Strengthening Rule of Law in China: the Need for Increased Adherence to the Constitution and Precedent in the Supreme People's Court

Kenneth Daines

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

BYU ScholarsArchive Citation
Daines, Kenneth (2013) "Strengthening Rule of Law in China: the Need for Increased Adherence to the Constitution and Precedent in the Supreme People's Court," Brigham Young University Prelaw Review. Vol. 27, Article 6. Available at: https://scholarsarchive.byu.edu/byuplr/vol27/iss1/6
Ma Wenlin was a lawyer who in 1997 sought to relieve many farmers in Shaanxi, China of illegal and exorbitant taxes imposed by local government officials. Believing that the higher courts would be sympathetic to the peasants’ plight and oppose local corruption, he filed a lawsuit on behalf of the farmers. However, it was not until Mr. Ma first appealed to the county government that he began to understand the full extent and breadth of Chinese government corruption. When the county refused to acknowledge his petition, he subsequently appealed to the district court and finally the State Council’s Petitions and Appeals Office, all without redress. The depth of Chinese Communist Party (CCP) officials’ corruption made Ma’s defense of the peasants’ constitutional rights close to impossible. Ma quickly comprehended that it was “not just lower-level officials in the village and township,” but also the government structure at higher levels that “were corrupt and working hand in hand.”

Upon announcing economic “Reform and Opening” for the People’s Republic of China in 1978, China’s paramount leader Deng

---

1 Kenneth Daines is a senior at Brigham Young University studying International Relations with a minor in Chinese. He plans on attending law school beginning fall 2014. Three outstanding editors assisted with this article: Rebecca Rees Peterson, Ryan Awerkamp, and Fran Djoukeng. Kenneth thanks them for their many hours of diligent work to help make this paper a success.

2 Ian Johnson, Wild Grass: Three Stories of Change in Modern China 66 (2005).
Xiaoping emphasized, “We must strengthen our legal system . . . to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leadership changes their views or shifts the focus of their attention. The trouble now is that our legal system is incomplete, with many laws yet to be enacted.”3 Since Reform and Opening, China has made significant legal improvements, paving the way for what one scholar has called a rising Chinese “legal consciousness.”4 However, criticism has also accompanied this legal attention as the immaturity and injustices of China’s legal system have been increasingly manifested. At the root of China’s legal struggles is not only the Communist-controlled Supreme People’s Court’s lack of true autonomy, but also repeated failures to uphold China’s Constitution and legal precedent. These failures are leading many Chinese citizens and activists to criticize the CCP for inconsistently administering the law and to demand more consistent protection of their constitutionally enumerated rights. Ultimately, if China is to keep pace with current economic development and prevent escalating social unrest, its Supreme People’s Court must develop better methods of implementing and ensuring more just and consistent rule of law. Promoting the supremacy of China’s Constitution through adherence to principles of legal precedent and appeals will reduce both manipulation of the law and government corruption.

In the first sections of this paper, I will highlight the historical development of law in China, as well as some key provisions and rights enumerated in China’s Constitution. Then, I will examine specific challenges China faces in terms of securing legitimate rule of law, in contrast with rule by man, as well as the negative consequences China will likely face should it fail to reform its legal system. Finally, I will recommend how China can more effectively promote constitutional rule of law and lessen CCP corruption by selecting judges with greater legal aptitude and proficiency (as op-

posed to the current system where priority is given to party loyalty). These reforms will facilitate a more mature, precedential, and appellate legal system, effectively increasing the future economic security and societal stability in China. These changes will also improve Chinese public perception of the government.

I. RECENT HISTORICAL DEVELOPMENT OF LAW IN CHINA

The Supreme People’s Court (SPC) of the People’s Republic of China experienced inconsistencies from its establishment in November 1950, which hindered Chinese legal development for decades. From the CCP’s inception, China’s justice system had little autonomy from party decrees, and thus the instability of CCP policies directly contributed to chaos in the courts. Consequently, the Party undermined rule of law from the 1950s through the mid 1970s by restricting the SPC’s power.

