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The Chinese legal system presents a bewildering variety of normative-looking material that scholars have been trying for decades to figure out.[1] More recently, the Chinese law field has seen debate over whether China has abandoned its post-Mao project of legal institution-building, turning against law,[2] or has in fact continued building legality, albeit with distinctly Chinese characteristics.[3]

In *Law as an Instrument*, Shucheng Wang provides a well-informed, in-depth exploration of the sources of Chinese law and offers rich food for thought on these and other questions in the world of Chinese legal studies. In the author's words, the book "aims to make a contribution by systematically examining various sources of Chinese law and illustrating the dynamics of their sociopolitical logic employed in the applications" (p 11). The author is specifically concerned with positive law, and even more specifically with law defined as the rules courts apply when making decisions in cases before them.

The book surveys various sources of law in five chapters sandwiched between the introduction and the conclusion. They cover the constitution, formal judicial interpretations by the Supreme People's Court (SPC), other kinds of judicial documents created by courts in the course of their work, formal Guiding Cases issued by the SPC, and judicial precedents more generally coming under various labels.

The chapter on the constitution fits somewhat uneasily with the court-centred focus of the rest of the book, given that courts—as the author acknowledges—are not permitted to use the constitution as a basis for decisions. The other chapters, however, are rich in detail and insight into how the documents they cover actually function in the system. Particularly welcome is the author's unwavering focus on the political realities of the operation of the legal system, which contributes greatly to his explanation of why, for example, the Supreme

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[*] An edited version of this review will appear in a forthcoming issue of the Asian Journal of Comparative Law.

[1] See, for example, Perry Keller, 'Sources of Order in Chinese Law' (1994) 42 The American Journal of Comparative Law 711.

[2] See, for example, Carl F Minzner, 'China's Turn Against Law' (2011) 59 The American Journal of Comparative Law 935; and Qianfan Zhang, 'The Communist Party Leadership and Rule of Law: A Tale of Two Reforms' (2021) 30 Journal of Contemporary China 578.

[3] Taisu Zhang and Tom Ginsburg, 'China's Turn Toward Law' (2019) 59 Virginia Journal of International Law 313.

People's Court has developed a practice of issuing detailed legislation—it can go by no other word—despite its lack of formal legislative power.

This focus on political realities also leads the author to view courts as essentially not different from other governmental organs situated in a bureaucratic hierarchy, and operating according to a bureaucratic logic, echoing the insight of Ng and He that

> the Chinese judiciary cannot even be described as being subservient to the executive, in the way that some European courts are . . . . It is part of the executive[.][4]

As he notes (p 146),

> in an illiberal context, the primary concern of the courts is the enforcement of legal rules issued by a sovereign political authority, rather than the consensus of the people in the community. [Therefore,] when ambiguities of law arise, given the absence of judicial independence, the judges will normally report the case, if it is complicated and difficult enough, to a higher-level judicial authority for a solution, rather than relying on local customs or consensus of the community.

In this political environment, he argues, it is vain to expect courts to develop case law and a legal reasoning style at all analogous to that of courts in liberal democracies with judicial independence, and the hopeful literature surrounding the Guiding Case system is misguided.

The author's fieldwork leads at times to surprising and counterintuitive conclusions. It is by now practically conventional wisdom, for example, that local judicial protectionism is worse in economically backward areas, but much less of a problem in the courts of developed urban areas such as Beijing or Shanghai. Yet the author finds the opposite to be true: the richer a local government is, the more power it has vis-à-vis everyone—not just the local court system, but superior levels of government as well—and that means more power to protect local favorites (pp 101-102).[5]

His close examination of the documents produced by courts as well as his fieldwork lead him to the existence of a major problem, both theoretical and practical, for the system: the existence of secret laws. Recalling the by "law" we are talking about rules used by courts in deciding cases, it turns out that there is a vast subterranean store of documents courts use to decide cases, but which are known only to insiders and lawyers with good connections. The story of their creation is an object lesson in unintended consequences. Because the system wants to limit the legislative powers of courts, lower courts are prohibited from issuing the rule-like interpretations we see coming from the SPC. But because SPC interpretation are not sufficient to meet courts' need for guidance in interpreting vague National People's

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[4] Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (1st edn, Cambridge University Press 2017), p 168.

[5] For a recent study finding that the judicial reforms of 2014-17 have, where carried out, reduced local protectionism, see Ernest Liu and others, 'Judicial Independence, Local Protectionism, and Economic Integration: Evidence from China' (2022) <https://ssrn.com/abstract=4205091>.

