



CHINA'S SUPREME COURT

Ronald C. Keith, Zhiqiu Lin and Shumei Hou

China's Supreme Court

This book explores the role and work of China's supreme court – the Supreme People's Court – focusing especially on the court's role in the struggle concerning the establishment of the rule of law in China's judicial system. It discusses the differing positions of those who favor “the rule of law” option, where there is organizational separation of legislature and judicial responsibility, and those who argue for the retention of China's present system where judges and the courts are subordinate to the Party and who are concerned by any increase in the court's independent interpretative activities. It shows how the independence of courts has in fact grown, examines how the supreme court has established its supremacy over lower courts, and discusses the supreme court's handling of the politics of death penalty reform. The book covers the supreme court's involvement in criminal, administrative and civil law.

Ronald C. Keith is Professor in the Department of International Business and Asian Studies at Griffith University, Australia.

Zhiqiu Lin is in the Department of Sociology and Anthropology at Carleton University, Ottawa, Canada.

Shumei Hou recently completed her Research Fellowship at the Griffith Asia Institute, Griffith University, Australia. She was formerly Associate Professor and Head of Administrative Law at Henan University of Politics and Law, a key institution for the training of judges, lawyers, and procuratorate officials; a “public intellectual” who has championed the development of administrative law and procedure inside China; and a practising lawyer with rare Supreme Court experience.

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China's Supreme Court

**Ronald C. Keith, Zhiqiu Lin,
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To Nerissa and Allisha

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Abbreviations

APL	Administrative Procedural Law
CCP	Chinese Communist Party
CCPCC	Central Committee of the Chinese Communist Party
CLP	Civil Law of Procedure
CPL	Criminal Procedural Law
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
OGI	Regulations of Open Government Information
PRC	People's Republic of China
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate

Preface

There is a curious, but telling juxtaposition on the wall in the marbled grand foyer of China's Supreme People's Court (SPC) building in Beijing. A large bronzed depiction of a one-horned, winged animal is positioned above a red highlighted signboard that calls upon Party members at Court to pay attention to the law and the mass line. This juxtaposition of the ancient and the revolutionary reveals a dilemma at the heart of China's State Constitution. The latter includes a 1999 amendment supporting the "rule of law" and the stricture that no one is above the law; however, Article 27 requires that all state organs and functionaries, including those in the SPC, must apply the mass line: "All persons working in organs of state must rely on the support of the people, keep in close touch with them, heed their opinions and suggestions, accept their supervision, and do their best to serve them."

As for what is likely a one-horned goat, according to one account, in the Shang Dynasty (ca. 1600–1050 B.C.), Justice Minister Gao, was sometimes unable to decide how to apply China's first laws to determine a person's guilt, or innocence. When in doubt he relied on the unerring intuition of a fabulous goat that butted only those who were guilty. As suggested in the popular Confucian adage 君子不器, or "the superior man is not an instrument" a magistrate is not merely a tool of measurement who impersonally applies yardsticks to a case; the magistrate must draw on an inner sense of high moral intuition.

How would a modern leader of the Chinese Communist Party respond to such a tradition? Just below the goat standing against the wall there were bolded instructions in Chinese characters that typify the Party's modern mass-line style of communication. The signboard highlighted five ways in which Party members must show leadership at the Court:

带头学习提高
带头争创佳绩
带头服务群众
带头遵纪守法
带头弘扬正气
带头服务群众

Passing Party members were reminded that they must play a leading role in raising their studies to a higher level—this accords with Mao’s famous instruction, “study, study, and study some more” (学习,学习,再 学习) – that they must struggle to create high standards, that they must—as Mao had also expounded—take the lead in serving the masses, that they must respect the law and discipline – Party discipline now calls for “acting according to law” and that they must take the lead forward in doing what is right.

