
Introduction

Emergence of Chinese Law?

Background: China's Turn against or towards the Law?

Throughout the twenty-first century, China has played an important role in the changing world order that cannot be easily ignored, both before and after the beginning of the Sino-US trade war, given its unprecedented integration into the global economy. In parallel with its economic development, China has also made tremendous efforts to build up an instrumentalist legal system ever since 1978, when Chinese leader Deng Xiaoping realized the importance of law for the country's economic revival and political stability. Interestingly, after Xi Jinping came to power in 2012, there has been some scholarly debate over the dynamics of China's legal order. One side argues that China is turning against or away from law with an attempt to revive pre-1978 court mediation practice, in contrast to its previous legal reforms emphasizing the role of formal law and court adjudication in resolving civil disputes (Minzner 2011). Other scholars contend that China's efforts to deepen its dictatorship in the Xi Jinping era have been to a large extent highly legalistic, empowering legal institutions and developing legal measures to combat traditional bureaucratic corruption; in short, harnessing the organizational and legitimizing capacities of the law rather than circumventing it (Zhang and Ginsburg 2019). To some extent, this debate is like focusing on two sides of the same coin. On the one hand, in recent years, China has witnessed a "litigation explosion": in short, a rapid increase in the number of cases filed with courts, largely due to the ups and downs of China's economic development, as well as the introduction of the "registration system for case dockets" (立案登记制 *lian dengji zhi*) in 2015, which requires courts to docket all case applications according to the law. This represents a significant departure from previous practice, in which courts had wide discretion to review and reject a case filed with the court. In addition, in order to improve the professionalism of Chinese

judges, the Supreme People's Court (SPC) adopted a "judge quota" system (法官员额制 *faguan yuan'e zhi*) in 2015; as a result, the number of quota judges with better remuneration packages, as distinct from other categories of court staff (i.e. judicial assistants and administrative staff), dropped by over 40 per cent according to the SPC's report (Sohu.com 2017). These reforms signal China's turn towards law through professionalizing court personnel; this is true despite the fact that, in reality, the increasingly heavy caseload has put judges in a difficult position, with judges in many courts being required to deal with an average of more than 300 cases per year. This heavy workload has led many judges to leave the courts (Lubman 2015).

Central authorities are certainly aware of the dilemma resulting from these judicial reforms, and have been attempting to revive the Maoist approach to dispute resolution, called the "Fengqiao Experience" (枫桥经验 *fengqiao jingyan*), which focuses on "small matters not leaving the village, and larger matters not leaving the township" as indicated in the Chinese Communist Party's (CCP) plan to revitalize the countryside (Central Committee of the Chinese Communist Party and State Council 2018). In order to implement the CCP's revival of the Maoist approach to social management, the SPC has specified a series of measures designed to integrate courts into this Maoist model of dispute resolution, led by the Party committee and government, which insists on engaging in non-litigation dispute resolution mechanisms wherever possible and prioritizing mediation, as well as overcoming difficulties and solving conflicts in a timely manner at the grassroots level (Supreme People's Court 2019). In this model, the court as a political actor plays a significant facilitatory role in the non-litigation dispute resolution network, led by the Party committee and government; for example, through setting up "judge liaison points" (法官联络点 *faguan lianluo dian*) in grassroots communities to provide periodic or even door-to-door consultation, or indoctrination, in order to resolve the dispute without litigation as early as possible. At this point, as one grassroots official said, it is much easier to resolve a dispute if a judge is involved in the mediation process, because the parties concerned are more willing to accept a proposal facilitated or offered by a judge (Interview 66-19-ZJWZ01). Clearly, apart from the state actors involved, a basic idea behind the Maoist approach to dispute resolution (i.e. the Fengqiao Experience) is to mobilize the masses through a politically selected group of people, usually with a certain (monetary and/or non-monetary) incentive – such groups include the "Chaoyang Masses"

