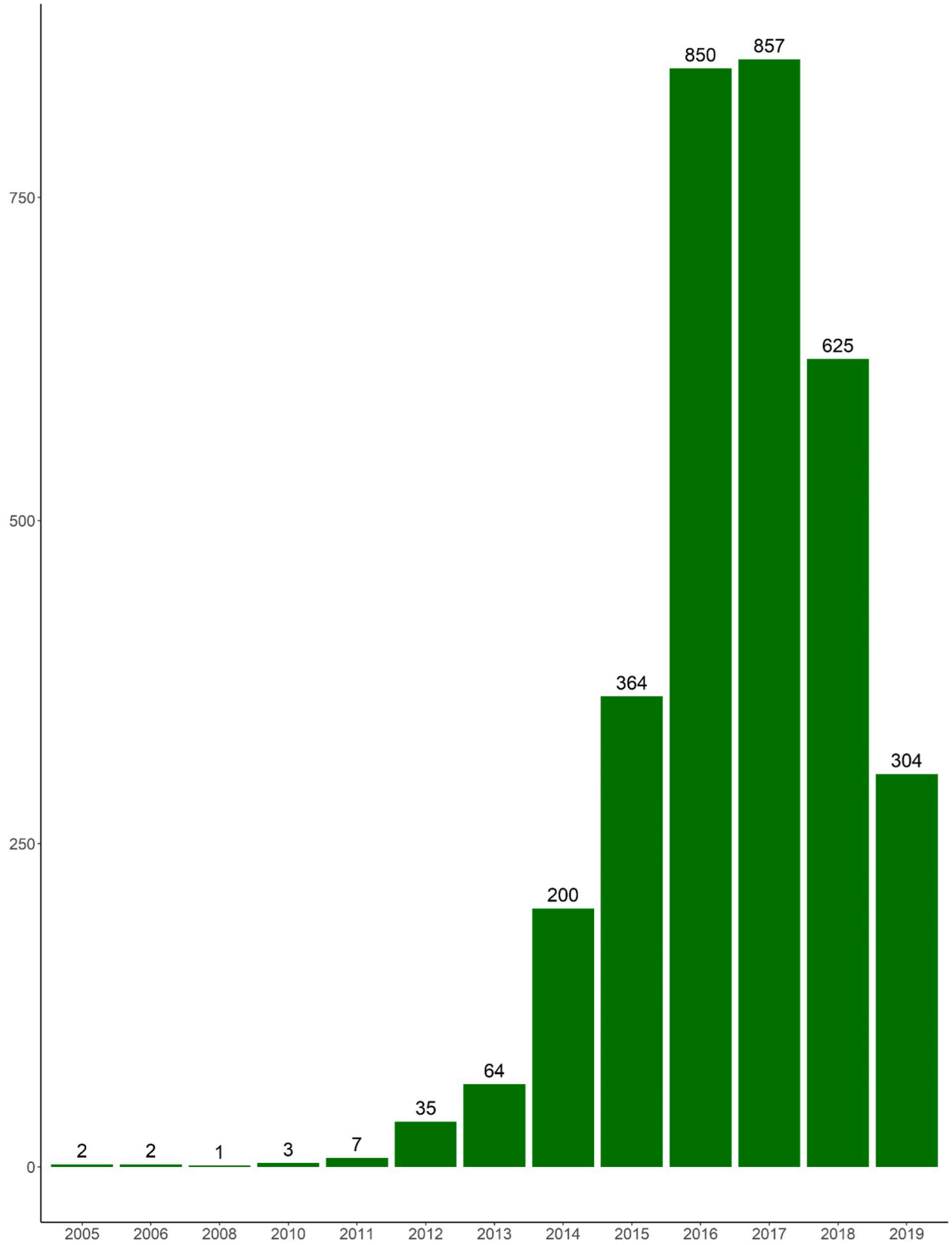
4.2. Judicial activism in China's local courts

