

ANNUAL HERBERT L. BERNSTEIN LECTURE IN INTERNATIONAL AND COMPARATIVE LAW

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FOREWORD

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To have Zhu Suli, Dean of Peking University Law School, deliver the Fifth Annual Herbert Bernstein Memorial Lecture in International and Comparative Law on November 2, 2006, was especially apt. His address not only commemorated Professor Bernstein, it also commemorated the twentieth anniversary of Professor Bernstein's first foray into Chinese law at the 1986 Law and Contemporary Problems Conference on "The Emerging Framework of Chinese Civil Law."¹ Moreover, Zhu's lecture touched on one of the central issues raised at that conference, namely the extent to which German and other foreign models had influence on and were of value to China. At the conference, and in a later essay, the late Tong Rou, a law professor at People's University Law School and one of the drafters of the *General Principles of Civil Law*, acknowledged that he and his colleagues had not created the civil law anew. However, stressing the singularly Chinese nature of the document and its reflection of the particular Chinese experience, he emphatically resisted analyses, Bernstein's among them, that he perceived as over-emphasizing foreign influence. To understand the

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1. *The Emerging Framework of Chinese Civil Law*, 52 LAW & CONTEMP. PROB. (Jonathan K. Ocko sp. ed., Spring-Summer 1989). Herbert Bernstein, *The PRC's General Principles From A German Perspective*, 52 LAW & CONTEMP. PROB. 117 (Spring-Summer 1989).

distinctive national character of the law, argued Tong, one had to consider “broadly the social structure, all political economic phenomena, and the entire legal system.”² In his lecture, Zhu Suli echoes Tong Rou’s concerns. Zhu welcomes comparative analysis of Chinese contemporary law, but he sees it as having value and cogency only in so far as the comparativist first grasps the realities of China and remembers that no comparative framework is intellectually neutral.

Zhu Suli’s scholarly writings are substantial and wide-ranging, contributing to the literature on rule of law, law and public policy, legal sociology, law and society, and legal education. Though largely in Chinese, they are indirectly accessible in English through an analytical summary of his work by Hong Kong University law professor Albert Chen³ and a review of his recent monograph, *Sending Law to the Countryside: Research on China’s Basic Level Judicial System*⁴ by New York University law professor Frank Upham.⁵ Accordingly, rather than reprise still another account of Zhu’s work, I will restrict my comments to several brief observations.

First, Zhu Suli is not simply one of Peking University (Beida) Law School’s more distinguished alumni; he is also one of its proudest and most loyal alums. Zhu’s decanal remarks to incoming and graduating Beida law students demonstrate his deep, emotional attachment to Beida Law School and his passionate feelings about the role that it and its students can and should play in China’s evolving legal system.⁶ Yet he tempers his prideful affection for both his

2. Jonathan K. Ocko, Preface, *The Emerging Framework of Chinese Civil Law*, 52 LAW & CONTEMP. PROB. 1, 12 (Spring-Summer 1989).

3. Albert H.Y. Chen, *Socio-legal Thought and Legal Modernization in Contemporary China: A Case Study of the Jurisprudence of Zhu Suli*, in LAW, LEGAL CULTURE AND POLITICS IN THE TWENTY FIRST CENTURY 227-49 (Gunther Doeker-Mach & Klaus A. Ziegert, eds., 2004).

4. ZHU SULI, SONGFA XIAXIANG: ZHONGGUO JICENG SIFA ZHIDU YANJIU [SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA’S BASIC LEVEL JUDICIAL SYSTEM] (2000).

5. Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L. J. 1675 (2005) (reviewing ZHU SULI, SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA’S BASIC LEVEL JUDICIAL SYSTEM (2000)).