(朝阳群众 *chaoyan qunzhong*) and “Xicheng Aunties” (西城大妈 *xicheng dama*) in Beijing city, or the “Wulin Aunties” (武林大妈 *wulin dama*) in Hangzhou city – to target and indoctrinate the parties concerned in order to resolve the dispute or other issue within the community. This political approach is primarily rooted in the CCP-led grassroots community in which the party concerned resides. This approach is also likely to impose peer pressure on those who are targeted, who may be politically labelled and treated as “troublemakers” or even “lawbreakers”. In the Mao era, in extreme situations, in order to purge these political opponents, the idea of “class struggle” was even raised by the CCP via political movements, such as the Socialist Education Movement (社会主义教育运动 *shehui zhuyi jiaoyu yundong*) launched in 1963, to remove “reactionary” elements with the CCP’s bureaucracy (Baum 1969). It is clear that the revival of the Maoist approach to dispute resolution indicates a definite shift towards stressing the importance of mediation in various forms, such as court mediation, societal mediation and administrative mediation. In this sense, it may be understood as a turn “against” law.

Nonetheless, this is only one side of the coin. On the other side, tremendous efforts have been made at the same time to build up a more professional judiciary. In fact, there is no inherent contradiction between these two sides of the coin, as both work to solidify China’s authoritarian regime by strengthening authoritarian legality and increasing the resilience of the CCP’s authoritarian politics.¹ It has been observed that the revival of pre-1978 court mediation practice represents an attempt to resolve disputes at early stages, particularly if the fault (as concluded from the court’s fact-finding) cannot simply be assigned to one party, in such a way as to “mitigate at least to some extent the kinds of adversarial excesses”; this is then followed by a verdict of right or wrong, determining the winner or loser in a similar way to a formalist Western-style legal system (Huang 2006b: 297, 306). This is in fact largely compatible with China’s traditional legal culture of Confucianism, with its emphasis on dispute resolution as its foremost concern rather than the protection of rights via formalist reasoning (Huang 2006b: 278). Furthermore, different from the traditional ideal of settling disputes by societal mediation (Huang 2006a), the Maoist approach to mediation expands the role of the court to the masses in the community, in accordance with the

¹ Mary E. Gallagher (2017) is a pioneer of exploring the theory of authoritarian legality in China.

ideology of the “mass line”, which means that “judges do not just sit at court but must go down to the village to investigate the truth with the help of the ‘masses’ and then resolve or ‘mediate’ a case” (Huang 2006b: 286).

In the era of Xi Jinping, due to the establishment of the “grid management system” (网格化管理 *wanggehua guanli*) that divides the territory of a local government into a number of segments, each monitored by an officially designated agent (Cai 2018), judges are now designated to each of these grids to resolve the disputes arising there. Judges’ engagement in the Maoist approach has in fact caused mediation to develop adjudicative features, as judges – constitutionally designated as adjudicators – have been playing a facilitative *political* role in the CCP-led grid management system. This political role of judges in the community, as arguably different from its constitutionally designated adjudicative role in court trials, is in reality politically pragmatic and influenced by practical political needs. For instance, judges may engage in propagandizing these newly enacted laws, or the CCP’s achievements pertaining to the “Chinese rule of law”, by propagandizing a number of selected judgments throughout the community. Moreover, in political movements or activities, certain political tasks may be assigned to them (e.g. in targeted poverty alleviation programmes) in the same way as they are to other political subordinates of the CCP in order to achieve specific political goals. All of this clearly shows the application of the CCP’s mass line – “from the masses, to the masses” – to the courts (Huang 2006b: 286). Given the both implicit and explicit involvement of state actors in the mediation process, as Huang observed, “mediation” in China’s context has “taken on a far more adjudicatory, aggressive, and interventionist meaning than the mediatory ideal of voluntary settlement of differences through third-party facilitation” (2006b: 287). The extent to which courts may expediently intervene in the dispute resolution process depends largely on the complexity and severity of the dispute, as well as the potential threat it poses to social security and political stability. The court may play a role in such a process: either at a very early stage, as a facilitative actor outside the courtroom, or in the final stages, acting as an adjudicator and making a judicial decision if early efforts to resolve the dispute (including mediation) are unsuccessful. Before a dispute goes to the court, various soft and/or hard measures may be employed by relevant state actors in order to effect reconciliation, such as through “moral-political education, through political pressure (applied also by the

local party leadership), and social pressure (applied also by relatives and neighbors), and even through positive material inducements" (Huang 2006b: 288). In this vein, it would be unsurprising for a judge to conduct on-site visits in order to persuade and educate the disputants into a voluntary compromise (Huang 2006b: 278). Moreover, political indoctrination may be readily integrated into such a didactic dispute resolution process by various state actors, either consciously or unconsciously.