An analysis of the data yields four findings related to judicial activism in China. First, Fig. 1 shows the yearly change of the number of court judgements that granted death or disability compensation to rural residents based on urban standards. Interestingly, it shows that as early as 2005, local courts were already invoking the *hukou* reform (abolishment of the agricultural and nonagricultural *hukou* distinctions) as a reason to unify rural and urban traffic injury compensation. A closer investigation shows that all four cases in 2005 and 2006 were from Guangdong province, which was one of the pioneers in abolishing the agricultural and nonagricultural *hukou* classifications (Chan and Buckingham, 2008). Still, only occasional court judgements were found before 2012. This could be due to missing data, because although Pkulaw is the best available database, its records are incomplete. It could also be because the abolishment of agricultural and nonagricultural *hukou* distinction remained a rather sporadic local experiment effort during this period. After 2014, when the State Council announced its intention to abolish this distinction nationwide, there was a huge increase in the number of relevant court judgements where local courts displayed judicial activism. Still, this increasing trend was reversed from 2018. Again, this might be due to missing data: in particular, some local courts might have understood that after years of specifying it in court judgements, the right of equal compensation was so firmly established that specific mention was unnecessary. More generally, it is plausible to argue that as the *hukou* reform rolled out gradually in China, more and more lawsuits ended with rulings that guaranteed rural and urban traffic casualties equal compensation rights.

Second, Fig. 2 presents the distribution of the number of court judgements across different provinces, which is used as an indicator for the level of judicial activism. In total, relevant court judgements were found in 24 provinces, with Guizhou, Jiangsu, and Zhejiang Province being the top three, while the search yielded only a few or even just one record for the remaining 21 provinces. For Zhejiang and Jiangsu, they are among the first provinces in the late 1990s to experiment with abolishing the *hukou* distinction between agricultural and nonagricultural residents (Chan and Buckingham, 2008). This head start might have prompted some of the local courts to be more open to granting rural residents equal compensation rights. At the same time, Zhejiang and Jiangsu are among the provinces with the highest urbanization rate (70.00% and 70.61% respectively in 2019), ranked after Tianjin, Guangdong (National Bureau of Statistics of China, 2020). This might make the rural–urban division less meaningful as compared to other provinces where a larger proportion of the population lives in rural areas. Still, it is surprising to see that almost half of the total (1,594) court judgements were found from Guizhou Province alone. After all, compared with more economic-developed provinces like Jiangsu and Zhejiang, Guizhou Province is much poorer and with weaker fiscal and government capacity.