6. See, e.g., Zhu Suli, Nide shi you chuxide haizi, zai beijing daxue faxueyuan biye dianlishangde zhici [You are Children with a Future, Remarks at the 2005 Graduation Ceremony of Peking University Law School] (June 29, 2005) (transcript available at <http://law-thinker.com/show.asp?id=2775>); Su Li, Diyige mengxiang chengzhen, Su Li 2005 nian beida faxueyuan xinsheng zhici [The First Dream Becomes Fact, Su Li’s Fall 2005 Remarks to Peking University Law School’s New Students] (Sept. 14, 2005) (transcript available at <http://law-thinker.com/show.asp?id=2855>); Zhu Suli, Xuanze Beida, Su Li 2006 nian beida faxueyuan xinsheng ruxue zhici [Picking Beida, Su Li’s Remarks at the Matriculation of Peking

school and his students with reminders that this well-known brand stands for nothing by itself. Beida law students must give it meaning and substance by being individually accomplished and committed to the social responsibility for the greater good that they undertake as a concomitant of their legal education.

Second, Dean Zhu is above all else a pragmatist. For him, “there is no absolute knowledge Law is for solving practical problems.”⁷ As Zhu makes clear in *Sending Law to the Countryside*, foremost among these problems is the absence of law and legal services in rural China.⁸ How, he asks in a recent essay on a celebrated rural judge, can China be a rule of law country when the sixty percent of its population that lives in the countryside is largely without law, that is, without affordable legal services and dedicated adjudicators?⁹ Thus, he calls for China’s legal education to be less theoretical and more practical; for there to be more former judges and litigators among its law professors; and for legal academics to worry less about developing ideal models and more about what is appropriate and what works. Unlike his Beida colleague, He Weifang, Zhu sees no inherent problem in using former military officials as judges in courts of first instance.¹⁰ Certainly, at the intermediate and higher courts, there should be an emphasis on professionalization and specialization. But at the basic level rural court, where disputants are looking for substantive justice and are more likely to agree to mediation than urban residents, proceduralism can be an impediment. Zhu sees enormous value in drawing judges from practically

University Law School’s 2006 Entering Class] (September 2006) (transcript available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=34429); Ni ruoruandi xiangqilai zhege xiaoyuan (zai beida faxueyuan 2006 jie xuesheng biye dianlishangde zhici, 2006/6/23) [Your Tender Thoughts of this Campus, Graduating Remarks at the June 23, 2006 Commencement Ceremony for Peking University Law School] (June 23, 2006) (transcript available at <http://law-thinker.com/show.asp?id=3277>).

7. Chen, *supra* note 3, at 231 (quoting Zhu Suli). Zhu Suli frequently uses the pen name Su Li.

8. In an article on legal education, Zhu cites a finding that twenty percent of China’s counties lack even a single lawyer. Su Li, *Dangdai Zhongguo faxue jiaoyude tiaozhan yu jiyu* [The Challenge and Opportunity in China’s Contemporary Legal Education], 2006 FAXUE, no. 2, at 9 (2006).

9. Zhu Suli, *Zhongguo nongcun dui fazhide xuqiu yu sifa zhidude huiying—cong Jin Guilan faguan qieru* [China’s Villages Need for Rule of Law and the Judicial System’s Response—The Example of Judge Jin Guilan] (2006), available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=32785.

10. See generally Zhu Suli, *Annual Herbert L. Bernstein Memorial Lecture in International and Comparative Law: Political Parties in China’s Judiciary*, 17 DUKE J. COMP. & INT’L L. 533 (2007).

experienced government cadres, especially if they themselves have rural backgrounds, can explain matters simply and in local dialect, deploy discretion adeptly and fairly, and draw their authority from personal qualities rather than from the trappings of the courtroom and judicial garb. He worries not about there being too many such judges, but rather about who will replace them when the current ones retire. The task, then, for legal academics, concludes Zhu, is to encourage their students to bring law to the countryside; to conduct detailed local studies that identify what works and what does not and which rural judges are effective and why; to distill the implicit logic of rural adjudicators; to express it in generalizable academic language, systematize the knowledge, and suggest creative ways to deploy diverse forms of law that suit the needs of a nation experiencing wildly uneven development.

