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## Is China a “Rule-by-Law” Regime?

KWAI HANG NG†

Does China have the rule of law? It is a question often asked and debated, not least for the fact that the Chinese government sometimes seems to convey the idea that they are promoting the rule of law. In recent annual plenary meetings of the Chinese Communist Party (CCP), the Chinese term 法治 (*fazhi*), often translated loosely as “the rule of law” in English, is raised as the theme of these most publicized and hi-power meetings. The Fourth Plenum of the 18<sup>th</sup> Central Committee that took place in 2014 was dubbed by many as the “rule of law plenum.”

Does China have the rule of law? Most scholars studying the Chinese legal system would say no.<sup>1</sup> Certainly, scholars differ in prognosticating whether China is moving towards the rule of law or drifting further away from it.<sup>2</sup> But they

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1. See STANLEY B. LUBMAN, *BIRD IN A CAGE : LEGAL REFORM IN CHINA AFTER MAO* (Stanford Univ. Press 1999); *THE LIMITS OF THE RULE OF LAW IN CHINA* (Karen G. Turner et al. eds, Univ. of Wash. Press 2000).

2. See Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935 (2011) (arguing China has moved away from rule of law); RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (Cambridge Univ. Press 2002) (arguing China is moving from rule by law to a form of rule of law); Larry Diamond, *The Rule of Law as Transition to Democracy in China*, 12 J. CONTEMP.

generally agree on the usefulness of the rule of law as a yardstick to evaluate the Chinese legal system. The take on the status quo of the Chinese legal system among optimists and pessimists alike is surprisingly consensual—China has yet to develop a robust rule of law. What it has is instead *rule by law*.

Despite the near consensus that China is practicing rule by law, the meaning of rule by law is not as certain. The concept is too often glossed over. We jump to the conclusion too quickly—“It is not the rule of law, but just rule by law.” In so doing, *rule by law* is treated almost as a residual, negative concept, not only in the sense that it connotes negatively (although it does), but that the concept is defined negatively. It is formalistic and morally empty.<sup>3</sup>

*Rule by law* is understood negatively—rule of law it is not. Analytically, it is the degenerative form of the liberal democratic version of the rule of law, often found in authoritarian regimes.<sup>4</sup> The “law” in rule by law is a means for authoritarian control and repression.<sup>5</sup> It is a kind of bad rule that confers surface legitimacy to authoritarian regimes.<sup>6</sup> As Gallagher puts it, “[it] brings the allure of constraints and rules on others while continued state-led control over deployment of these institutions provides opportunity for discretion and flexibility.”<sup>7</sup> Cheesman

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CHINA 319 (2003) (arguing a shift toward rule of law is necessary for democratization in China).

3. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 92–93 (Cambridge Univ. Press 2004).

4. See Tom Ginsburg, *In Defense of Imperialism? The Rule of Law and the State-building Project*, in *GETTING TO THE RULE OF LAW* 224, 226–27 (James E. Fleming ed., 2011).

5. Martin Krygier, *Rule of Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 233, 234 (Michel Rosenfeld & András Sajó eds., 2012) [hereinafter Krygier, *Rule of Law*].

6. See Ginsburg, *supra* note 4.

7. MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE* 47 (Cambridge Univ. Press 2017) [hereinafter GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA*]. Gallagher uses the term “authoritarian

underlines its derivative nature by describing it as a concept that “has no immanent contents of its own.”<sup>8</sup> It is “what you get because institutions are not working well enough to have anything better.”<sup>9</sup> “Rule by law is what *is*, the rule of law is what *ought* to be.”<sup>10</sup>

There is little dispute about the lack of independence for legal institutions in China. My point is that there is a gap, or rather, a conceptual leap, from what we know (the Chinese system does not practice the rule of law) to the conclusion drawn (the Chinese system practices rule by law). The concept of the rule of law is highly amorphous.<sup>11</sup> In its most expansive and substantive form, the rule of law is inextricably tied to liberal democracy.<sup>12</sup> The rule of law protects and strengthens legal, political, private, and institutional liberty.<sup>13</sup> Such is the way international NGOs (non-governmental organizations) and legal professionals promote the rule of law in many non-western countries.<sup>14</sup> The Council of the International Bar Association, for example, passed a resolution in 2005 that said: “The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect.”<sup>15</sup> The

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legality” to describe the Chinese-style rule of law. *Id.* at 30.

8. Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 HAGUE J. ON RULE L. 96, 105 (2014).

9. *Id.*

10. *Id.*

11. TAMANAHA, *supra* note 3, at 91–92.

12. Besides the dominant thick liberal version of the rule of law, there are other “thick” versions that are tied to other values and ideologies. For a survey of other thick theories in Asia, see ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. (Randall Peerenboom ed., Routledge 2004).

13. TAMANAHA, *supra* note 3, at 32–46, 91–101.

14. Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, 50 NOMOS 64, 96–97 (2011).

15. TOM BINGHAM, *THE RULE OF LAW* 171 (Allen Lane 2010) (quoting the Council of the International Bar Association).

shortcoming of a conspicuously “thick” concept of the rule of law is that there are just too many ways to fall short of it.<sup>16</sup> The expansive version of the concept proselytizes an idealized vision of liberal democracy that becomes an impossible yardstick for evaluating other political systems.

A goal of this Article is to go beyond using “rule by law” as an epithet to describe China. In the next section, I present an analysis of the Chinese case based on a definition of rule by law that is stripped-down and yet non-vacuous. I then discuss how well the concept serves as a measuring rod for China. For the exercise, a good measuring rod is defined as one that is valid. The validity of the concept rule by law cannot be isolated from the historical and social reality to which it is applied. Does the concept describe and explain how law works in China? The second half of the paper discusses one possible way to develop a positive narrative—law as policy.