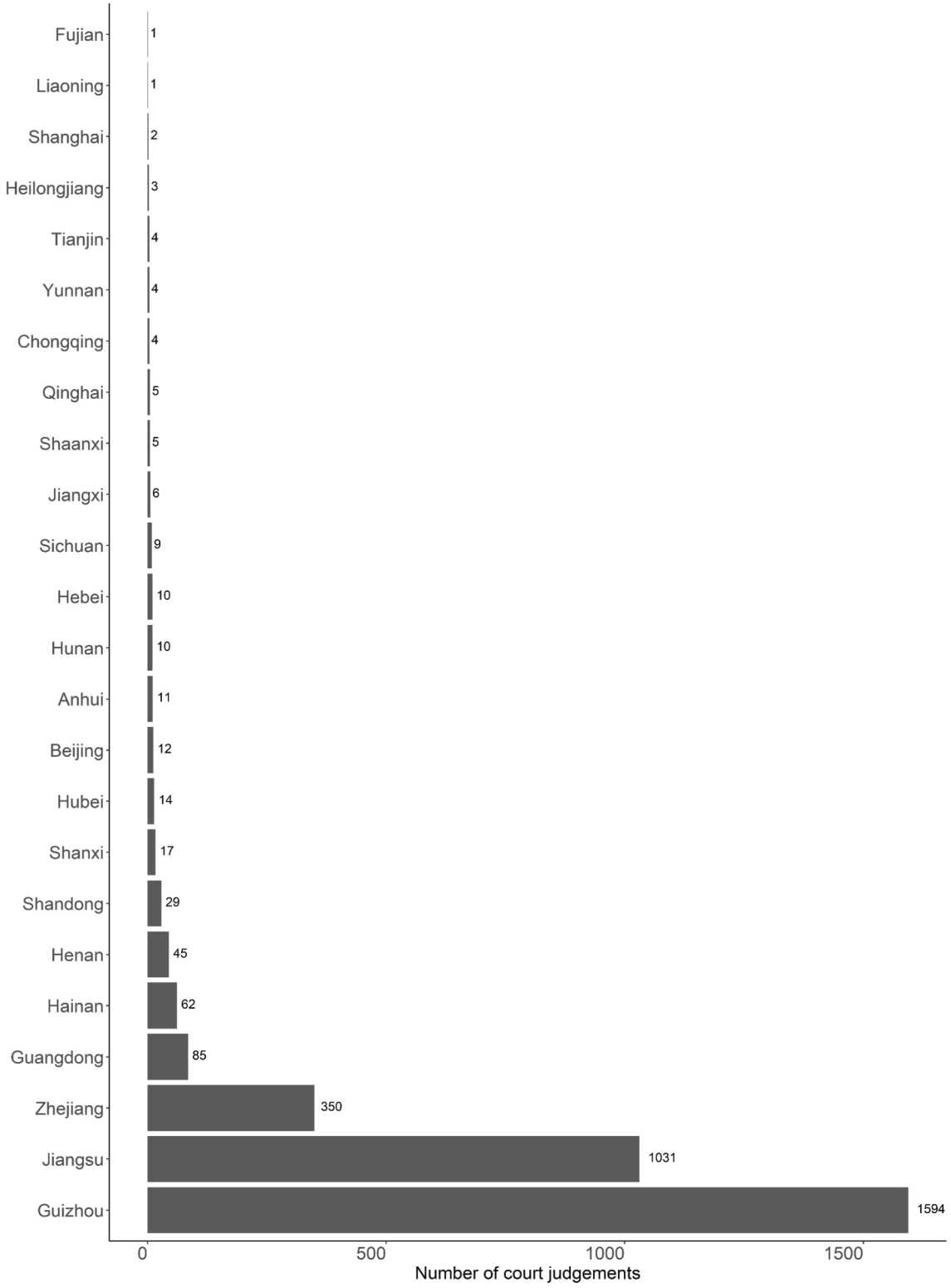
Fig. 3 further confirms that Guizhou Province is an exception. Here, a high and a low degree of judicial activism are differentiated. A low degree of judicial activism means that the judges invoked the *hukou* reform as one among several arguments, such as the victim living or working in an urban area for a year or more, the reduced income gap (e.g., in Jiangsu Province), the province's increased urbanization, etc. In contrast, judges who invoked the *hukou* reform as a sole and sufficient reason for granting rural traffic casualties equal compensation rights exhibited a high degree of judicial activism. As Fig. 3 shows, Guizhou and Zhejiang Province displayed a high degree of judicial activism in deciding traffic dispute lawsuits, as the majority of the court judgements granted rural casualties equal compensation rights solely based on the *hukou* reform. In contrast, in Jiangsu Province, a significant proportion of court judgements was invoking the *hukou* reform as an additional argument, instead of a sufficient argument. In the other 21 provinces, almost half of (169) the court judgements can be regarded as displaying a high degree of judicial activism, while the other half (170) demonstrated only a low degree.

Therefore, the level of judicial activism in Guizhou Province is particularly high both in terms of the number of court judgements and in terms of their degree. There are at least two reasons for this exception. First and foremost, Guizhou Province has taken an innovative strategy in implementing the *hukou* reform since 2014 (Ma and Liu, 2022, p. 315). More specifically, Guizhou Province has not only reformulated the central *hukou* reform policy ahead of many other provinces but also constructively put more local inputs into its own *hukou* reform policy, thus adapting the central policy more self-consciously to its conditions