What was such a signboard doing in the middle of the SPC’s foyer? After so many years of reform had the mass line not disappeared long ago with Mao? This perplexing mute juxtaposition on the Court’s wall reflects an enduring unresolved contradiction that informs the ongoing struggle to develop the “rule of law” in China. The original 1980s jurist debates on what are the defining characteristics of the “rule of law” considered the relation between the “rule of law” 法治 and the “rule of man” 人治. 1990s political and legal debates focused on the relation between the “rule of law” and the “rule of virtue” 德治. Reformers had associated the rule of man with Mao’s personality cult while others suggested that the rule of law would not work in China unless it was applied by persons of tremendous virtue. In 1999, Party Secretary General Jiang Zemin vetted a constitutional amendment based on his formulation, “running the country according to law and establishing a socialist rule of law country” 依法治国建设社会主义法治国家. But Jiang did have a caveat! He concluded that “to govern the country with high morals and persistently strengthen social moral construction” was as important as “ruling the country according to law.”

Even former SPC President Xiao Yang, who had labored so hard to consolidate new reference to the “rule of law” in China, told US Supreme Court Justices Kennedy, Scalia Ginsburg, and O’Connor that while indeed Chinese reform had made great progress, they should be under no illusion. The rule of law in China has to respond to the requirements of China’s “customary society” 礼俗社会.

In such a society, the feelings that inspire human relationships cannot be wholly sacrificed to impersonal regulation. In China, the goddess of justice holds a pair of scales, but is not blindfolded as is her Western counterpart. Under Jiang Zemin, the “rule of virtue” and “rule of law” were placed in a synthesis. The law must be applied by persons of high moral integrity who are recognized as such by the Party.

There is, however, the outstanding issue that is captured in the frieze above the entrance to the US Supreme Court which says: “EQUAL JUSTICE UNDER LAW.” In the context of Chinese “custom” and “feeling” there is the potential for human feelings to foster unqualified *guanxi* 关系 to undermine “equality before the law.” The latter principle, however, is endorsed by China’s State Constitution, as it not only promises fairness for everyone who comes before the law, but it serves as insurance against the political favoritism and privilege that threatens the justice underlying the law.

This book examines the dilemmas and achievements of the SPC particularly in light of the tension between law and politics in China’s post-1949

history. The key question is: Is this tension the same in a modernizing, as distinct from a revolutionary, setting? Analysis begins in 1949 and asks whether the relation between law and politics changes at critical political points such as in 1954, 1958, 1966–76, 1978, 1981, 1989, 2007, and 2013.

With the advent of reform after December 1978 the Party told its members to drop “policy is the soul of law” and to respect “judicial independence” and to desist from past arbitrary intervention in court sentencing. Party members were to “act according to law” and to lead by example. They were to encourage the masses’ understanding of the law and its purposes. The CCP moved from the “Party taking the place of law” 以党代法 to “playing the leading role according to law” 以法治国.

In today’s China, the Party asserts its commitment to trial independence, but the courts must be sensitive to the needs of the people. China’s “supreme court” is in this way to serve as a “people’s supreme court.” “Judicial democracy” even requires that the masses supervise the Court. The question as to just how “supreme” is the People’s Supreme Court remains open-ended. Until recently, the banner of the “three supremes” 三个至上 (supremacy of constitution and laws, supremacy of the Party’s cause and supremacy of the people’s rights and interests) was bolded on the Court’s website.

The difficulties in following too closely the masses’ feelings are obvious. As discussed in Chapter Four the SPC has taken on special responsibility to foster more exacting standards in the confirmation of the death penalty, but the Court has demonstrated in specific cases that it will assuage outraged popular opinion demanding the immediate imposition of the death penalty.

The on-time provision of justice has become an important element of the political legitimacy of the one-Party State especially in light of new political focus on social justice and on the extreme burden of systemic corruption that has reached into the highest levels of the SPC, itself, as in the Huang Songyou case and in the recent systemic and axiological complications of the Bo Xilai affair.

The present study is perhaps the last in a series of the authors’ books about the fascinating transition to a modern legal system in China. The first, *China’s Struggle for the Rule of Law*, (1994) aspired to detailing and analyzing the new lines of pre-internet debate over the introduction into China of the foreign notion of the “rule of law”. Second, *Law and Justice in China’s New Marketplace*, (2001) extended this record to look at the law’s adaptation to new market and property relations. The 1990s saw the emergence of the “plurality of subjects before the law” 利益主体多元化, and the conscious creation in China of a new “pluralized jurisprudence” 多元化的法理学 facilitating a fair understanding of new property and societal relations in China’s extraordinary transition to market.