#### THE CONCEPTUAL CONTENT OF RULE BY LAW

The Chinese Communist Party wants people to study the guiding thoughts of its leaders, from Mao, to Deng, and now Xi Jinping. In an important sense, one does not need to micro-analyze the recent sayings of Chinese leaders to get a reading of their legal philosophy. They are not evasive. In fact, they have been quite clear and relatively consistent. Since Deng Xiaoping, PRC (People’s Republic of China) leaders, including Xi, describe what they do as 依法治国 (*yi fa zhi guo*). The official translation of *yi fa zhi guo* is “to govern the country according to law,” or as some have translated, rule according to law. The sentence “the People’s Republic of China governs the country according to law and makes it a socialist country under rule of law” (Article 5) was first added to the Constitution in 1999. This in part accounts

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16. There are of course “thinner” definitions of the rule of law that emphasize the preventive character of the concept to constrain power and avoid abuse. See Krygier, *Rule of Law*, *supra* note 5, at 234–36.

for why scholars refer to China as a “rule-by-law” country. Law is seen as an instrument to rule at the disposal of the state. Legal power is not an independent power to temper other forms of power; it is power at the service of political power.<sup>17</sup>

Conceptually, what can one say positively about rule by law? What is that rule-like or law-related quality in rule by law? As a conceptual lens, does rule by law fit China? Does the concept resonate with the empirical reality that it attempts to explain? Does it help observers understand more clearly the legal development of China? I answer the questions by identifying three essential characteristics of rule by law—commanding, opaque, and arbitrary.

#### A. *Command*

The *command* metaphor is a familiar one. Legal positivist John Austin famously treats law as command.<sup>18</sup> What law commands is obedience. Its merit or demerit is a different question. Put differently, to say that law is commanding is to emphasize its *ruling* and *forceful* character. As Krygier points out, “whatever the character of the laws themselves . . . , if law in a particular society is routinely trumped by, say, raw legally unauthorized exercise of power by gangsters, conmen, or more generally legally unauthorized power-wielders, it makes little sense to speak of the rule of law.”<sup>19</sup> Does Chinese law work like a set of commands? One would think that China is an open-and-shut case of commanding law. We see that in the police state that it runs in regions where ethnic and religious minorities

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17. This distinction of rule of law and rule by law is more a matter of degree. Shapiro is famous for making the claim that the notion of judicial independence inherent in the notion of rule of law is a myth. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (Univ. of Chi. Press 1981).

18. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 1, 13–15 (Isaiah Berlin et al. eds., Humanities Press 1965).

19. Krygier, *Rule of Law*, *supra* note 5, at 234.

cluster. We also see that in areas related to the political legitimacy of the party state and questions about national unity. The Chinese party state is sensitive to any challenge to its power. Draconian laws are devised to control and limit any behavior that questions the legitimacy of the rule of the CCP. In many cases, whether state actions follow the law or not is beside the point, as the law offers blanket power to the police and other authorities to do what is needed to maintain political stability. There is little tolerance for infractions against the state. The law *commands* obedience.

Undoubtedly, the party state's restriction of political freedom and its tight rein on civil liberty are the main reason, and for many, a sufficient reason, to consider rule by law an apt label to describe China. In some parts of the country, China is deploying state-of-the-art surveillance technologies to identify and punish any violation of law. The law positively commands compliance. It is an executive-centered approach to law. The law carries the will of the party state. China seems to be a textbook case of rule by law.

However, when one looks at the legal system as a whole, there are other aspects of law that are less commanding and more negotiable. Much of the business of the sprawling court system is not criminal. Criminal cases now make up just about six percent of the total caseload of the Chinese courts.<sup>20</sup> Of course, quantity isn't everything and a few high-profile and well-publicized cases are enough to set the tone. But for many litigants in China, their cases are more quotidian than political. In fact, the most actively expanding sectors of the legal system are not its criminal wing. Civil and commercial disputes are the fastest growing sectors of law.

Marketization not only brings prosperity to China. It also brings about more interpersonal conflicts. It is in the handling of these disputes and conflicts that we see the other

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20. In 2016, for example, criminal cases made up only 6.4 percent. See Zuigao Renmin Fayuan Gongzuo Baogao 2017 (Report on the Work of the Supreme People's Court 2017), <http://www.court.gov.cn/zixun-xiangqing-37852.html>.

side of the Chinese legal system, a side that the rule by law thesis does not point us to see. This side is less strident and repressive. On the basis of the rule by law thesis, it is puzzling to find that Chinese judges often avoid using the law. They either hold back on imposing or do not fully impose the law on civil litigants. Chinese judges are used to making political discernment. When they see a case as a *dispute* between individuals rather than a *challenge* to the party state, they can be surprisingly flexible in exercising the law. The line distinguishing the two is of course a fluid one but many Chinese judges are adroit at gauging the political sensitivity of a case. It is worthwhile to note that the conventional criminal-civil distinction does not reflect the discernment that frontline judges exercise. Judges are more concerned about whether a case is routine or “problem”; mishandling of the latter would lead to “malicious incidents.”<sup>21</sup> Routine disputes can be civil in legal classification—family disputes, or other kinds of emerging tort disputes can be found in China. Some disputes can also be criminal, such as cases of assaults, theft and robbery, and hit-and-runs. Even though many of these cases are, legally speaking, criminal cases, the party state has gradually moved away from harsh punishments to resolve criminal cases in a “civil justice” way—i.e., the focus is about getting defendants to compensate and apologize to their victims.<sup>22</sup>

When dealing with bitter disputes, the courts are often law-shy. Judges play the role of mediator first and adjudicator second. A decade ago (2009), the Supreme People’s Court (SPC) released its Third Five-Year Reform Plan that put more emphasis on the “mass line,” or “adjudication for the people,” suggesting a populist turn by

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21. See Xin He, *No Malicious Incidents: The Concern for Stability in China’s Divorce Law Practice*, 26 *SOC. & LEGAL STUD.* 467 (2017).

22. Kwai Hang Ng & Xin He, *The Institutional and Cultural Logics of Legal Commensuration: Blood Money and Negotiated Justice in China*, 122 *AM. J. SOC.* 1104, 1125 (2017).



the courts.<sup>23</sup> The practical result of this is a renewed emphasis on the use of mediation to resolve conflicts. The function of conflict resolution given to law means that law is not viewed as an independent power that operates according to its own rules. Instead, it is given a political goal and the judicial system is tightly entrenched as part of the administrative bureaucracy to promote societal harmony.