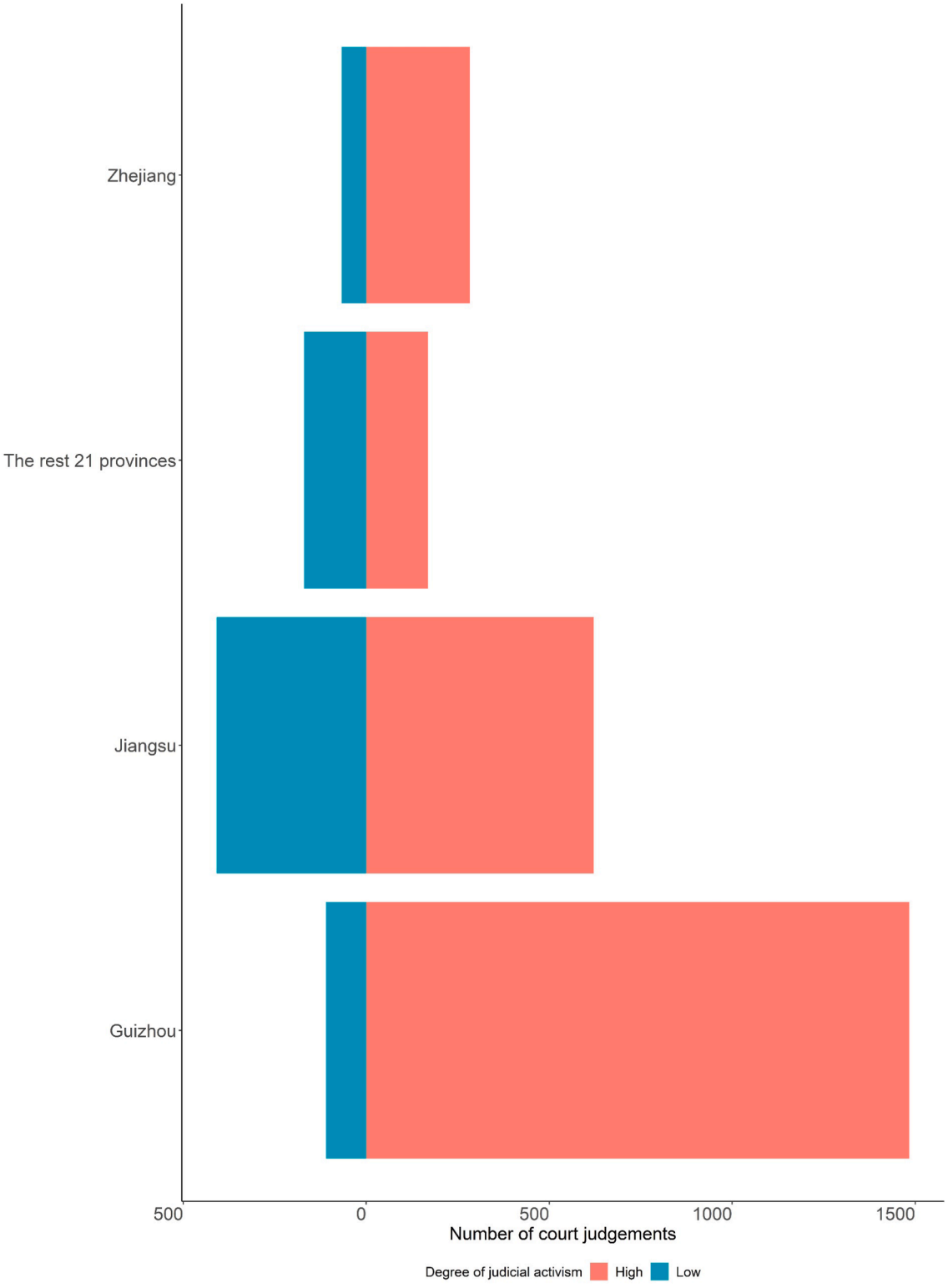
Source: data compiled by the author.

Fig. 1. Yearly change of the number of court judgements.



Source: data compiled by the author.

Fig. 2. Number of court judgements in each province.



Source: data compiled by the author.

Fig. 3. Number of court judgements based on different degrees of judicial activism across provinces.

(Ma and Liu, 2022). Provincial party secretaries and provincial governors in Guizhou Province have also paid special attention to the *hukou* reform (Ma and Liu, 2022). Therefore, it is likely that such reform momentum encouraged local courts in Guizhou Province to invoke the *hukou* reform policy to reduce discrimination against rural residents. As the judges from Zunyi Intermediate People's Court explained in the Zhan vs He case, their decision to grant Mr Zhan urban compensation standard can be considered as an implementation of the *hukou* reform in Guizhou Province. Secondly, Guizhou Province has had a surprisingly good history of being pioneers in other reform areas, so it might give more discretion to reform-minded judges to engage in judicial activism. For instance, from the 1980s to the early 2000s, Guizhou officials were able to implement central policies more innovatively to reduce rural poverty (Donaldson, 2009). In addition, Guizhou Province's holistic approach to the housing reform in the late 1990s was a big success and its experience even caught the attention of both the central and regional governments and was promoted nationwide (Zhu, 2013). Importantly, Guizhou was also the first province in China to establish an environmental court and undertake experimental practices in environmental public-interest litigation (Zhai and Chang, 2018).