Deng Xiaoping’s “Reform and Opening,” however, profoundly changed Chinese law. Because he experienced a system under Mao Zedong where lawlessness was rampant and the rule of law was unpredictable, Deng committed to establishing “a socialist legal system,” which paved the way for 1982’s adoption of China’s current Constitution. China’s new Constitution included a provision that “gave the court greater status than it had enjoyed under either the 1975 or 1978 constitutions.” This was motivated primarily by China’s need to address the increasing civil and commercial demands that would inevitably accompany an expanding market economy. Deng knew that a stronger and more reliable judiciary would be fundamental to China’s successful establishment of what he termed economic “Socialism with Chinese Characteristics.”

Deng also emphasized increased education of future legal cadres to strengthen China’s legal system. In Mao’s terms, that cadre would have to be both “red” and “expert.” To this end, Deng actively sup-

6 Id. at 147.
7 Lo, supra note 3, at 657.
ported the establishment of Chinese institutions for more advanced legal training which would emphasize “proficiency in legal knowledge [and] a high degree of political integrity.” Though there were less than 2,000 lawyers at the beginning of Reform and Opening in 1978, by 2008 there were 157,000 licensed lawyers, 14,000 law firms, and more than 600 universities that offered bachelor’s degrees in law. Pitman B. Potter notes, “Law faculties are filled to capacity with many of China’s best students, driven by the prospect of lucrative employment to study a field that . . . did not exist 25 years ago. Law firms have multiplied—more than 5,000 have been established since 1990, bringing the total to more than 9,000. And through it all, the government delivers a steady litany of . . . policy pronouncements extolling the importance of the rule of socialist law.” These trends and statistics demonstrate China’s objective to create a stronger, more mature legal system with more capable lawyers and judges to ensure the successful implementation of economic reform.

In examining China’s current path toward securing legal reform, however, it is necessary to examine China’s constitutional guarantees to its people. A better understanding of these rights will facilitate further examination of legal challenges that have since arisen in applying the Constitution and laws to individual circumstances.

Rule of law principles and citizens’ rights are clearly outlined in the 1982 Constitution, its fourth since the first 1955 draft. The beginning Articles assert the supremacy of the Constitution in Chinese law by stating that “all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law.” Other Articles guarantee specific rights such as the right to own earned income and prop-

property, freedom of speech and the press, and the freedom of assembly.\textsuperscript{12} Perhaps the most liberally bold (and therefore controversial) right granted in China’s Constitution is found in Article 41, which states, “Citizens of the People’s Republic of China have the right to criticize and make suggestions to any state organ or functionary . . . [and] make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary. . . . Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law” (emphasis added).\textsuperscript{13}

Many recent Chinese activists’ petitions and lawsuits are demanding their constitutionally sanctioned right to seek redress for government violations of and failures to protect the people’s rights. As some citizens begin to understand their rights and use the courts to protect those rights, more Chinese are following suit and turning to the courts for redress.\textsuperscript{14} These citizens’ ultimate hope is for constitutional rule of law to supersede government leaders’ impulsive decisions and corruption, thus accomplishing justice.

\section*{II. CHINA’S LEGAL CHALLENGES}

Although Deng Xiaoping’s 1978 reforms put China on the path toward rule of law, they failed to establish legitimate judge-selection criteria. Accordingly, the courts remained biased and continued operating primarily under rule by man. Lo defines rule of law as a legal system that protects individuals from arbitrary power, ensures that no one is punished except for “a distinct breach of the law,” prohibits anyone from being above the law, and provides “procedural and institutional guarantees . . . for the rights of the individual.”\textsuperscript{15} While Deng intended for his reforms to make law “the highest authority” in

\begin{itemize}
\item \textsuperscript{12} See for example articles 13 and 35.
\item \textsuperscript{13} Supra note 11.
\item \textsuperscript{14} Gallagher, supra note 4, at 791.
\item \textsuperscript{15} Lo, supra note 3, at 660.
\end{itemize}
China to protect society from political whims, his cardinal principle was still “leadership by the Party.” 16 Deng had thus paved the way for “socialist rule of law,” or in other words, rule of law with Chinese characteristics. 17 Party leaders like Peng Zhen attempted to reconcile the contradiction between rule of law and rule of the CCP by asserting that “law and party policy . . . are not interchangeable since they perform different roles in achieving party objectives.” 18 Despite China’s increased legal awareness facilitated by Deng’s reforms, this contradictory legal paradigm still places the CCP above the law in power and influence. Accordingly, China’s legal system defies Lo’s basic definition of rule of law.