Sensitivity and insecurity to popular opinion and to protesters also contribute to a bureaucratic mentality shared among frontline judges that privileges mediation and reconciliation. As scholars who study the Chinese judicial system have pointed out, the Chinese system spends an inordinate amount of time facilitating and sometimes even coercing mediated settlements. At the height of this mediation movement about a decade ago, grassroots courts typically recorded a mediation rate of over fifty percent, and some of them boasted a mediation of eighty to ninety percent.<sup>24</sup> Even though mediation is less emphasized under Xi, it remains an integral part of “doing law” in the grassroots courts. Courts avoid using the law if possible, particularly so in rural inland regions. As mentioned, this tendency crosses and muddles the traditional civil-criminal divide. In many non-political criminal cases, the courts have moved away from the policy of harsh punishment to allow for more leniency. In practice, this means an emphasis on reconciliation. The use of fines in lieu of imprisonment is common.<sup>25</sup> The policy creates a new set of problems, particularly deepening inequality between the rich and the poor. Even within the domain of criminal law, leniency is now officially encouraged. Courts are willing to offer

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23. Benjamin L. Liebman, *A Populist Threat to China's Courts?*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 269, 296 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

24. See Hao Xiong, *Two Sides of Court Mediation in Today's Southwest Grassroots China: An Empirical Study in T Court, Yunnan Province*, 1 ASIAN J.L. & SOC'Y 367 (2014).

25. Ng & He, *supra* note 22, at 1128.

suspended sentencing to many criminals who commit offenses such as drunk driving, public disturbance, and assault, as long as they express remorse and are willing to pay.

This tendency to placate is particularly pronounced among cases in which larger groups are involved and in cases in which protests may spread to a wider group. Judges are instructed to exhaust all means to prevent the disputes from escalating into social disturbance and “malicious incidents” (恶性事件 *exing shijian*), such as protests, demonstrations, or in more extreme cases, violent attacks upon judges that sometimes end in the attacker committing suicide.<sup>26</sup> The eruption of “malicious incidents” results in sanctions of individual judges. Courts are also sensitive to media reports. State-owned but market-oriented media not only are acting to uphold the goals of the party state; they also act as arms of the party state to engage in “popular opinion supervision.”<sup>27</sup> In places where social stability is more vulnerable (economically less-developed inland regions), the environment of judging is so uncertain that it leads to a general aversion to adjudication among the courts there. When dealing with potentially disruptive cases, judges lean on diversionary practices such as mediation in civil trials and victim-criminal reconciliation in criminal trials. Adjudication produces winners and losers. The judges’ concern is that winner-takes-all adjudicative decisions run the risk of challenges by losing parties.

What I discussed here is certainly not unique to China. Judicial systems around the world use mediation and other forms of alternative dispute resolution (ADR). We are familiar with the “vanishing trials” phenomenon in the United States.<sup>28</sup> However, this tendency to push for

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26. See He, *supra* note 21, at 468–69; Minzner, *supra* note 2, at 938.

27. Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 37 (2005).

28. Marc Galanter, *The Vanishing Trial: An Examination of Trials and*

mediation does show how judges *do law* in China and it is quite different from the general impression we have of a rule-by-law regime—for disputes among individuals, small companies, and even corporations, the law is not keenly applied. Enforcement also remains a problem in the less economically developed regions.<sup>29</sup> To my knowledge, the Chinese system is the only judicial system that the same judge who adjudicates is also asked to mediate throughout the course of an adversarial-style trial. This procedural arrangement means that to describe Chinese-style judicial mediation as bargaining in the shadow of the law is an understatement. It is literally bargaining in the face of the law.<sup>30</sup>

In the United States, mediation is often motivated by economic reasons. The costs of litigation have become so expensive that most individual litigants are simply “priced out” of a full-scale trial. But in the case of China, the law is avoided for different reasons. The reasons for pushing for more mediation are administrative and political. Many civil cases handled by the grassroots courts of China resemble the cases handled by the small claims courts of this country. Those cases do not involve large sums of money and litigants are unrepresented. The court procedures are similarly uncomplicated and swift. As mentioned, outside of the big city courts, the mediation rate in China is generally higher than fifty percent. In the absence of a prohibitive costs disincentive, this strongly suggests that judges there are more determined to push for settlement.

This goes to show that the law is not as commanding as we believe. Even an authoritarian state has to pick its

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*Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459(2004).

29. See Xin He, *A Tale of Two Chinese Courts: Economic Development and Contract Enforcement*, 39 J.L. & SOC'Y 384 (2012) (analyzing links between economic development and contract enforcement).

30. Kwai Hang Ng & Xin He, *Internal Contradictions of Judicial Mediation in China*, 39 L. & SOC. INQUIRY 285, 287, 301 (2014).

fighters—judges know there is a risk of public pushback if the law is used too much. The imagery of rule by law presents a partial picture. Even though the party state consistently rejects western-style constitutionalism, and the related notion of the rule of law, its own brand of law is an eclectic blend of hard and soft—commanding and draconian in handling any threat to social stability and challenges to its political authority, while flexible and pragmatic in its treatment of the socially aggrieved.

### B. *Obscurity*

Another characteristic of a rule-by-law regime is that the laws are often obscure. Law that is unknown or opaque to the public is hardly definite and clear to follow. In this sense, rule by law is akin to rule without law, only that the former produces a façade of law to cover up lawlessness. Krygier suggests that some governments may rule by law but the laws fail to exhibit the proper character of the rule of law, that is, “if the laws are secret, retrospective, contradictory.”<sup>31</sup>

Once again, applying the criteria to evaluate the Chinese case is not as straightforward as one would imagine. There are some aspects of the Chinese law that seem indefinite and do not announce themselves in advance to fulfil the so-called *ex ante* function of law.<sup>32</sup> One obvious example is the rule of analogy that was included in the 1979 Criminal Law, which allowed judges to sentence on an offense not specified by the law by reference to the closest analogous provision. The rule was removed when China revised its criminal code in 1997 and the principle of *nulla poena sine lege* was introduced. However, the rule of analogy was still referred to in later Supreme People’s Court interpretation of the PRC Criminal Procedure Law.<sup>33</sup> Then there are offenses that are so vague

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31. Krygier, *Rule of Law*, *supra* note 5, at 235.

32. See John M. Darley, et al., *The Ex Ante Function of the Criminal Law*, 35 L. & SOC’Y REV. 165, 165 (2001).

33. PITMAN B. POTTER, CHINA’S LEGAL SYSTEM 37–38 (Polity Press 2013).

that it is hard to identify the bright lines between what is allowed by law and what is not, casting long shadow over public expression of views deemed by the state to be offensive. The most infamous of this type is the offense of “picking quarrels and provoking troubles.” The offense has long been criticized as catch-all excuses for arbitrary state repression.<sup>34</sup> And the law regarding “disturbing social order,” scattered in both criminal and commercial laws, is sometimes used to sanction small-scale protests.