To say this, however, is not to say that law is absent from these processes. Rather, given the development of formalist Continental law in China during the reform era since 1978, law has indeed come to play an increasingly important role in Chinese society, as indicated by the government's periodical nationwide propaganda efforts to stress the importance of the law with the goal of building up a (rhetorically so-called) rule-of-law order with Chinese characteristics. This approach somewhat downplays – at least domestically – the more authoritarian features of the regime, which are often exaggerated or blamed by its liberal counterparts for political purposes.

In this vein, given the importance of law for solidifying China's authoritarian governance, every effort has been made since 1978 to develop a positive system of law through law codifications, which represents a complete break from the period of the Cultural Revolution from 1966 until 1976, during which time legal nihilism prevailed across the entire country. Of course, in the process of codification, it is inevitable that China has been required to import a large amount from foreign jurisprudence. For example, private law was underdeveloped in the Chinese law tradition, meaning that conflicts arising from business deals and contracts were largely handled by customs and local traditions through non-official channels (Fairbank 1983: 122–123). After decades of the development of law codification in the areas of both public and private law, China has made tremendous efforts and achievements in this field, as partially evidenced by its promulgation of the Civil Code of the People's Republic of China (PRC) (中华人民共和国民法典 *zhonghua renmin gongheguo minfa dian*) in 2020. Nonetheless, these codified laws, the underlying concepts of which are largely imported from Western jurisprudence, may have distinctive meanings and logic in the context of Chinese society. For instance, from a historical and cultural perspective, the Western formalist legal tradition emphasizes principles of the protection of rights; by contrast, Chinese law in the Confucian tradition comprises *qing* (compassion based on Confucian humanness), *li* (moral

principles governing both nature and society) and *fa* (the laws of the state), while law occupies an instrumental position in maintaining social order (Huang 2006b: 279). An intellectual inquiry that identifies these sources of Chinese law in action, along with their functions in the country's sociopolitical context, is accordingly merited.

Thesis: Sources of Chinese Law

As China's legislative enterprise has developed, its positive law system has been comprehensively codified in a specific law: that is, the Legislation Law of the PRC (中华人民共和国立法法 *zhonghua renmin gongheguo lifa fa*), enacted in 2000 and amended in 2015, which provides various statutes normatively and with binding force that enable the government to govern its territory, various actors to gain its authority with legitimacy and judges to have a legal basis for making judicial decisions (National People's Congress 2015). Keller (1994: 726) has divided the statutes therein into three categories: primary, secondary and tertiary legislation. At the top of this pyramid is the primary legislation, which ranks just below the Constitution in terms of legal authority and is often narrowly categorized as "*falü*", a term usually translated as "law". The secondary legislation is "*fagui*", a term usually translated as "regulations", which are made by the State Council (which possesses the highest executive power according to the Constitution) and regional people's congresses (including their standing committees as executants) at the prefectural level and above. The tertiary legislation is "*guizhang*", a term usually translated as "rules", which are produced by central government ministries and local government at the prefectural level and above.

Moreover, there is a special category of laws applicable to ethnic autonomous areas, usually translated as "autonomous and separate regulations" (自治和单行条例 *zizhi and danxing tiaolie*), which are issued by the people's congresses of ethnic autonomous areas to modify relevant higher-level statutes in light of the political, economic and cultural characteristics of the area in question (Keller 1994: 726). However, these laws only come into force after obtaining approval not only from the higher-level Congress but also from the CCP (Feng 2017: 59). This approval system, which lacks specific criteria, has in fact undermined the legislative autonomy in practice. It has been found that although ethnic autonomous regions have made efforts to make autonomous regulations, which are usually deemed to be the most important form

of autonomous legislation, none of the five provincial-level autonomous regions have passed them with formal approval.²