Despite party attempts to resolve the contradiction, an apparent power struggle between CCP authority and authority of the law itself is contained in China’s Constitution. The paradox is that while the CCP declares the function of law to be to “constrain state power,” they also “insist on the primacy of the party.” 19 Stanley Lubman illustrates this legal tension between past legislation and current CCP policies, noting that China’s 1982 Constitution requires both obedience to the law and supremacy of the CCP in legal authority. Accordingly, legislation is viewed primarily as an instrument to implement future CCP policies rather than an established regulation that limits the CCP’s actions. 20 Essentially, the challenge facing China is in determining how much current party policy needs to reflect past legislation, especially China’s constitutionally enumerated rights. Does the written law of the land have the final word in determining legality, or is the law to serve more as a guideline to be interpreted freely by the Standing Committee or the lower party leadership? This question continues to be central to legal challenges that have been leveled against CCP officials’ corruption and injustice. In current practice,

16 Id. at 658.
17 Id. at 660.
18 Id. at 659.
19 Horsley, supra note 8, at 67.
20 Id. at 139.
however, “legislation is . . . dependent on and potentially secondary to CCP formulation of specific policies.”

The general lack of both transparency and acknowledgment of precedent further complicate China’s judicial system. Despite the 2009 reforms to improve legal transparency, legal opinions are rarely made public, and trials are usually closed to the media in spite of government assertions that the rulings in Chinese trials are transparent. This failure to publicize judicial rulings has facilitated legal corruption because judges are not publically scrutinized and are therefore subject to the will and pressure of CCP leaders. Transparency problems have also contributed to a judicial system with little regard for legal precedent. Because previous decisions are not widely published, there is little pressure on judges to uphold prior rulings in court. Consequently, “court decisions do not have binding precedential value as in a common law system like the United States.” Such transparency, corruption, and precedential difficulties all serve as major hindrances to China’s effective establishment of resilient and reliable rule of law.

Recent developments, however, illustrate a growing legal consciousness in China as well as an increasingly responsive government to public demands. For instance, in 2010 the SPC partnered with Stanford Law School to establish the Guiding Cases Project, with the goal of promoting a more effective Chinese legal precedential system. Although this reform does not parallel current Western norms of legal precedent through landmark cases, this is a progressive turn in the direction of legal precedent. Article 7 of the 2010 Provisions of the Supreme People’s Court Concerning Work on the Guiding Cases states that “People’s courts at all levels should refer to the Guiding Cases released by the SPC when adjudicating simi-

21 Id. at 140.
22 Id. at 57.
23 Id.
lar cases.”24 If these guiding cases are utilized to the extent that the SPC has asserted, they will serve as a foundation of legal precedent and appeals in China. Civil rights attorneys will be able to reference these cases in defending Chinese citizens’ legal rights. Before discussing how China should select better-educated judges to carry out such reform, I will explore cases that demonstrate China’s lack of an effective precedential system, as well as the Chinese people’s recently increasing level of legal consciousness.