At the same time while this authoritarian display of legal power continues, China has passed a huge volume of legislation and administrative regulations to make its legal system more rules-based. The central government also works hard to disseminate law. Campaigns were organized to send law to the public. In the Rule of Law Index compiled by the World Justice Project in recent years, China consistently ranked far below the median in many factors contributing to the index. Its scoring on publicizing the law is however a bright spot, relatively speaking.<sup>35</sup> The party state also has implemented policies to promote access to court. It did so by lowering court fees in 2006 to reduce litigation-related expenditures for socially or economically disadvantaged groups, especially for peasants in less developed parts of the country.<sup>36</sup> Before that, local courts had more discretion charging court fees at a level they desired and could manipulate fees to create an extra hurdle for litigants. The party state has been relatively successful in promoting the use of law, especially in urban cities. This is reflected in the growing judicial caseloads of the grassroots courts. Judges in

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34. Stanley Lubman, *Picking Quarrels' Casts Shadow Over Chinese Law*, WALL ST. J. (June 30, 2014, 9:10 AM), <https://blogs.wsj.com/chinarealtime/2014/06/30/picking-quarrels-casts-shadow-over-chinese-law/>.

35. YA-WEN LEI, *THE CONTENTIOUS PUBLIC SPHERE : LAW, MEDIA, AND AUTHORITARIAN RULE IN CHINA* 36 (Princeton Univ. Press 2018) (ranking sixteenth (eighty-fourth percentile) in this factor).

36. Michael Palmer & Chao Xi, *The People's Republic of China*, in *THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE* 261, 261 (Christopher Hodges et al. eds., 2010).

the biggest and busiest urban courts handle hundreds of cases a year.<sup>37</sup>

There is also a stronger sense of legal consciousness among the ordinary people of China.<sup>38</sup> Marginal groups including workers and peasants use the law to hold local officials accountable. The traditional imagery of a rule-by-law regime using law in a top-down fashion to control and suppress certainly does not capture this feedback loop of law in China, and perhaps also in other authoritarian regimes.<sup>39</sup> Citizens are encouraged to use the law to challenge abuse of power by grassroots bureaucrats. Law has become a common and legitimate language for ordinary people to formulate their complaints. Law sometimes serves as a weapon of the weak.<sup>40</sup>

### C. *Arbitrariness*

The third oft-invoked feature of rule by law is its arbitrariness. In A.V. Dicey’s famous definition of the rule of law, the first characteristic of the concept is a system of government that excludes the arbitrary exercise of power by persons in authority.<sup>41</sup> Arbitrariness is the opposite of determinacy. A state makes up the law as it goes on. Lon

37. There has been an uptick of attrition of judges as a result of the crushing workload. Meng Yu & Guodong Du, *Chinese Courts Facing Litigation Explosion*, CHINA JUST. OBSERVER (Feb. 19, 2019), <https://www.chinajusticeobserver.com/insights/chinese-courts-facing-litigation-explosion.html>.

38. Mary E. Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 L. & SOC’Y REV. 783, 783 (2006) [hereinafter Gallagher, *Mobilizing the Law*]; LEI, *supra* note 35, at 36 (citing Gallagher).

39. See RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., Cambridge Univ. Press 2008); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 281–99 (2014).

40. See GALLAGHER, AUTHORITARIAN LEGALITY IN CHINA, *supra* note 7, at 80; LEI, *supra* note 35, at 45; Gallagher, *Mobilizing the Law*, *supra* note 38, at 793–94.

41. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188 (10th ed. 1959).

Fuller, for example, argues that determinacy is a key attribute of the rule of law.<sup>42</sup> The law should be publicly announced and be enforced in a predictable manner. Indeterminate or arbitrary application of law suggests a lack of robust reasoning.

Judicial determinacy, to the extent that it is practiced in reality, is always relative. Still it is tempting to ask: Do Chinese courts apply the law in a reasoned, predictable fashion that produces determinate outcomes? Are Chinese judges arbitrary in their decisions? The question is a tough nut to crack for social scientists because of the absence of available data. Impressionistically though, it seems that the courts have shown an improved degree of determinacy in some areas of the law. Since the early days of market reform in the 1980s, the party state has enacted massive volumes of laws and regulations in areas such as contract, property, copyrights, patents, and trademarks. The rapid expansion of the Chinese legal system is aimed at promoting economic activities.<sup>43</sup> Law continues to play the role of providing ground rules for the market to develop; it is also used to sanction misbehaviors, both by private parties and by agents of the party state, and in some cases, to redress afflicted parties.

China has also passed a lot more law to carry out its market-oriented development strategies.<sup>44</sup> In 2015, over one-third of the civil cases, or a total of 3.34 million cases, were commercial cases (finance cases, private lending disputes, sales contract disputes, intellectual property cases, corporate disputes, maritime cases).<sup>45</sup> On top of these commercial

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42. LON L. FULLER, *THE MORALITY OF LAW* 46–91 (rev. ed., Yale Univ. Press 1969).

43. Jacques deLisle, *Law and the Economy in China*, in *ROUTLEDGE HANDBOOK OF THE CHINESE ECONOMY* 255, 255 (Gregory C. Chow & Dwight H. Perkins eds., 2015).

44. See KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017).

45. *Id.* at 27.

cases were private loan cases not involving financial institutions, i.e., lending disputes between individuals, between a company and an individual, or between two or more companies, which accounted for about another twenty-two percent of civil cases.<sup>46</sup> If we combine the two categories (commercial cases and private lending disputes), over half of all of the civil cases were disputes arising from market transactions, either between individuals or among corporations.<sup>47</sup> In big urban courts, judges that deal with commercial litigations such as intellectual property rights, securities, bankruptcy, and personal rights (privacy, portrait, and reputation) are among the busiest and most prestigious in their courts.