Nonetheless, such a conceptualization, the process of which contains legal concepts such as “primary legislation” and “secondary legislation” that are largely used in Western parliamentary and presidential systems, can only indicate the hierarchical status of various positive laws, which are in turn based on the hierarchical authority of the lawmaking bodies in China’s context; it can by no means reflect the practical functions of various positive laws in categories of this kind. Obviously, China, as a communist state that has adopted a people’s congress system, is substantially different from – although perhaps on the surface similar to – liberal democracies, with their congressional legislative system that usually consists of primary and secondary legislation. In this regard, it has been pointed out that the Chinese legal terms discussed earlier, such as those translated as “law”, “regulation” and “rule”, are very likely to give rise to considerable confusion in foreign accounts of Chinese law if no specific definition or explanation is provided for them (Keller 1994: 726). For instance, it is a general rule-of-law requirement that a law should be certain, stable and predictable. However, distinctively, according to an important Chinese doctrine of lawmaking referred to as the policy of “preferring the coarse to the fine” (宜粗不宜细 *yicu bu yixi*), ambiguity is considered a key quality of national legislation – in particular, those of the National People’s Congress (NPC) and the Standing Committee of the National People’s Congress (NPCSC), which in principle are not intended to be certain or predictable with reference to the “plain meaning” of language as understood in Western legal formalism (Keller 1994: 749). Therefore, in practice, primary legislation often does not function as a source of law of chief importance to judges when making judicial decisions. Instead, it is the SPC’s specific judicial interpretations and documents (as discussed in Chapters 3 and 4) that constitute the de facto primary source of law relied on by judges for adjudicating disputes. As one senior judge stated, without specific judicial interpretations or documents that provide an interpretation of relevant national legislation, a

² It has been pointed out that the autonomous legislative power is mostly underused and that, in the reform era, there has been no significant expansion of the amount of autonomous legislation. At the subregional level, autonomous regulations of twenty-five out of thirty autonomous prefectures were passed within six years of the passage of the Regional National Law in 1984. The five autonomous prefectures that did not pass their autonomous regulations are all located in the Xinjiang Uyghur Autonomous Region (Feng 2017: 65, 72).

judge usually can do almost nothing with the adjudication by the national legislation of the NPC/NPCSC. This shows that, given the lack of case law in China, the national legislation of the NPC/NPCSC can hardly act as a stand-alone legal basis for judges to make judicial decisions if no relevant judicial interpretations and documents are invoked. This clearly indicates a unique structure of China's positive law in which the SPC's specific judicial interpretations and documents, rather than the statutes of the NPC/NPCSC, are the primary sources of positive law relied on by judges in making judicial decisions.

In this vein, a further avenue of scholarly inquiry concerns *how* and *why* the SPC's judicial interpretations and documents have become a primary source of law in adjudication, which can in fact only be understood in China's sociopolitical context, rather than from some other perspectives. Moreover, as far as the Constitution – which ranks highest in the hierarchy of legislation – is concerned, its function and logic in Chinese law is effectively ignored due to the lack of an effective constitutional review system such as those in liberal democracies. Notably, this should not be interpreted to mean that the Constitution has no position in China's positive law. Rather, its importance has been stressed constantly, particular in the Xi era, as exemplified by the establishment of National Constitution Day in 2014, the goal of which was to increase awareness of the Constitution, promote its spirit, and strengthen its implementation (South China Morning Post 2014). Subsequently, establishing an effective constitutional review system that is suitable for China became a priority on the CCP's reform agenda. In response, the NPCSC (2019) has made significant efforts to establish a limited form of constitutional review system, of a kind that is suitable for its authoritarian regime, by enacting a specific statute – the Working Measures for the Recording and Review of Regulations and Judicial Interpretations (hereinafter “Working Measures”) in 2019. Although courts are largely excluded from China's current model of constitutional review, the Constitution undoubtedly occupies an indispensable position in the structure of China's positive law, the dynamics of which also need to be intellectually examined in China's sociopolitical context.