III. Need For Greater Precedent In Appeals

The aforementioned case of Mr. Ma and the Shaanxi peasants effectively demonstrates the need for greater precedent and justice in China’s legal system and also demonstrates judicial instability and uncertainty’s negative effect on Chinese society. Mr. Ma’s story highlights not only China’s growing legal consciousness, but also the challenges Chinese reformers face in attempting to secure individual rights and uphold the constitutional rule of law on the principle of precedent. Although court decisions are not directly administered by the CCP as they were historically, Ma’s case reveals that Chinese law’s primary function is to enforce and uphold current CCP policies, even at the expense of constitutionally prescribed individual rights and decisions that previous courts have made.25

Party leaders’ failure to effectively adhere to the rule of law is directly related to government corruption. While selecting better-educated judges will not solve the lack-of-autonomy problem, it will improve the consistency and fairness of judges’ decisions because they will be informed of standard legal procedures, the content and proper application of the constitution, as well as the value of adhering to previous precedent. According to Ian Johnson, “Law in China is not neutral. Courts and judges are part of the government,


not independent of it. . . . Even the Constitution gives a nod to the party’s supremacy. . . . Instead of allowing laws to rule the land, the government uses laws to rule.”26 The Communist Party’s superiority over the law is seen plainly in Mr. Ma’s lawsuit. From a legal standpoint, his case should have been upheld in court; by law, “local authorities could only tax farmers five percent of their income. But [Ma] could produce hundreds of witnesses with hard proof showing that they’d been taxed many times this amount.”27 Ma’s purpose was not to challenge political authority but rather to demand adherence to the rule of law.

Ma’s case also illustrates the need for precedential adherence in China’s courts. Since a nearly identical and recent case in Peijianwan had successfully ended exorbitant taxes on their peasants, Ma’s appeal was not unusual or without precedent. Logically, his appeal for the peasants should have been granted, or at least given serious consideration. However, as Johnson observes, “China’s legal system doesn’t have the concept of precedents—courts often make rulings that completely ignore the fact that other courts have ruled differently in similar cases.”28 Because party officials felt threatened by Ma’s challenge to their authority, they decided in this particular case to not enforce the law they had previously written, thereby ignoring their own legal precedent. The fact that they would ignore precedent in such a clearly parallel case illustrates not only poor judgment, but also lack of basic understanding of the value of precedent in establishing a strong rule of law society. The best way to address such ignorance is to ensure that China’s judges are better educated, beginning with the SPC.

Mr. Ma’s associate later explained the local party officials’ reasoning in Mr. Ma’s case when he said, “If all the peasants in China file class-action lawsuits, then the Communist Party is finished. So Ma Wenlin’s case couldn’t be allowed to succeed.”29 Because of his

26 Id. at 10.
27 Id. at 59.
28 Id. at 57.
29 Id. at 30.
audacious challenge of the status quo, Ma was an unfortunate recipient of cruelty; when he appealed his case to the Beijing Public Security Bureau in 1998, he was brought into the office and beaten by two men, losing thirteen teeth. He was then sentenced to five years in a labor camp. The failure of equal protection under the law for those peasants (as guaranteed in China’s Constitution) stands as a glaring reminder of the immaturity of China’s legal system and the daunting obstacles to establishing a more refined reliable and reformed legal system in China.

IV. CITIZENS APPEALING FOR THEIR CONSTITUTIONAL RIGHTS

In order to establish a stable legal system, China must abide by the Constitution and precedent; however, ignorant judges currently allow the CCP’s concerns to override the Constitution as the supreme authority in China. The power of party over legal justice is illustrated in several groundbreaking cases such as the Qi Yuling case of 1990. Because an appeal was successfully made to the China’s SPC defending an individual’s right to receive an education, this case is now regarded as “the first judicial application of the Constitution” in China. Though not directly challenging government officials, it was a bold appeal of lower level rulings, as well as an assertion of an individual’s legal rights. Qi Yuling’s case offers evidence of a slowly reforming judiciary in China; however, the ruling was eventually overturned because the CCP feared empowering the public to challenge decisions in court. Unfortunately, the CCP’s concerns for maintaining power overshadowed Qi Yuling’s constitutional rights, and this previously important legal precedent was undermined.