Lastly, the data revealed which local courts have engaged in judicial activism and granted rural traffic casualties equal compensation rights (Table 1). Not surprisingly, Primary and Intermediate People's Courts in Guizhou, Jiangsu, and Zhejiang Province, were among the top. Unexpectedly, two Intermediate People's Courts in Henan Province were also on the top. The fact that Guizhou's Intermediate People's Courts had the biggest number of court judgements indicates that, perhaps, a large number of defendants did not accept granting rural traffic casualties equal compensation in the first instance and have appealed, especially those insurance companies. Indeed, among the 1,005 second instance court judgements, the insurance company was the main party contesting this ruling in 839 cases. Fortunately, in all cases the Intermediate People's Court maintained the ruling, including the Zunyi Intermediate People's Court, which decided in favor of Mr Zhan's estate in the case discussed above.

Table 1
Top ten Primary and Intermediate People's Courts based on the number of court judgements.

Level	Name	Number of judgements
Intermediate	Zunyi Intermediate People's Court, Guizhou	473
Intermediate	Bijie Intermediate People's Court, Guizhou	171
Intermediate	Nantong Intermediate People's Court, Jiangsu	70
Intermediate	Changzhou Intermediate People's Court, Jiangsu	64
Intermediate	Ningbo Intermediate People's Court, Zhejiang	29
Intermediate	Huzhou Intermediate People's Court, Zhejiang	28
Intermediate	Anshun Intermediate People's Court, Guizhou	24
Intermediate	Zhoukou Intermediate People's Court, Henan	17
Intermediate	Guiyang Intermediate People's Court, Guizhou	15
Intermediate	Shangqiu Intermediate People's Court, Henan	8
Intermediate	Other	106
Primary	Jintan District People's Court, Jiangsu	360
Primary	Liyang Municipal People's Court, Jiangsu	121
Primary	Dafang County People's Court, Guizhou	111
Primary	Qiangxi County People's Court, Guizhou	105
Primary	Wujin District People's Court, Jiangsu	100
Primary	Rudong County People's Court, Jiangsu	93
Primary	Chishui Municipal People's Court, Guizhou	85
Primary	Deqing County People's Court, Zhejiang	65
Primary	Lishui District People's Court, Jiangsu	59
Primary	Fenggang County People's Court, Guizhou	57
Primary	Other	1153

5. Conclusion and implications

There is a general perception that the *hukou* system discriminates Chinese citizens who live in rural areas. For a long time, rural residents were deprived of not only equal social welfare and benefits, but also equal personal injury rights. The Chinese government began reforming the *hukou* system in the late 1990s. One of the major policy changes was to abolish the agricultural and nonagricultural *hukou* classifications. Although this reform has been understood to be only nominal and based on soft law, a few local courts have used it as a solid reference that rural residents should be granted the same personal injury compensation as urban residents. Nonetheless, the SPC 2003 Interpretation, which was in effect and legally binding until 2022, laid down separate compensation standards for rural and urban residents.

This study has found that in at least 3,314 court judgements in the sector of traffic dispute lawsuits from 2005 to 2019, the judges have granted rural casualties equal death or disability compensation partly or solely by invoking the *hukou* reform. This study identifies this phenomenon as a form of judicial activism in China. In those court judgements, the local courts did not follow the SPC 2003 Interpretation. Instead, they adjudicated the traffic accident lawsuits based largely on the party-state's *hukou* reform policies, which can be considered as a form of soft law in China. Without formal legislation granting rural casualties equal compensation rights, and despite being challenged by numerous insurance companies, the local courts generated a hard impact of the soft *hukou* reform policies: they reduced discrimination against rural residents in China.