Third, as the above suggests, Zhu Suli is a contrarian who relishes playing the role of intellectual “bad boy” and provocateur. (Perhaps this inclination explains why he is so attracted to the work of Judge Richard Posner, who is much easier to peg ideologically than Zhu, but who, Zhu notes, is an anti-Marxist libertarian, whose analytical approach has much in common with Marxists’ historical materialism¹¹). Of Chinese and Western commentators who complain about the Communist Party’s influence on and interference in the judicial system, Zhu asks: in terms of China’s modern history, what did you expect? China’s modern political parties antedated the modern state. Indeed, the Communists (like their erstwhile competitor for political power, the Guomintang, Zhu boldly notes) established a party-state in which the party was explicitly privileged over the state. Moreover, while certainly problematic, the Party’s influence is not utterly reprehensible and sometimes produces the desired substantively just result even as its interference violates procedural justice. Yet Zhu is no apologist for the Party and openly defends the valuable social role of the public intellectuals who criticize its missteps and overreaching.¹² Zhu’s most contrarian stance is his critique of legal academics’ emphasis on rule of law, especially on a purely modern model of rule of law. It is not that Zhu is opposed to rule of law. Rather, he objects to its being treated as a decontextualized panacea, and he objects to legal professionals

11. Su Li, *FALU YU WENXUE: YI ZHONGGUO CHUANTONG XIJU WEI CAILIAO* [LAW AND LITERATURE: USING MATERIALS FROM CHINESE TRADITIONAL PLAYS] 14 (2006).

12. Xiao Qiang, *Zhu Suli on Public Intellectuals*, CHINA DIGITAL TIMES, Jan. 15, 2005, http://chinadigitaltimes.net/2005/01/zhu_suli_on_pub.php.

cutting themselves off from ordinary people by not listening to them and by speaking in overly specialized language.¹³ Zhu's paradoxical couching some of this critique in Western high theory has led Frank Upham to characterize *Sending Law to the Countryside* as "important," but also as "irritating and fun."¹⁴ Zhu's own stature as a widely read public intellectual indicates that Upham's characterization can arguably be applied to most of Zhu's prolific writing.

Fourth, Zhu Suli is a scholar who reads voraciously, broadly, and integratively—his latest book, a study of law and literature, draws widely from Chinese literature as well as from Chinese and Western scholarship on the subject¹⁵—but one who is, like Clifford Geertz,¹⁶ also finely attuned to the problems of commensurability and comparison as well as to the purpose of comparison. Is its purpose to denote one system as the perfect universal model, others as aspiring but still imperfect emulators, and others as inherently incompatible with the model? Or is it to use the perspective of one system to cast new light on the processes of another, to use one to understand the strengths and weaknesses of the other? Or, finally, is it to prepare for the task (impossible in Zhu's view) of grafting one legal system onto another?¹⁷ In his provocative, pragmatic, penetrating essay that follows, Dean Zhu attempts to answer the question: what is the proper frame of reference for a comparative legal analysis of contemporary Chinese law?

13. Zhu Suli, *Fazhi yu gonggong zhengce meizhou pinglun' kaimushide pinglun* [Comment at the Opening Ceremony of the Weekly Discussion on Rule of Law and Public Policy] (Apr. 2, 2007) (transcript available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID37854).

14. Upham, *supra* note 5, at 1677.

15. Su Li, *FALU YU WENXUE*, *supra* note 11.

16. CLIFFORD GEERTZ, *Law as Local Knowledge*, in *LOCAL KNOWLEDGE* (3d ed. 2000).

17. Zhu Suli, *Zheli meiyou budongchan—faluyizhi wentide lilun shuli* [*Here There is No Real Property—Theoretical Parsing of the Problem of Legal Transplantation*], (2007) available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=38679. Presented in the southwest corner of Western China's Qinghai province, a predominantly Tibetan area, this essay argued that a legal concept, such as real property, cannot be transplanted in vacuum. To have meaning and be effective, it requires the transplantation of the entire framework and infrastructure whence it came.