Qi Yuling’s attempt exemplifies how China’s Constitution is becoming more relevant to the Chinese people despite the CCP’s regular disregard for constitutional rights. Chen Jianfu asserts that “One must not dismiss the Chinese Constitution out of hand. . . . [A]fter a

30 Id. at 76-77.
decade or so of legal reforms, a number of administrative laws and regulations have been issued implementing various aspects of the Constitution and, thus making the Constitution much more relevant” to ordinary Chinese people. Qi’s successful appeal illustrates the impact a citizen’s legal action can have; Zaozhuang Municipality Intermediate People’s Court’s ruling on Qi’s case was successfully (though only partly) reversed, an unprecedented event in Chinese legal history. Qi’s appeal was groundbreaking because Chinese judges had long held that the Constitution should not be referenced in court or used to justify judges’ decisions. One critic of the Qi decision noted that the “direct application of constitutional provisions in that particular case” was challenged by numerous Chinese legal academics. Despite opposition, Qi’s constitutionally appealed right to receive an education provides a glimpse of the potential for China’s constitutional supremacy in administering consistent and just rule of law.

Unfortunately, even in a case as significant as Qi’s, the CCP eventually calculated that its own interests would come before adhering to the Constitution and precedent. In December 2008, the SPC surprisingly revoked the decision because “it [was] no longer applicable.” Despite the tremendous attention the Qi Yuling decision initially received, it soon “disappeared from judicial discourse and was never heard from again.” CCP officials were clearly troubled by the SPC’s granting a constitutional appeal for individual rights protection when those rights were, in their judgment, “not

32 JIANFU CHEN, CHINESE LAW: TOWARD AN UNDERSTANDING OF CHINESE LAW, IT’S NATURE, AND DEVELOPMENT 58 (1999).
33 Kui, supra note 31, at 201.
36 Clarke, supra note 34.
37 Id.
found in any statute.”\textsuperscript{38} In an evident tension between the Court’s constitutional interpretation and the CCP leadership’s worries, party leaders prevailed and the Court importantly decided to comply, successfully ensuring that the case would be regarded as an “outlier, not a trendsetter.”\textsuperscript{39}

Evidence suggests that the CCP continues to exercise greater influence than the Constitution, especially when it senses that its power could be threatened, thus deterring the establishment of rule of law. In 2009, civil rights lawyers Liu Wei and Tang Jitian defended Falun Gong practitioner Yang Ming in an appeals case. Yang was convicted of “using superstitious sects [cults] to undermine the implementations of the law.”\textsuperscript{40} Liu and Tang argued insufficient evidence on grounds that the State never declared Falun Gong a cult. The presiding judge decided to prevent them from fully presenting their argument. Liu and Tang then protested that the court had violated their rights as enumerated in Articles 36 and 37 of the 2007 Lawyers Law (which protect lawyers’ rights to present their cases before a court). However, Article 49 declares that lawyers may not “disrupt the order of a court . . . or interfere with normal conduct of litigation or arbitration.”\textsuperscript{41} Almost a year later, the Beijing Bureau of Justice ordered a hearing that considered disbarring the two attorneys for their actions.\textsuperscript{42} Though they sought to defend their case with Articles 36 and 37, they were both disbanded for violating Article 49. Additionally, in 2005 and 2006, before Liu and Tang’s case, lawyers who defended Falun Gong practitioners had their law licenses suspended for a period. And in another instance, lawyers Zhang Xingshui and Zhou Min defended another civil rights case, but lost. They were unable to renew their law licenses before they could ap-

\begin{itemize}
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{41} Id. at 535, 560.
\item \textsuperscript{42} Id.
\end{itemize}
peal the decision because of their perceived attempt to disrupt court order.\textsuperscript{43}

These cases collectively demonstrate that although the Chinese Constitution has enumerated citizens’ rights, the protection of both the CCP’s image and its authority is ultimately more important than legal guarantees to China’s citizens. According to Attorney Elizabeth M. Lynch, “[C]hinese lawyers should take warning—courts consider zealous advocacy on behalf of a client a challenge to their authority, and the rights supposedly guaranteed in Articles 36 and 37 of the 2007 Lawyers Law will be quickly subverted by Article 49’s vaguely-worded prohibition against ‘disrupting the courtroom.’”\textsuperscript{44} This provision of the Lawyers Law provides a significant stumbling block to the development of a stable and predictable appellate legal system.