Of course, apart from these positive laws, one element that cannot be ignored in the discussion of the sources of law is case law, which may either have a binding force (as in the common law tradition) or an increasingly persuasive force (as in the civil law tradition). Although China has no case law system with binding force based on judicial independence, it is interesting to note that in order to achieve consistency

in the application of laws – as officially claimed – in practice, the SPC has made efforts to build up a so-called “guiding case system” that can be distinguished from all other judicial precedents. In addition, it has been a common practice for China’s courts to select and periodically publish a certain number of judicial precedents as “typical cases” (典型案例 *diànxing anlie*) or “reference cases” (参考案例 *cankao anlie*). This kind of hybrid judicial precedent system is unprecedented in the family of legal systems. Apart from the existing literature, which pays attention to the guiding case system largely at the descriptive level, there is still a need to examine the nuances of various judicial precedents in the entire picture of sources of Chinese law regarding its practical function and position in China’s sociopolitical context, which are discussed in Chapters 5 and 6.

Arguments and Implications

As already mentioned, given the emergence of sources of Chinese law with an increasing importance in China’s legal order, which are quite different from those in both the civil law and common law traditions, it is intellectually desirable to explore the structure, function and logic of sources of Chinese law in the Chinese context. It has been perceived that these legal concepts in Chinese law, such as “rights” and “courts,” are largely transplanted from foreign laws, but may have a distinct meaning in China’s context that cannot be easily understood in the context of the Western tradition. This means that the understanding of Chinese law may even be misleading if taken outside of the Chinese context. For example, the conceptions of “rights” in China’s political discourse have significantly different meanings from the Anglo-American tradition, while protests about “rights” in China seem less politically threatening (Perry 2008). Moreover, it has recently been argued that the conventional language of Western jurisprudence (such as that pertaining to laws and judges) may be misleading if used to discuss the Chinese legal system. Given China’s integration into – while often being in a certain amount of tension with – the world order, as Donald Clarke (2020) pointed out, “we should not derogate difference just because it is different, but we should not be biased against finding difference in the first place.”

Having realized that it is often inappropriate to understand Chinese law in contrast with these “Western rule of law” concepts, it is intellectually imperative for scholars to explore the dynamics of Chinese law in a Chinese context, without relying excessively on concepts and theories imported from the West, as a way to respond to both theoretical and

philosophical interest, as well as the practical realities in China. This has been categorized as the “third wave” of Chinese law scholarship and represents an attempt to reconceptualize the academic study of Chinese law (Minzner 2011: 975). This differs substantially from the previous scholarship conducted before the mid-twentieth century, when there was no existence of “Chinese law” as a discrete field of research in the scholarly narrative of the West; at this time, imperial law was largely considered as penal, and imperial legal institutions were mostly ignored in the scholarship (Minzner 2011: 975). The emphasis on the relative unimportance of Chinese law continued until the 1960s, when scholars began to explore imperial legal institutions and legal cases and even researched contemporary Chinese law in Communist China by investigating its processes and models of its application; however, as admitted by contemporary Chinese law research pioneer Jerome Cohen, due to outside observers’ limited access to that Chinese legal system, it could be difficult for these observers to fully grasp the meaning assigned to certain legal terms (1968: vii–viii). Needless to say, there has increasingly been a turn in the scholarship towards seeing PRC legal institutions and practice as intelligible objects of study (Minzner 2011: 976), particularly after China – as a single-party state – became a global economic superpower in the twenty-first century.

During the “third wave” of Chinese law scholarship, characterized by the development of China’s legal codification and ongoing judicial reforms, abundant descriptive research has been conducted on various specific subjects of Chinese law, such as Chinese company law, land law, civil law and criminal law. Moreover, due to the gap between the law on the books and in action, particularly in an authoritarian regime, some Chinese law scholars have attempted to conduct fieldwork in China through various access channels in order to explore relevant issues of Chinese law and legal institutions from a socio-legal perspective, thereby deepening scholarly understanding of these aspects in a specific socio-political context in a manner that differs from the assumptions made from some other (e.g. Anglo-American) perspectives.³ However, as far as the sources of law – a fundamental issue for any legal order – are concerned, and despite the scholarly attention paid to some of them (such as the SPC’s judicial interpretations and guiding cases), they tend

³ For example, Kwai Hang Ng and Xin He have done a lot of fieldwork to research China’s court system (Ng and He 2017).

to be largely fragmented, and a comprehensive and systematic examination of them in China's socialist context has not yet been completed.