Third, *New Crime in China: Public Order and Human Rights* (2006) took up the issue as to how law is created, or stipulated, and how it is prioritized and rationalized in the context of an axiological challenge that calls for a rational balancing of the need for public order and the need for rights protection in a fast-changing society. The current book builds on this earlier

research, but tries to make amends for the previous lack of institutional focus on political discourse, legislation, and jurisprudence and attempts to place China's transition to a modern legal system more systematically within the substantive political context of the SPC and the building of China's judicial institutions.

Where once the Court was mandated to support the state's assault on counterrevolution, it now must ensure the protection of rights and interests in a fast-changing social environment that is far more institutionally and legally complex than in the past. China's SPC has lacked a related institutional biography. Yet the SPC is extraordinary in that it is not only a judicial, but also an administrative, institution that has key responsibilities in the reform context of politics and law. Analysis must not only keep track of what are "Chinese characteristics," but it has also to consider the different types of Western influence with respect to the Anglo-American and Continental legal traditions.

The continuing subscription to the underlying principles and organizational requirements of what is herein called the "1954 system" has provided a clear institutional basis for the constitutional protection of rights and interests, but the SPC has a mandate to "serve the people" in the new contexts of modernization and globalization, and it has created new formats relating to judicial interpretation, case guidance, and supervision to ensure against the distorted application of the law in China's many jurisdictions. Furthermore the SPC has rarely been factored into Western analysis of China's centre-region relations, yet it is an important national institution that must deal with the changes in centre-region relations as they impact on the rational and consistent application of law in the pursuit of justice at all levels of state administration.

The Court's "service to the people" has required systemic flexibility within the confines of the "1954 system", and the Party instruction below the fabulous goat to serve the people and respect the law may not be moot. The Party has refused to endorse American "judicial independence", but recent events suggest a renewed attempt to control, for political authority, and privilege through checking and balancing based on the "principle of separation of responsibilities, mutual restriction and mutual coordination." Moreover, the new reform prospect for transparency and enhanced legal understanding in court judgements has emerged because of, rather than in spite of, Party political demands for fair and efficient justice that resists corruption and supports the needs of the masses. At critical points the Party's political leadership has resisted constitutional amendment creating a formal SPC right of interpreting NPC legislation, but the Court has been given the responsibility to "serve the people" and to protect their "rights and interests" as they cope with changing property and market relationships.

The SPC has been through a fascinating learning curve. The SPC has studied the dilemmas associated with the creation of a "rule of law" with "Chinese characteristics" in the contexts of both revolution and modernization. Chinese characteristics may receive greater or lesser emphasis over time, but there is a relevant adage in the West to the effect that "law is local." China's advanced culture and fast developing society and economy argues for the

rational adaptation of law and legal reform effectively and justly to respond to local conditions and society. The “rule of law” is at bottom a foreign concept in China; however, with the exception of the past several years of touting the “three supremes” the domestic relation between politics and law has often allowed for the studied consideration of the best of international legal practice as the SPC adapts creatively in its service to the people of China.

1 The Supreme People's Court in China's struggle for the "rule of law"

China's supreme court is a court like no other. First of all it is a "Supreme People's Court" that is required to deliver "people's justice" 人民司法, and this has had profound implications for the range and substance of its activities. Second, China's Supreme People's Court (SPC) has had to deal with an extraordinarily close, almost palpable relation between law and politics as China has moved through stages of revolutionary transformation into the present era of market reform and accelerated economic growth. The SPC served Mao's transition to socialism, yet since 1978 it has served a very different cause in the construction of China's "rule-of-law economy." As a growing national institution, the SPC has the key responsibility to ensure the proper operational settings for the rule of law's application in the search for justice during a time of deep and unsettling societal and axiological change.