In the face of these controversial decisions, Qi Yuling’s decision (prior to its reversal) offers hope for China’s future with judges who effectively apply the Constitution to uphold individual rights. Though the overturn of the Qi decision left it “effectively defunct,” the case still serves as “something of a minor talisman for those who are pushing, both in the academy and the courtroom, for a greater judicial role in constitutional rights protection.”\textsuperscript{45} Despite the decision’s reversal, Woo and Gallagher still emphasize the significance of this pivotal case by saying, “Qi Yuling played a role in the evolution of public rights consciousness in China and may yet play a renewed role in the reform of the system of constitutional litigation in China.”\textsuperscript{46} Furthermore, despite the government’s discouragement and punishment of civil rights attorneys like Liu Wei and Zhang Xingshui, their cases do suggest a legal awareness that is rapidly developing in China. Civil rights attorneys are increasingly seeking opportunities to defend Chinese citizens’ rights, thereby attempting to build a rule of law society.

\textsuperscript{43} Id. at 562.

\textsuperscript{44} Id. at 563.

\textsuperscript{45} Woo & Gallagher, supra note 35.

\textsuperscript{46} Id. at 363.
V. CONSEQUENCES OF INACTION

Unfortunately, examples of rule of law violations like these are commonplace in China. Peerenboom notes that these problems are not anomalies, and that “foreign investors complain bitterly about the lack of rule of law [in China]; human rights activists denounce the repeated persecution of political dissidents; citizens continue to complain about judges on the take, notwithstanding the ongoing campaign to root out judicial corruption”.47 Although China has made rapid progress recently, “indigent defendants [still] often cannot secure the service of a lawyer.”48 While these legal challenges certainly will not be resolved in a short time frame, they will likely prove disastrous to China both economically and politically if not addressed seriously.

Evidence shows that China’s potential for continued economic growth and development increases significantly if it pursues a path of securing rule of law through better educating its judges. In terms of economic growth measures like property rights and transaction costs, predictable and stable laws clearly promote economic growth and business investment in a society.49 The reverse is also true; a lack of stable laws is closely correlated with economic and political instability.

In Amsden’s book Asia’s Next Giant: South Korea and Late Industrialization, South Korea is shown to be an example of a recently industrialized nation that is now thriving in the world economy. They have adopted and implemented effective rule of law measures, with a system of highly qualified judges who implement the law according to the South Korean Constitution and precedent from previous court decisions. South Korea additionally has a remarkable degree of social stability, particularly considering the adverse and tense conditions that accompany the North Korean threat to their existence. In contrast, Thomas Carothers observes, “Promoting the

47 Randall Peerenboom, China’s Long March Toward Rule of Law iix-x (2002).
48 Id. at x.
49 Order in the Jungle, Economist, Mar. 15, 2008, at 83.
rule of law advances both principles and profits. What will it take for Russia to move beyond Wild West capitalism to more orderly market economies? Developing rule of law . . . is the key. How can Mexico negotiate its treacherous economic, political and social transitions? . . . Establish once and for all the rule of law.\textsuperscript{50} Thus in each instance, weak rule of law leads to both societal and economic instability; China’s successful preemption of such adverse conditions must center on more effectively strengthening the rule of law.

VI. Recommendations and Conclusion

As Deng Xiaoping believed, “leadership by the party” and “rule of law” need not be mutually exclusive in China. In fact, to effectively maintain either in the long term, China’s legislators must establish a system that honors precedent to secure all Chinese citizens’ constitutionally prescribed guarantees. Currently, three primary obstacles prevent stable precedential rule of law in China: (1) CCP supremacy over the law; (2) lack of trained judges; and (3) corruption.\textsuperscript{51} Because CCP supremacy is unlikely to change in the near future, precedent will only be realized when China undertakes more serious reform of its judge-selection process for the SPC. Judges who are better educated in Chinese laws, the Constitution, and the Guiding Cases reforms will be critical to preserving societal order, preventing corruption, and fostering economic growth in China. It is apparent that for China’s courts, as with all other CCP-dominated institutions, change will most effectively be implemented from the top down. The CCP must secure rule of law in China through reforming the SPC.