Congress legislation, courts do in fact create such rules, but label them in non-provocative ways: "summary of meeting minutes" (会议纪要 *huiyi jiyao*), "adjudicative guidance" (裁判指引 *caipan zhiyin*), and "implementation opinions" (实施意见 *shishi yijian*), to name a few.

These documents are intentionally not published in order to avoid attracting criticism for encroaching upon the lawmaking authority of the People's Congresses, and are instead circulated internally to judges (p 98). Indeed, sometimes junior judges are not even aware of them. As the author writes (p 99),

> Because of the inaccessibility of local courts' judicial documents to the public, there is information asymmetry among legal practitioners. . . . [E]xperienced lawyers need to search for and access these unpublished but extremely important judicial documents, . . . sometimes even through their connections with the judges, in order to equip themselves with the living law applied by the judges . . . . This was confirmed by a senior judge, who said that, "in practice, the defence counsel will be in an extremely advantageous position if they can find a channel to access relevant unpublished judicial documents through personal connections with the judges, or in other ways".

No doubt there are some definitions of legality that do not include a requirement that the rules of decision be known or at least knowable to the public, but the Chinese government has not gone this far. The existence of these semi-secret rules, however understandable, means that the system is not operating according to its own standards.

In the chapter on the constitution as well as elsewhere in the book, the author seems, through his discussion of what he calls prerogative and normative institutions (e.g., pp 57-59), to be suggesting that Ernst Fraenkel's theory of the dual state applies to China, although Fraenkel's book[6] does not appear in the bibliography. Although other distinguished scholars have made a similar suggestion,[7] I am unconvinced, particularly with respect to the oft-made claim, at least partially endorsed in the book (pp 140, 177), that while extrajudicial influence is of course exerted in sensitive political cases, ordinary commercial cases will generally be judged on their merits. Empirical research and fieldwork by scholars show that that's just not the case.[8] The Chinese court system and the political system of which it is a part don't

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[6] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Edward Shils and others eds, First edition, Oxford University Press 2017).

[7] E.g., Hualing Fu, 'Duality and China's Struggle for Legal Autonomy' [2019] China Perspectives 3.

[8] One scholar analyzed a 4,000-case dataset, supplemented with interviews with officials, judges, firm managers, and lawyers, to conclude that in commercial litigation,

> firms use voice and exit to influence court decisions, and . . . judges bow to the pressures of local fiscal imperatives. . . . My interviews with government and court officials indicate that they are largely responsive to these business requests, especially when the businesses are important taxpayers. A judge explicitly told me, "You need to follow the money."

operate that way. There is no line between politically sensitive cases on the one hand and ordinary cases on the other. The same judges appointed through the same process and with the same incentive structure hear both kinds of cases. The same tools for interference exist in both. As the author ultimately acknowledges this—"there is no doubt that courts under authoritarian regimes are institutionally not immune from politics, and that their adjudication is subject to varying degrees of political control in practice" (p 177)—I found myself unsure of where exactly the author stands on the applicability of dual state theory to China.

I began reading this book with the hope that I would learn a great deal about the sources of law in China and I was not disappointed. The author has done a great service to the field in bringing together into one unified volume the fruits of several years of research and fieldwork. He keeps his eye resolutely on political realities and brings a sophisticated understanding to what he sees.

Finally, there are two aspects of the book's otherwise excellent production (I don't recall finding a single typographical error) that I think are worth calling attention to in a book review in the hope that future authors and editors will find the comments worth taking aboard.

First, I do not see the point of separating the bibliography into works in English, works in Chinese, and primary sources. Nobody reads a bibliography that way; they go there in order to look up references in the text. The references in the text are all in the "[Name] [Year]" format; why make the reader consult up to three different lists when they could more easily find everything in a single alphabetized list? If one sees a reference to "Chen 2005", there is no way of knowing what language the work is in.

Second, given the problem of link rot generally and with Chinese sources in particular, authors should provide URLs to archived copies of every online source, using an established archive unlikely to disappear soon, such as www.archive.org or perma.cc. This would be particularly helpful for material such as Chinese court judgments, which may be behind a paywall (if obtained from pkulaw.cn) or simply disappear on a political whim (such as judgments on "picking quarrels" cases at the China Judgments Online site). Only in this way can citations truly fulfill their scientific function, which is to allow the reader to retrace and verify the steps taken by the writer.

Yuhua Wang, 'Relative Capture: Quasi-Experimental Evidence From the Chinese Judiciary' (2018) 51 Comparative Political Studies 1012.