The SPC regularly faces what Marx would have called a "crying motley of contradictions." The SPC has, for the most part, abstained from what has been increasingly viewed as the "judicialization" of politics in Asia,¹ but the Court's story is, nonetheless, fascinating for the Court has directly participated in the transition from building a revolutionary society to the building of a "socialist market." In Mao's time, it acted against "counterrevolution." During more than three decades of economic reform it has helped protect "rights and interests" responding to the calls of the Chinese Communist Party (CCP) as China's "governing Party" 执政党 to support social and political stability. Arguably, the Court, in its cycles of "judicial activism", has performed an indispensable service in its "creative function of rule-making."²

The difficulty in establishing any kind of "rule of law" in China is suggested in the conflicted history of nascent Chinese "constitutionalism" 宪政. The SPC was created under the revolutionary Party leadership of Mao Zedong. Law served an angry class politics that regarded "equality before the law" as a lawyer's subterfuge that gratuitously stood in the way of the revolutionary masses quest for justice. The people's courts facilitated a mass struggle against class enemies.

Public trials orchestrated political consolidation. In the heat of class struggle, the people's courts ignored due process. Often Party policy statements substituted for law, and legal process reflected opportunistic applications of

analogy. In the absence of law, the SPC issued “judicial interpretations” 司法解释 that were explicitly rationalized in Party policy. National political consolidation and judicial activity were premised in a formal subscription to the jurisprudential principle of “flexibility” 灵活性 which sanctioned extravagant analogy in law and the substitution of policy for law.

After Mao's death, the predictability and rationality of law was asserted against the irrational volatility of the “rule of man” 人治 and the “spirit of the leader” 领导精神. The second-generation Party leader, Deng Xiaoping, masterminded the law's incorporation into a deliberate strategy for post-Cultural Revolution institutionalization. Deng entwined “democratization” and “legalization” specifically to resist the extremes of personality cult politics and to facilitate the development of a new modern national economy that was to rest on a healthy institutional base.

The post-1978 trend of legal reform stressed the “neutrality,” “independence,” and “professionalism” of the courts. This trend formally culminated in the 1999 amendment to Article Five of the State Constitution that proclaimed: “The People's Republic of China governs the country according to law and makes it a socialist country ruled by law 中华人民共和国实行依法治国建设社会主义法治.”³ This amendment reinforced the extant principle in Article Five which affirmed: “No individual or organization is privileged to be beyond the Constitution or law 任何组织或者个人都不得有超越宪法和法律的特权.”

During the post-1978 reform years the relation between law and politics persisted but has been subject to cyclical reinterpretation. As well there have been varying degrees of explicit “sinification” of China's legal system. As the former SPC President, Xiao Yang, put it to his peers at the US Supreme Court, the “rule of law” in China is bound to operate differently within China's “customary society.” Over the years of reform, Chinese political and legal discourse has distinguished between the “rule of law” 法治 and the “legal system” 法制 and debated the correlations of the “rule of law” with both the “rule of man” 人治 and the “rule of virtue” 德治.⁴

Since the mid-1980s discourse in China regarding the role and activity of the court system has deliberately inquired as to how to create the “rule of law” within China's particular context. If the “rule of law” is at bottom an impartial mechanism for ensuring equality before the law versus the exercise of arbitrary state power and privilege, how can the SPC support the development of a genuine “rule of law” in China while at the same time supporting Party emphases on meeting the needs of the people under “socialism with Chinese characteristics”. How does a “People's Supreme Court” support the rule of law in China?

The political and constitutional foundations of the SPC

The modern history of the SPC's institutional life, philosophy, and operation reflects the changing relation between politics and law as expressed in the development of specifically Chinese “constitutionalism” 宪政. The latter has clearly placed the legal system within state administration; and at the same

time it has disavowed the superiority of Western “judicial independence” and the “separation of powers.”

The immediate relevance of politics to law has been spelled out over time in constitutional provision and amendment as well as in the adjustment of related Party documentation and SPC court policy, planning, and practice so as to “keep up with the changing times.” How are we to analyze the contradictions at the heart of the system of “people’s courts” in China? Shao-Chuan Leng and Hungdah Chiu, for example, in their 1985 classic, *Criminal Justice in Post-Mao China* looked back on CCP political experience prior to victory in 1949 to discern in post-1949 China “the emergence of the two models of law, jural and societal.”