Recent CCP attempts to reform legal aptitude and limit corruption have mostly proven to be unsuccessful; they do, however, suggest China’s desire for improvement. Under President Jiang Zemin, the CCP attempted to address rule of law concerns through the

\begin{itemize}
  \item \textsuperscript{50} Thomas Carothers, \textit{The Rule-of-Law Revival}, 77 FOREIGN AFF. 95, 95 (1998).
  \item \textsuperscript{51} Keyuan Zou, \textit{Judicial Reform in China: Recent Developments and Future Prospects}, 36 INT’L LAW. 1039, 1042 (2002).
\end{itemize}
Third Amendment in 1999 as well as through the 2007 amendment of the Law on Lawyers designed to strengthen the legal profession.\textsuperscript{52} However, these reforms have not adequately come to fruition, as evidenced by a host of “recent cases [which] show that the CCP is still disregarding the rule of law and allows political will to dominate their decisions”\textsuperscript{53} and corruption cases that are increasing in quantity and intensity.\textsuperscript{54} These failures are largely due to the SPC’s primary loyalty to CCP dictates and blatant disregard for written laws, constitutional provisions, and even previous court decisions. Despite the CCP’s persisting “rule by man” tendencies and corruption, the recently announced Guiding Cases Project offers a promising glimpse of future Chinese rule of law through precedent. Should China choose to pursue the path of promoting adherence to the guiding cases they have designated, they will have arguably taken the most important step since Reform and Opening toward establishing binding precedential rule of law. In order for this reform to have full effect, however, it will be essential for China to employ better-trained judges who will ensure that newly presented cases will be addressed in accordance with the guiding cases released by the SPC. If they fail to demonstrate such competence, the guiding cases will be remembered as another empty promise, and the Chinese people’s status will remain stagnant or even degenerate.

Placing “expert” judges on the SPC, and eventually on lower courts, will be absolutely critical to establishing a system where precedent and appeals operate properly. Though a judge’s lack of legal expertise does not necessarily lead to corruption, demanding judges’ legal proficiency increases the likelihood that legal rulings and decisions will prove consistent with China’s established laws.\textsuperscript{55} China has taken important steps in the right direction toward selecting better trained judges, placing recent emphasis on selecting for

\textsuperscript{52} LYNCH, supra note 40, at 535.

\textsuperscript{53} Zou, supra note 51, at 1042.


\textsuperscript{55} Id. at 850.
“professionalism and procedural justice.” However, Chinese judges on average are still “not very competent: the majority of the judges have received no formal education in the law.” 56 Not surprisingly, China’s current judge-selection system “favors personal and political loyalty over integrity and competence” as evidenced by Article 6 of the Party Directive for the Selection and Appointment of Party Cadres. The Directive gives six points of selective criteria, with the first four points all focused on loyalty to the CCP. The fifth point is the only given criterion that mentions “law-abiding and honest public service.” Thus, it is apparent in the current selection process that priority is given to “political quality” over “professional quality.” 57

To counter this emphasis on loyalty over aptitude, the CCP clearly must change the laws to promote better-educated SPC nominations. In addition to the Guiding Cases Project, the CCP should draft a new law demanding SPC judges with higher judicial aptitude. A legal cadre capable of interpreting the guiding cases in harmony with the 1982 Constitution will likely follow. Together, education and the guiding case reforms will likely establish a stable precedent in China. To meld the two reforms, after passing the law demanding better-educated judges, the CCP should design a more comprehensive Confucian-style legal aptitude examination that prospective judges must pass before being sworn in. This exam should require knowledge of 1) The 1982 Constitution, 2) Chinese laws and past court rulings, and 3) application of the guiding cases. If a nominee fails to score 90% or higher on each of the three sections, they will fail to qualify for judicial appointment. The mere presence of an exam that tests knowledge of principles like precedential application will ensure that CCP officials nominate legally adept candidates for judgeship and limit corruption or political favors that often characterizes China’s current judge-selection process. The exam itself will ensure that judges without knowledge of the laws, Constitution, and guiding cases are not allowed to make decisions contrary to precedent and China’s constitutionally sanctioned rights.