As an exercise in the "third wave" of Chinese law scholarship, this 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. In addition to descriptive, theoretical and comparative analysis, it conducts an interdisciplinary exploration of various sources of Chinese law in the Chinese context through my fieldwork in China, with a particular focus on ethnographic observations within China's courtrooms and interviews with judges. A detailed discussion of the research methodology and data collection has been included in the Appendix.

More specifically, it examines several important common sources of law, i.e. the Constitution, statutes and judicial precedents, in China's sociopolitical context. In addition, three other significant sources of Chinese law – the SPC's judicial interpretations, judicial documents and the SPC's guiding cases – are thoroughly investigated with reference to the ways in which they have been involved and applied in practice. It further theorizes about relevant issues regarding these sources of law in China's context. For instance, it points out that the SPC's judicial interpretation has become a *de facto* primary source of law for adjudication, which is well suited to China's authoritarian regime. It further attempts to reconceptualize Chinese law in the Chinese context, as it is difficult or even impossible for many existing legal concepts imported from Western jurisdictions to explain the dynamics of various sources of Chinese law in this context. For example, China's constitutional law is conceptualized as a "dual constitution" in a way that provides stronger explanatory power regarding the function and logic of China's constitution in its socialist order, which goes beyond these normative statements, particularly from the standpoint of liberalism. This theorization and reconceptualization of Chinese law aims at deepening the understanding of sociopolitical logic employed by these law enforcers in the application of Chinese law, which goes beyond, and seems more sensible and durable than, these normative statements in various legislations.

Furthermore, a significant component of the book's narrative is the paradigmatic significance of understanding the structure of positive Chinese law, which has not yet been comprehensively addressed in the scholarship. Based on the systematic examination of various important

and seemingly fragmented sources of law in China's legal system, it provides an integrated framework of positive Chinese law that is embedded into its socialist legal order and illustrates the dynamic relations between these sources of law in China's authoritarian regime. As discussed in the book, apart from these judicial precedents, which typically have only limited persuasive force as a reference for judicial decision-making, China's positive law system practically incorporates five categories of law with distinct practical functions: (1) the Constitution; (2) various statutes; (3) the SPC's judicial interpretations; (4) judicial documents; (5) the SPC's guiding cases. This dynamic structure differs substantially from those in the existing family of legal systems elsewhere in the world.

It is clear that the emergence of China's positive law system is not accidental, but rather has emerged from China's sociopolitical context, which (as the book discusses) has made it possible to propose a theory for Chinese law – that is, instrumentalism – explaining the formation, evolution and application of Chinese law in China's authoritarian regime. This particular theory of instrumentalism, as distinct from the debates over this theory in the Anglo-American tradition, reflects the dynamic function of law as an instrument in the political, economic, cultural and historical aspects of Chinese society. Moreover, instrumentalism of this kind may shed light on the academic study of the legal systems of other socialist states or, more broadly, other authoritarian regimes or illiberal democracies.

Chapter Outline

This book is an attempt to systematically examine various sources of law in contemporary China in order to develop and present a paradigmatic framework of Chinese law in context, and, on this basis, propose a theory of instrumentalism for Chinese law. It offers a detailed analysis of significant components of positive law in China's legislative system, as presented in the following chapters.

Chapter 2 considers the Constitution, the highest law in the legislative hierarchy, and (inescapably) its relationship with the CCP. Due to China's economic development over recent decades, it has been difficult for traditional theories, either communist or liberal ones, to accurately reflect the constitutional reality in China. Concepts such as the “unwritten constitution” or “living constitution” in the Western context are unable to provide a holistic view of China's Constitution, especially after

1978. China's Constitution, centred on the CCP and the state, has been largely transformed since this time. This chapter goes beyond the liberal approach and argues that a dual constitution has developed in China, within which the Party's Constitution attempts to keep pace with that of the state. More specifically, the Party has been endeavouring to integrate itself into the state through political conventions and "intraparty regulations" (党内法规 *dangnei fagui*). This dual constitution is unique in the sense that it departs from the model articulated by Mao Zedong, as well as from that of the Soviet Union, and does not follow the formalistic approach adopted by Western countries in defining the nature of a constitution.