Importantly, the principle of equal treatment should not just be applicable to traffic dispute lawsuits alone. For instance, based on the SPC 2003 Interpretation, rural residents also received much lower compensation for work-related injuries, thus it is not hard to imagine how thousands of injured migrant workers have been treated discriminately even if they have worked extremely hard for their companies. Still, it is likely that some local courts could have invoked the *hukou* reform policy to grant injured migrant workers a higher compensation standard. Unfortunately, rural residents in China today are still faced with many other types of labor market discrimination, such as wage discrimination, hiring discrimination, and pre-market discrimination (e.g., inequality in primary education) (Song, 2014). In this regard, as this study has shown, the abolishment of the agricultural and non-agricultural *hukou* classifications should be interpreted as China's embrace of the fundamental principle of equal treatment for rural and urban residents, instead of a symbolic move from the party-state that ends up being empty words. The final unification of the compensation standards for both rural and urban residents by the SPC in 2022 was a late but positive move. This important step will help reduce discrimination against rural residents on a nationwide basis. Still, as much research has shown, the implementation of central policies is both slow and uneven in China (Ma, 2021; Ma and Liu, 2022; O'Brien and Li, 1999). The fact that it took almost three years from the start of the experimentation to the final decision of the SPC to revise its 2003 Interpretation, also indicates that there could be difficulties for the local courts' implementation. Therefore, further research on this topic is much needed to assess the progress and the challenges of the recent reform.

Moreover, this study suggests that debates over the merits of judicial activism must be context-specific and examined case-by-case, instead of overly normative and theoretical. In this case of traffic accidents, by following party-state *hukou* reform policies instead of strictly the SPC 2003 Interpretation, judicial activism helps reduce discrimination against rural residents. Given that this apparent discrimination has caused huge outcry in China, it is likely that judicial activism of this kind

may help maintain social stability in China. It might even improve citizens' trust towards the judiciary, as it often goes against the interests of powerful insurance companies. Still, this study does not argue for a further deference of the local courts to the party-state. Instead, it calls for more independence of the local courts to use their discretion to protect the rights of the vulnerable and discriminated groups. In this case, the SPC 2003 Interpretation was largely out of date, but revised legislation on personal injury compensation has been delayed for a long time. Judicial activism displayed by local courts helps compensate for this delay.

Theoretically, this study calls for more attention to the role of soft law in judicial activism. While it is crucial to understand how judicial activism takes place via hard law (most importantly in the form of constitutions), it will be a mistake to overlook the potential of soft law for judicial activism. Most importantly, in authoritarian regimes like China, the rule of law is usually weak and the courts are often put under strict political control. Still, even under such conditions, the courts never advance the interests of rulers in an unambiguous and straightforward fashion, because the judges may embrace thick (substantive) conceptions of fundamental rights (Moustafa, 2014). While constitutions and other forms of hard law do provide the judges with a few tools for judicial activism, they can also grasp opportunities from both international and domestic soft law to challenge the state and ultimately help protect fundamental rights. As China's case demonstrates, the *hukou* reform policy allows the local courts to support the rightful claims (O'Brien and Li, 2006) of the discriminated rural residents. In this way, they help reduce the huge gap between what is formally promised and what is actually delivered on the ground, typically as a result of authoritarian legality (Gallagher, 2017). Therefore, the key feature of judicial activism is how judges, even under strict political control, manage to use their discretion to protect the fundamental rights, irrespective of what kind of law they rely upon.

Empirically, this study suggests that future studies of judicial activism should go beyond the focus on the Constitutional Court or the Supreme Court. Instead, the everyday practices of the local courts are also important to investigate. It is true that instances of judicial activism from the Constitutional Court or the Supreme Court are often high profile cases concerning the rights of a significant number of citizens that could have a more lasting impact. Still, as this study shows, the local courts are also important actors in the judicial system. Individually, they may be handling cases concerning only a few citizens. However, they are street-level bureaucrats (Lipsky, 1980) who in the aggregate can use their discretion to reduce discrimination against thousands of rural residents. Their courage to creatively invoke soft law in a politically ambivalent environment (Stern, 2013) is not less laudable than the courage of their colleagues at higher levels in the judiciary. In fact, as this study shows, in China the SPC was at the conservative end of the spectrum and laid down the foundation for the systematic judicial discrimination against rural residents. Similarly, in countries like Pakistan (Munir and Khalid, 2020) and India (Sathe, 2001), sometimes the Supreme Court's judicial activism is considered as going too far by intervening in matters that are beyond its jurisdiction. In such cases, judicial activism from the local courts could become an especially important force to counterbalance the power of the Supreme Court and help protect people's fundamental rights.

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7. Data availability statement

The data that support the findings of this study are available from the corresponding author, Yi Ma, upon reasonable request.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data availability

Data will be made available on request.

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