57 Li, supra note 54, at 872.
China’s legislators should recognize that requiring greater adherence to legal precedent would not necessarily be a step towards democracy. The CCP has long been reluctant to allow institutional or legal reforms, even if gradual, for fear of eliciting the allusion of Western democratic transition, and therefore weakening its tight control of the Chinese government. This hesitancy makes it difficult for the CCP to accept the need to prioritize legal aptitude over political loyalty. Precedential and constitutional adherence would simply ensure that the courts observe the laws that the CCP itself has written and that the court’s decision-making is consistent. Such consistency will not only boost the image of the government’s commitment to root out internal corruption, but will also improve Chinese citizens’ perception of the government as their constitutionally enumerated rights are recognized and protected in the courts. This would likely mitigate the high levels of unrest and dissatisfaction (particularly in the countryside) in China, and thereby decrease the likelihood of protests or revolution that Chinese leaders dread. It would be a policy of strength, not of weakness, demonstrating to the Chinese people that the CCP is confident in its leadership and committed to adhere to the Constitution.

An important concession that has to be observed in order for precedential rule of law to function in a Chinese context will be that, for the present time, members of the SPC continue to be appointed by CCP leaders. If the CCP does not have the final say in which judges are confirmed, these reforms are highly unlikely to be considered by Party leaders. Chinese courts still enjoy a notable degree of autonomy because “the courts still decide most of the criminal, civil, and economic cases on their own,” with the general overarching rule being to “follow instructions from the CCP.” The CCP will continue to “direct the verdicts in cases of national or local importance,” and this pattern should be expected to continue without disruption.


59 Fu, supra note 56, at 205.

60 Fu, supra note 56, at 204.
It remains to be seen what the CCP’s role in relation to the judiciary will likely be moving forward, and whether the Constitution will ever truly be the supreme law of the land. Regarding the SPC, Article 126 of China’s Constitution states, “The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.” Currently, this explicitly prescribed court autonomy is not being observed in the SPC or lower courts today. Like other constitutionally sanctioned rights and powers not currently enforced, the courts’ eventual autonomy should serve as a guiding post for the CCP’s path to judicial reform. Though cases like Mr. Ma’s and Qi Yuling’s cast considerable doubt on the permanency and veracity of China’s constitutionally enumerated rights, they also offer hope. They both illustrate China’s growing legal awareness and reveal Chinese citizens’ desires to establish effective, predictable, and constitutional rule of law.

Selecting better qualified judges in the Supreme People’s Court will certainly not solve all of China’s legal problems, nor will it singlehandedly secure a fixed system of effective constitutional rule of law. Reforming the judicial selection procedure will, however, strengthen the legal system and be a major step towards establishing reliable rule of law. Recognizing many remaining barriers such as routine party corruption, lack of transparency, and lack of judicial autonomy, China has a long march toward lasting reform. Ultimately, the CCP must change along with the judiciary in positive ways to create a culture of stable precedent. Further, even with better-educated judges, their decision-making will ultimately depend on the judges’ individual wisdom and morals. While increased education generally leads to better decisions, it is by no means a guarantee that they will make constitutionally sound legal decisions. Nevertheless, educating judges regarding rule of law principles is pragmatically one of the best steps the CCP can take to secure a better future for China.

Today, China’s underdeveloped and inconsistent legal system threatens to disrupt economic growth, government legitimacy, and societal stability in the People’s Republic of China. This unreliability is largely due to the CCP’s failure to follow the basic principles of legal precedent and constitutional supremacy. Though these shortcomings are prominent, China’s positive developments do indicate that “an increasingly transparent, participatory, and accountable China [will] continue to progress further . . . toward rule of law.”

Despite these improvements, China must more emphatically pursue the path of legal reform through demanding better trained judges who adhere to legal precedent; only then can China’s constitutional rights and protections afforded to each citizen be fully secured, thereby establishing greater legitimacy and longevity through rule of law.

62 Horsley, supra note 8, at 67.