On the one hand, there were a number of basic laws enacted, and a regular judiciary system consisting of courts, procuracy, and people’s assessors instituted along with elaborated judicial procedures providing for public trial, appeal, right of defense, etc. On the other hand, special encouragement was given to the development of mass line devices in judicial work, the use of mediation for handling civil cases, the employment of extrajudicial organs and procedures in imposing sanctions and settling disputes. At times, “people’s justice” was dispensed through the regular process of the judiciary. At others, it was done through summary proceedings of revolutionary tribunals and public security organs. The alteration of procedures was determined ... more often by the relative intensity of the revolutionary struggle in a given time.⁵

At the founding of New China, Article Two of the 1949 Organic Law of the People’s Government of China endorsed the Chinese Communist Party’s (CCP) principle of “democratic centralism.”⁶ Article 26 acknowledged the SPC as the “highest judicial body in the country.” The SPC was charged with the “direction and supervision of the work of judicial bodies at all levels throughout the country.”⁷

However, the CCP’s leaders were not shy about their political intentions. What little law there was became the “state’s tool.” In the heady days of national political consolidation, law was coopted in the tumultuous sequence of 1950s mass campaigns to wage struggle against class enemies. The indictment and sentencing of the class enemy was designed to create education and propaganda supporting the new regime, hence the following statement by a basic-level judge makes an unconvincing reference to evidence, while whipping up the masses’ sense of injustice against three landlords:

... we are going to pass judgment on three criminal landlords from Hui-lung hsiang. ... We’ve caught these rogues. ... They couldn’t escape if they had wings on them, so you don’t need to be afraid of them anymore. Now is the time for everyone to pour out the grievance he has kept in his heart for years – murder, swindle, rape, ill-treatment, everything. The

final verdict of this tribunal will be based on your evidence and your opinions.⁸

In the early 1950s there was much “pouring out” of grievances in the theatre of class struggle. Court proceedings were deliberately sensationalized to further mass education and political consolidation. Lawyers were not welcome. Cross-examination was unnecessary. The tribunals were designed to create political consciousness through Party-led catharsis as the enemy was brought to book before the masses on judgment day.

The law served again as the state’s “tool” during the Anti-Rightist Campaign in 1957–58. Those who fanned the flames of class struggle warned against vacillating elements who would only use the finer points of law to delay or frustrate the mass action against the “rightists” in the intellectual community. Such apprehended legal subterfuge was in essence “using law to oppose the Party” 以法抗党.⁹ “Tool theory” 工具论 required the development of the legal system to support class struggle and this deliberately challenged the Western principle of the “supremacy of law.”¹⁰ The relation between law and politics in the 1950s was explicit, brutal, and unapologetic.

In his 28 October 1951 report to the Third Session of the Chinese People’s Political Consultative Conference, the SPC’s first Court President, Shen Junru – a united front “progressive” and the only non-Party member ever to serve as Court President—warned that the judges throughout the court system must fall in line with Party instruction to eschew “boundless magnanimity” 宽大无边 towards class enemies and counterrevolutionaries. He reminded China’s judges that the people’s judicial organs are self-consciously a part of the people’s dictatorship which does not recognize the capitalist notion of “judicial independence,” 司法独立. As the new regime politically consolidated itself, the courts were to facilitate the “centre’s unified centralization” (中央的集中统一).¹¹

Moreover, prior to the approval of a new permanent constitution in 1954, Party Committees habitually interfered in trial proceedings. This interference persisted even after the promulgation of the 1954 constitution and was formally justified in the introduction of “unified Party leadership” 党的一元化领导 in 1959. It was not until 20 years later that the CCP Central Committee formally annulled the Party committee approval of trial cases in favor of “judicial independence” as “trial independence” 审判独立.¹²

Placing the SPC in the 1954 constitutional system

Arguably, the 20 September 1954 State Constitution was an important step towards Chinese constitutionalism particularly as it featured new reference to the “independent” exercise of judicial authority. Professor and Judge Zhang Wenxian, for example, notes that the new constitution heralded a change in “the mode of the Party leadership over the judiciary.” The CCP moved from “Party taking the place of law” 以党代法 to “playing the leading role