

*When a Judicial Mistake Went Viral: The Diffusion of Law in China**

Yingcheng Qi, Ruobing Wang, Ning Cao, and Chao Xi

Abstract

Earlier anecdotal evidence suggests that judicially-developed doctrines, concepts, principles, norms and practices are disseminated not only downwards, but also upwards and horizontally, among Chinese courts. Methodologically, however, the rejection of the common law notion of precedents by China's civil law tradition has rendered any attempt to quantitatively track the dissemination of legal information an unrewarding exercise. The spread—and citations by mistake—of a non-existent judicial interpretation across all four levels of the Chinese judiciary has offered a rare window into the diffusion of law in China. Our

Yingcheng Qi is Associate Professor at the Law School, Jilin University.

Ruobing Wang is Postdoctoral Fellow at the Chinese Law Programme, Hong Kong Institute of Asia Pacific Studies, The Chinese University of Hong Kong.

Ning Cao is Research Associate at the Faculty of Law, The Chinese University of Hong Kong.

Chao Xi is Professor and Outstanding Fellow, Associate Dean (Research), and Chair, Corporate Law and Governance Cluster of the Centre for Comparative and Transnational Law at the Faculty of Law, The Chinese University of Hong Kong. Correspondence should be sent to chaoxi@cuhk.edu.hk.

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research presents a first quantitative data-based evidence that hierarchical relationships between courts – top down, bottom up and horizontal – are at work in channeling information in the Chinese judiciary, particularly at the basic and intermediate levels. Another original contribution of our research is that it empirically demonstrates the role of cultural and geographical bonds in facilitating the dissemination of information among Chinese courts. Overall, our research provides fresh evidence for the presence of a robust, professional community of Chinese courts and judges, wherein novel laws, norms, information and practices flow and come to influence decision making.

In December 2007, the Higher People's Court in Shanghai issued a judicial policy document ("Shanghai Opinion") seeking to untangle a procedural law intricacy which had long plagued the Chinese judiciary.¹ The Shanghai Opinion, promulgated by the superior court in Shanghai, is a notable instance of judicial creativity and innovation taking place at subnational courts, in particular the provincial-level courts, in China.² It was intended to provide the three levels of sub-national courts in Shanghai with some much-desired clarity that the preexisting body of national laws had yet to offer on certain complicated procedural law matters, so that these matters could be handled in a consistent manner throughout the Shanghai judiciary. The Shanghai Opinion, albeit authoritative for courts in Shanghai, is not legally binding on them and it certainly does not bind courts beyond Shanghai. In denying sub-national judicial lawmaking a formal role in the Chinese legal system,³ Chinese law bars in general any direct reference to the Shanghai Opinion—indeed any judicial policy documents of its nature—in court judgements,⁴ let alone any reliance on the Shanghai Opinion to reach a judicial decision.

The Shanghai Opinion gained little national relevance until January 2014, when a court in the Guangxi Autonomous Region explicitly relied on the Opinion in rendering its decision in a case.⁵ Importantly, in that Guangxi court judgment, the Shanghai Opinion was cited as a piece of judicial interpretation: the official title of the Shanghai Opinion remained intact, yet the enacting authority was indicated in the judgment to be the Supreme People's Court ("SPC"). Under Chinese law, SPC-enacted judicial interpretation is legally binding on all Chinese courts and citable. Hence, in what appeared to be an unfortunate mistake, the Shanghai Opinion was wrongly characterized as an SPC judicial interpretation ("the