Law is used to promote economic growth under the policy directives of the party state. The goal here is to create a legal infrastructure for the unique state-led market economy of China. A broad array of market activities, from simple bank loans obtained by small businesses to corporations raising capital in the stock market, are now done through law. More recently, in the face of the prospects of slower growth, the party state reiterated the role of law in facilitating voluntary transactions, equal standing of parties, and improved protections for some categories of insecure property rights.<sup>48</sup>

However, it remains to be the case that the courts behave more like government bureaucracies than judicial institutions. The party state is interested in the instrumental function of law in promoting good governance.

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46. SUPREME PEOPLE’S COURT, *THE WORK OF CHINA’S COURTS 2015* (2016), <http://english.court.gov.cn/pdf/TheWorkofChina’sCourts2015.pdf>.

47. NG & HE, *supra* note 44, at 27.

48. See Zhongguo Gongchandang di Shiba Jie Zhongyang Weiyuanhui di San Ci Quanti Huiyi Gongbao (中国共产党第十八届中央委员会第三次全体会议公报) [Communiqué of the Third Plenum of the 18th Central Committee of the Communist Party of China] (adopted by the Cent. Comm. of the Communist Party of China, Nov. 12, 2013), available at [http://www.xinhuanet.com/politics/2013-11/12/c\\_118113455.htm](http://www.xinhuanet.com/politics/2013-11/12/c_118113455.htm) (Chinese) and [http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm) (English translation) [hereinafter Communiqué].



It holds a mindset that is more focused on outcome than process. A rules-based approach to procedural justice that values determinacy is often considered too rigid for promoting economic prosperity or reinforcing social stability, at least in the short term. For reasons I will explain, Chinese judges are given a good degree of discretion in the judicial process.<sup>49</sup> In our recent book *Embedded Courts*, Xin He and I presented examples to show how judges worked in the gray zone. Many litigants did not see their judges as just carrying the law. For example, in divorce cases in the rural regions, some courts continued to deny women's petitions to divorce in the face of serious and repeated allegations of domestic violence.<sup>50</sup> And that apparently contradicted what the Marriage Law states. They were more concerned with the consequences of their judicial decisions (e.g., how a volatile husband would react if a woman was granted a divorce). In the area of corporate law adjudication, in which there is a strong will to achieve technical competence, it remains to be the case that judges cannot ignore extralegal factors. During the global financial crisis in 2008, when many export-oriented businesses suffered financial hardship, the Shanghai High Court publicly issued a directive calling for heightened sensitivity to the impact of judicial decisions on distressed industries.<sup>51</sup> Furthermore, the tension between protecting private rights and preserving state interests remains strong in areas of law governing commercial relationships. In the recent Communiqué of the Third

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49. It is for this reason why we need to draw a distinction between the rule of law and everyday decisional independence. Nowadays, Chinese judges, especially those in urban cities, enjoy a palpable degree of decisional independence in dealing with routine cases. But that does not mean that they always decide in according with law. See NG & HE, *supra* note 44, at 118.

50. Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints' Influence on Judicial Behavior*, 23 INT'L J. L., POL'Y & FAM. 83, 102 (2009).

51. Nicholas Calcina Howson, *Judicial Independence and the Company Law in the Shanghai Courts*, in JUDICIAL INDEPENDENCE IN CHINA 134, 150 (Randall Peerenboom ed., 2010).

Plenum, it underlines the importance of striking a balance between the role of the government and that of the market.<sup>52</sup>

Organizationally, the courts are part of the local party-government coalition. The CCP has established party groups in every court. The courts also work alongside other bureaus, including the public security bureau and the procuratorate (in criminal cases) or other grassroots government branches (in civil cases), the justice department under the ministry of justice, as well as the local CCP's Political-Legal Committee. The courts even take charge of dealing with a set of stability-related problems that in the eyes of most Western courts fall squarely outside of the realm of law. A decade ago, in the heyday of the campaign to promote the "harmonious society," some courts were asked to coordinate and lead in the consultative and administrative process of "grand mediation."<sup>53</sup> The word "grand" means "inter-departmental" in Chinese bureaucratic lingo. Today, some local courts continue to play a leading role in facilitating inter-bureau, multilevel consultation on stability maintenance. They coordinate and manage cases that involve the input of more than one bureau, particularly when dealing with conflicts that have the potential of turning into mass protests. Other courts that assume a less prominent role in local governance are still expected to show up and participate in various forms of local campaigns, from wide-ranging themes that include anti-corruption, birth control, respect for the elderly, and street cleaning.

To say that the Chinese courts are arbitrary does not really capture their complex character. As far as following and applying the law is concerned, the courts apparently display randomness. They are unpredictable. But there is method in the randomness. The Chinese courts can be judicially unpredictable but they are predictably pragmatic.

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52. See Communiqué, *supra* note 48.

53. Keith J. Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51, 143–44 (2011).

Their everyday task is to maintain social stability and law is an instrument, admittedly just one of the instruments, used to achieve the goal. Grassroots Chinese judges often hold the view that law is not for every occasion and not all the cases that arrive at the doorsteps of the courthouse should be adjudicated. Their decision-making process is guided by other reasons, albeit different from the legal reasons that we expect of a judicial institution.

In the common law, there is the idea of judge-made law. Scholars debate about the active role of judges in interpreting and developing the law. In the western tradition of jurisprudence, writers emphasize the distinction of *jus dicere* and *jus dare* to suggest that the job of judges is to interpret law and not to make law.<sup>54</sup> Yet the active work of judges in China traverses the dichotomy of *jus dicere* and *jus dare* because it is not of a jurisprudential nature. It is administrative. Judges creatively interpret the law, or relax the rules, at times expand and at times contract the bounds of justiciability. Along the way they often offer off-the-book *ex parte* advice to litigating parties. Chinese judges are at their most innovative best when they work around the rules to create an agreeable solution for all parties. This explains why the dichotomy separating the rule of law and rule by law does not manage to say a lot about the everyday operation of the Chinese courts. It works to some extent in revealing the political and repressive character of it in some areas. But it does not articulate what law does for the party state in other areas. The laws can be at times draconian, at times populist; at times well-publicized, at times vague; at times rigid, at times discretionary.