Chapter 3 examines the SPC's judicial interpretation, which has been formally legalized as a source of law for adjudication, as well as its relationship with various other statutes in China's legislative system. It points out that the inner logic of China's legislation with different hierarchical status, as distinct from those of democratically elected parliamentary systems, is determined by the *de facto* distribution of legislative power within its authoritarian regime, where the SPC has become a significant player in exercising legislative power in a way that has largely evolved beyond its constitutional settings. In particular, it investigates the unique inner logic of the SPC's judicial interpretations, which have become a *de facto* primary source of law for adjudication in practice.

Chapter 4 explores the unique function and role of judicial documents – a significant form of informal state law, as distinguished from formal statutory laws – in China's legislative enterprise. In particular, it examines *why* and *how*, with no explicit statutory delegation, the judicial lawmaking practice of producing judicial documents has become embedded in the adjudication of China's courts. It accordingly proposes a twilight theory of China's judicial documents that explains why the practice of judicial lawmaking through producing documents exists in a twilight zone between legal and illegal, and is suitable for China's politically resilient authoritarian regime. Moreover, it demonstrates how the judicial document can be referred to effectively by judges in adjudication. It further investigates the extent to which the judicial document has enabled the court, under the dual leadership of the superior court and the local Party committee, to efficiently and effectively respond to the subnational diversity and the differences of local politics.

Chapter 5 focuses on the guiding case system, which is distinctive and cannot be simply explained by current case law theories. More

specifically, it first explores the distinctiveness of the guiding case system in the specific context of China, as opposed to other types of case law in liberal democracies, then goes on to explain why the SPC has been able to expand its judicial lawmaking authority in the sense of being able to interpret the law through guiding cases. Furthermore, it illustrates that the Main Points of Adjudication (MPA) (裁判要点 *caipan yaodian*), as a part of a guiding case, has essentially become a form of statutory interpretation that enables the SPC to independently perform a legislative function to a certain extent without routine surveillance by the NPCSC. This stands in contrast to the previous practice, where the SPC performed the legislative function merely through having it delegated by the NPCSC. It is further suggested that, under China's authoritarian regime, the effectiveness of the SPC's lawmaking function through the guiding case system depends largely on the extent to which the courts could be independent in the context of China.

Chapter 6 investigates judicial precedents in China's instrumentalist legal system and finds that judges are generally reluctant to refer to a judicial precedent, including a guiding case, in the process of making a judicial decision. It further reveals that the guiding case system has effectively crystallized a bureaucratic system of judicial precedents with guiding cases at the top of the pyramid. A bureaucratic system of this kind is grounded primarily in the political hierarchy of the courts and a nationwide typical-case-selection movement, in which the lower courts are politically responsible for submitting a certain number of typical cases selected from within their respective jurisdictions to the SPC every year. Finally, it attempts to develop a bureaucratic theory of judicial precedents centred on guiding cases that fits into China's authoritarian context and that differs substantially from any other type of case law in a liberal context.

Chapter 7, which centres around the discussion of previous chapters, proposes a theory of instrumentalism – contextually, a more explanatory framework than either Marxist or Confucian legal theories – to explain the function and role of law in Chinese society. This kind of instrumentalism, which differs from the debate over this theory in the Anglo-American tradition, is situated in China's authoritarian regime, where a primary concern is the maintenance of political stability through strengthening authoritarian legality for the ruler. On this premise, economic development, as well as other social goals – such as efficiency of the government – for which the law can undoubtedly be placed in an instrumental position may become a priority in the ruler's political

agenda. When it comes to dispute resolution, the primary matter of concern is not the achievement of the formalist justice of Western tradition via either a formal or informal process, but rather the settlement of disputes for which the law primarily plays a facilitative role as a tool, regardless of what strategies it may use. Instrumentalism of this kind, which is suitable for Chinese society both culturally and historically, shows that law is visible and does matter in China, although it cannot be completely understood through the lens of other legal traditions, particularly those from the West.