## II. CHARACTER OF JUDICIAL ACTIVITIES IN CHINA

If rule by law is too much of a negative label for understanding the Chinese legal system, what labels can we

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54. See generally FRANCIS BACON, THE ESSAYS OR COUNSELS, CIVIL AND MORAL (Brian Vickers ed., Oxford Univ. Press 1999).

develop to positively describe China? I echo Cheesman’s call that in studying law in non-western contexts, it is rewarding if one can go beyond describing a case negatively (absence of x) to develop an account that identifies the unique and novel quality of the social form of law in place. Cheesman describes those building block concepts for creating a positive account as “asymmetrical” concept, in the sense that they cannot be firmly situated along a sliding scale of the rule of law.<sup>55</sup> They are qualitatively distinct.<sup>56</sup>

### III. LAW AS POLICY IMPLEMENTATION

The method in the randomness exhibited by the Chinese courts signals a different approach to law. I describe this as the logic of policy implementation. On this reading, the written laws are, first and foremost, policy statements of the party state. The well-known notion of the separation of powers in liberal democracy sees the role of the legislature as enacting laws for good governance. The executive is then to carry those laws into effect. And the judiciary is to interpret those laws and apply them accordingly. The Chinese system is characterized by the convergence of powers in the CCP. Non-separation or the mixing of powers in the Chinese case means that laws passed by the legislature reflect faithfully the policy intent of the executive. And the judiciary, rather than interprets laws based on the criteria of legality, uses decisions and in some cases, non-decisions, to advance the policy intent of the party state, to see to the policy producing its desired effects. The central state expects grassroots judges to honor the law, not as black-letter law but as policy statement.

Treating the law as policy helps to make sense of the puzzle of legal empowerment in China. Law has been much developed and strengthened in China in the past few

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55. NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR’S COURTS MAKE LAW AND ORDER* 19 (2015)

56. *See id.*

decades. The goal of the latest judicial reform in China, spearheaded by the central government, is to address the principal-agent problem prevalent in the Chinese judicial system.<sup>57</sup> The delegation of power is always a tricky exercise for the party state. The central government is worried about the abuse of power at the grassroots level. What the judicial reform attempts to achieve is to rein in the abuse of legal power by local governments and to redirect the use of legal power at the service of the central government.<sup>58</sup> To wit, leaders of the party state do not want to see the law used to serve the interests of the agents.

Specifically, there are two types of abuses. The first is the problem of local protectionism. One of the dogged obstacles to the central government's control of the judicial system is the control local governments have over courts' budgets. The old adage "Don't bite the hand that feeds" describes the attitude the Chinese courts held towards their local governments. Political budgeting, i.e., budgeting decisions that target judicial decision making, has plighted the Chinese courts for many years. Lower-level governments' control of judicial budget control begets local protectionism.<sup>59</sup> It is a problem the SPC struggles to rectify because local courts are fiscally dependent on the local governments. A grassroots court is often an extension of the local government. When there is a big local enterprise going up

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57. In the past five years, China has been undergoing a series of judicial reforms. The scope of the reform is broad and sweeping, addressing issues that range from the implementation of case-filing registration, judicial openness, and promoting the use of information technology in the courts. See Supreme People's Court, *Judicial Reform of Chinese Courts*, SUP. PEOPLE'S CT. (March 3, 2016), [http://english.court.gov.cn/2016-03/03/content\\_23898869.htm](http://english.court.gov.cn/2016-03/03/content_23898869.htm); see also Carl Minzner, *Legal Reform in the Xi Jinping Era*, ASIA POL'Y, July 2015, at 4, 4–9; Rebecca Liao, *Judicial Reform in China*, FOREIGN AFF. (Feb. 2, 2017), <https://www.foreignaffairs.com/articles/china/2017-02-02/judicial-reform-china>.

58. Jerome A. Cohen, *A Looming Crisis for China's Legal System*, FOREIGN POL'Y (Feb. 22, 2016, 10:15 AM), <https://foreignpolicy.com/2016/02/22/a-looming-crisis-for-chinas-legal-system/>.

59. See Xin He, *Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts*, 31 L. & POL'Y 463 (2009).

against another business headquartered in another province or a foreign company, local courts factor that into their decision-making process.

A look at the countrywide court budgets explains the sponsoring role of local governments. In 2009, the total funding received by the Chinese courts was 46.78 billion yuan, of which 7.98 billion yuan, or about 17 percent, came from the transfer payment funds of the central government.<sup>60</sup> Another 2.7 billion yuan, or 5.8 percent, were supporting funds from provincial governments.<sup>61</sup> Together they made up just about a quarter of the court funding. The remaining 36.1 billion yuan, or about three-fourths of the funding, were local money not controlled by the SPC and the provincial high courts.<sup>62</sup>

Grassroots and intermediate courts serve the interests of the local governments who build the courthouses and pay the bills, rather than the interests of the central government who laid down the law. This is what the new budgeting policy introduced by the latest judicial reform (which took effect in 2016) tries to fix. Under the policy, the majority of the funding comes from the central and provincial governments. The goal of the policy is to take the financial stick out of the hands of lower-level governments. Grassroots courts still rely on local governments for major capital projects, such as new court buildings and investment in new technologies. But the main source of funding should shift from the local to the central. This is a move that until most recently the SPC has lobbied for years without much success.<sup>63</sup> The process represents a clear departure from the “local money” model

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60. Humei Tang, et al., *Quanguo Fayuan Jingfei Baozhang Tizhi Gaige Qingkuang Diaoyan Baogao* (全国法院经费保障体制改革情况调研报告) (The Survey Report on the National People’s Court’s Guaranteed Funding System), *RENMIN SIFA* (PEOPLE’S JUDICATURE), no. 17, 2011, at 75.

61. *Id.* at 76.

62. *Id.*

63. Susan Trevaskes, *Political Ideology, the Party, and Politicking: Justice System Reform in China*, 37 *MOD. CHINA* 315, 319–20 (2011).

that has been in place since the 1990s.

We can now see more clearly what the central government wants to do with the judicial reform. Ruling the country according to law is not mere propaganda. It is a message sent to judges working at different levels of the courts. It means honoring the central government's policy intent. That much is clear. But it is equally important to point out what "ruling the country according to law" does not mean. From the perspective of the party state, it does not mean applying the law rigidly as rules.

The second form of abuse of power is individual abuse of power. Judicial corruption in China remains a problem. This includes bribery and corruption, as well as the gray practice of *pulling guanxi* in China. Judges were underpaid. That was particularly the case in the biggest cities such as Beijing, Shanghai, Guangzhou, and Shenzhen in China. Attritions of the most qualified judges in the big cities have suddenly become a problem in recent years, much to the chagrin of the party state.<sup>64</sup> Bribes are more tempting when the gap between judicial salaries and that of the private sector grows. What the latest judicial reform delivers (and this is one of the most vocal demands from frontline judges) is to have judges' salaries raised.<sup>65</sup> Today a head judge in a big city court in Guangdong can make RMB 30,000 (about \$4,200) a month. The salary is quite high for a grassroots government official. Lawyers working in the private sector still make a lot more, especially those working in the coastal region. But the judicial salaries are now substantially higher than non-judicial bureaucrats of comparable ranks. The party state is understandably wary of creating disparities among some of its own. But they went ahead to do so to make judges less susceptible to bribery. This, coupled with more stringent

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64. Cohen, *supra* note 58.

65. See Cao Yin, *Top Court Vows to Raise Judges' Pay*, CHINA DAILY (July 9, 2014, 07:25 AM), [http://www.chinadaily.com.cn/china/2014-07/09/content\\_17678125.htm](http://www.chinadaily.com.cn/china/2014-07/09/content_17678125.htm).

anti-corruption measures, creates the “carrot and stick” approach meant to reduce the abuse of power at the individual level. By raising the salaries of judges, the central government expects individual judges to give loyal effort to the law, or rather, the policy intent of the law.

Under the reform, judges who preside over a case would be responsible for the case for the rest of their judicial career. The purpose of this “lifetime responsibility” policy is to hold individual judges accountable for the cases they handle. It aims to eliminate the intervention of more senior judges from the same court. Intervention from above is a perennial problem in the Chinese courts. It is uncertain whether the policy works to stymie intervention. Many Chinese academics and judges themselves are doubtful.<sup>66</sup> But the intent of the party state is quite clear. It is again to remind frontline judges that the law is policy statement to be honored and carried out. The “lifetime responsibility” policy further confirms that Chinese judges are being regarded by the party state as primarily bureaucrats rather than judicial officials. To rectify the mistake of a *judge*, one appeals his or her decision. But to rectify the mistake of a *bureaucrat*, one asks that person to bear lifelong responsibility.

#### IV. THE RULES-BASED CHARACTER (OR THE LACK THEREOF) OF THE CHINESE LEGAL SYSTEM

The latest judicial reform aims to produce more faithful frontline judges; their faithfulness is manifest in implementing the party state’s policies. Despite the pledged commitment to law in important policy documents such as the Communiqués of the Third and the Fourth Plenary Sessions of the 18<sup>th</sup> Central Committee, many lower-level bureaucrats remain skeptical that a solely rules-based

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66. See Xu Zhenhua & Wang Xingguang, *Faguan Banan Zeren Zhuize de Dijinshi Moshi Tanjiu* (法官办案责任追究的递进式模式探究) (Exploring Different Models of Judicial Responsibility) (September 14, 2017), <https://mp.weixin.qq.com/s/5sBRftvFFPRvh-oH7HSV1A>.



system is flexible and agile enough for effective governance, to carry out the eclectic brand of paternalistic/socialist justice (“socialist rule of law with Chinese characteristics”) that the party state promotes. Similarly, the party state does not seem to view determinacy as fundamental to its legal system. In dealing with some difficult cases, judges use their discretionary power to maneuver the gray zone between the legal and the illegal. The state condones judges’ use of discretionary power, as long as they are not using it for personal gains or favors. The exercise of flexibility greases the wheels of this legal-administrative machine. Notwithstanding all the laws and regulations that the state has passed since the 1980s, the Chinese judicial process has built in and still allows for plentiful discretions.<sup>67</sup> As Potter points out, discretion remains a key element in criminal prosecution and sentencing, and in fact, in other areas of law.<sup>68</sup> And because law is policy, the exercise of discretion by individual judges is monitored by bureaucratic oversight and sanction, not by legal rules or the judicial mechanism of appeal.

The reliance on judges’ discretion is almost a matter of necessity. The People’s Republic of China is not a federation. It is a single unitary political entity. China has the largest unitary judicial system in the world. There are over 3,000 courts scattered around the country. It is one of the most centralized and certainly the biggest system in the world.<sup>69</sup> Its laws are single unitary laws. There is no major distinction between federal and state laws in China.<sup>70</sup> There is one set of laws that applies across the country. That set of laws is

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67. See Benjamin L. Liebman, *China’s Courts: Restricted Reform*, 191 CHINA Q. 620 (2007); Liebman, *supra* note 23.

68. POTTER, *supra* note 33, at 8.

69. If we include outpost tribunals or branch courts, the total would be more than 13,000 courts.

70. Provincial people’s congresses and their standing committees may pass local regulations. These regulations cannot contradict the constitution or national laws and administrative regulations.

the national laws promulgated by the National People's Congress and its standing committee. The laws are, on paper, uniform. The purported uniformity of law, however, means that it is ill equipped to deal with the broad spectrum of problems appearing across different parts of the country. For this unitary system to work in a big and varied country with various degrees of economic development and social and communal structures, it has to allow judges to apply the law flexibly. I use the word "apply" rather than "interpret," because the flexibility of Chinese judges is of an administrative nature. The use of mediation, as mentioned, is one key practice to instill flexibility. But judges also have other unofficial discretions to adapt the law to accord with local situations. The discretions are unofficial or gray because what judges do sometimes seem to go against the spirit of the law. For example, they have discretion in deciding when a case should be heard. They speed up a case when they want to push for a decision, or slow it down when they do not want to come to a decision. Judges also seem to have more leeway in sentencing and offering suspended sentences, compared to their American counterparts.

If we analyze the Chinese legal system by using jurist H.L.A. Hart's famous concepts of primary rule and secondary rule,<sup>71</sup> the Chinese system today has grown tremendously in primary rules, as evidenced by the promulgation of new laws in substantive areas. These laws are, however, policy statements that need to be flexibly applied. Compared to the flourish of the primary rules, the system is not at all developed in secondary rules, or rules about rules, be they constitutional, evidential, and procedural. Secondary rules clarify the conditions under which primary rules can be introduced, modified, or enforced.<sup>72</sup> As rules about rules, they, if enforced, take discretion away from judges. And this is the area that the CCP has been most cautious to make

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71. H.L.A. HART, *THE CONCEPT OF LAW* 78–79 (Clarendon Press 1972).

72. *Id.* at 79.

changes. One may even say that the Chinese system resists secondary rules. The CCP's pushback against what it views as a form of legal formalism is one ideological trait that it inherits from the old Soviet system.<sup>73</sup>

For example, there is not a lot of statutory interpretation in written judgments. Most Chinese judgments, even those from the appellate courts, are quite terse and do not devote much attention to spelling out the precise relationship between relevant statutory provisions and their application to the case.<sup>74</sup> It is often unclear what interpretive principles judges follow in applying the law. In some instances, judges are legalistic and literal. In other instances, they give what appear to be intuitive decisions. Officially, judges are not expected to interpret. Their job is to apply the law. Chinese courts are not given the power of "judicial interpretation."<sup>75</sup> The SPC does have the power under the *Organic Law of People's Courts* to clarify national laws for lower courts. The court occasionally issues "interpretation" on matters related to the application of the law. They come in the form of subsidiary laws that fill in the gaps of existing laws. Most of these documents do not address issues related to judicial interpretation. They are mainly expansions of the law to fill gaps rather than commentaries about how to interpret the law.

Perhaps some would object to my thesis of law as policy implementation. Some observers argue that the judicial reform seems to have elevated the status of law. There is, for

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73. Xingzhong Yu, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 36 (1989).

74. Weixia Gu, "Courts in China: Judiciary in the Economic and Societal Transitions", in *ASIAN COURTS IN CONTEXT* 487, 508–10 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015).

75. The power of "judicial interpretation" rests in the National People's Congress Standing Committee (NPCSC). In 1981, the NPCSC delegated the power of "judicial interpretations" (司法解释 *sifa jieshi*) to the SPC. But judicial interpretations are not precedents; instead, they are usually abstract interpretations adopted by the SPC, much like policy statements, and they should be registered at the NPCSC.

example, the growth of Chinese-style case law. One development that results from the judicial reform is the publication of guiding cases and the policy of making all judgments from different levels of courts available online. In 2010, the SPC set up its guiding case system, where the SPC issues batches of “guiding cases” on a regular basis, which lower courts are asked to follow. The total number of guiding cases, however, remains minuscule. More important, it is difficult to see what judges follow when they *follow* the guiding cases. There is no obvious equivalent of *ratio decidendi* in the Chinese law. The guiding cases are case summaries—the SPC do not expect judges in lower courts to study the full texts and to figure out the *ratio* of the cases. In other words, judges are instructed to follow the decisions in the guiding cases. Guiding cases, as some have pointed out, “are not expressions of metanorms exalting reason.”<sup>76</sup> The SPC said as much—guiding cases are *to be quoted* for judgment, but *not to be cited* for legal reasoning.<sup>77</sup>

The SPC also instructs lower courts to make their judgments accessible to the public. Millions of judgments are now open to public view. While promoting transparency, the policy is not designed to further develop the case law of China. The goal is to create a judicial panopticon, so to speak, to again tackle the principal-agent problem. Grassroots courts now know that they have to make their judgments available. Making judgments available to the public creates transparency; transparency in turn leads to more scrutiny. As mentioned, judgments in China, even those of the guiding cases, are not case law. The SPC repeatedly stated that prior cases should not be cited in any judicial decision. Its goal is

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76. Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2232 (2016).

77. Adjudication Committee of the SPC, “Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding” Shishi Xize (《最高人民法院关于案例指导工作的规定》实施细则) (Detailed Rules for the Implementation of the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance”) (2015) (available at Chinalawinfo, [www.lawinfochina.com](http://www.lawinfochina.com)).

to make lower courts subject to the scrutiny of higher courts. Again, what the party state wants is for judges to give loyal effort to its policies—to have the interests of the party state in mind.

Introducing more primary rules makes the system comprehensive. But the concentrated development of primary rules and the sparse presence of secondary rules suggest that this layering of new laws is more a step towards achieving faithful policy implementation than any serious attempt to develop a stronger tradition of judicial reasoning. There are differences across areas of law. In areas such as commercial litigation and intellectual property, judges are under more pressure to pay close attention to the law, mainly because the stakes are higher and the scrutiny by counsel of all parties is more intense. But even in those areas, there remains a lingering concern that legal consideration is mixed up with other forms of consideration.

#### V. CONCLUSION

The negative concept of rule by law is at best a convenient fudge to underline the authoritarian and repressive aspect of the Chinese judicial system. It is important not to lose sight of the many other sides of the Chinese courts that apparently escape the rule-by-law narrative. Ideals such as the rule of law have sometimes been used loosely to evaluate the behavior of the Chinese judicial system. But the party state is pursuing something different. The purpose of producing a positive account of law as policy implementation is to try to gain some positive insights about what is happening in China. It is to broaden the conceptual repertoire available for researchers, particularly when studying places whose legal traditions and social conditions are different from the more familiar Anglo-American tradition.<sup>78</sup>

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78. This is the point that Cheesman made. *See* Cheesman, *supra* note 8.

The exercise, I believe, also helps to gain, albeit in a backhanded way, a deeper understanding of the concept of rule of law. Rather than defining the rule of law deductively and then imposing the concept to China, we look into what is practiced locally and see how this Chinese model of law as policy implementation runs up against the rising expectations for legal determinacy and clarity. In other words, we can still gain an understanding of the rule of law, not directly but obliquely, through identifying the limits of the model of law as policy implementation. For example, under the latter model, law is not a means to police the actions of the central government. I don't think we can expect Chinese judges to give decisions that are maddening to the leaders of the party state. It is a testimony of the convergence of power that what happened in countries such as Egypt, Pakistan, Zimbabwe, and Malaysia, where top judicial officials were removed from their jobs for the judgments they handed down, did not happen in China. As Chinese leaders repeatedly said, the law serves the leadership of the party, not the other way around. Judges in China are well aware of that. What has been happening in the judicial reform is that the Chinese judiciary is to some extent empowered (and scrutinized), but the empowerment is for more effective policy implementation and is quite different from a strengthened rule of law. In practice, this means that power is given to frontline judges in the form of administratively guided discretions. Judges use the law to promote the policies of the central government. This “policy” role of law will only be further promoted as the party celebrates the seventieth anniversary of the People's Republic of China this year.