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Foreword*

Political Parties in China's Judiciary

Jonathan K. Ocko**

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 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 comparatist first grasps the realities of China and remembers that no comparative framework is intellectually neutral.

* Fifth Annual Herbert L. Bernstein Memorial Lecture in Comparative Law, Duke University School of Law, Nov. 2, 2006. Reprinted with permission from The Duke Journal of Comparative and International Law: Foreword to Zhu Suli, *Political Parties In China's Judiciary*, 17 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 527 (2007).

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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).

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

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 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

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 (Günther Doeker-Mach & Klaus A. Ziegert, eds., 2004).

4. Zhu Suli, *Songfa Xiexiang: 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://lawthinker.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 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 Political Parties In China (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

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 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.

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.chinalaw-info.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).

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 Guomindang, 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 cutting themselves off from ordinary people by not listening to them and by speaking in overly specialized language.¹³ Zhu’s paradoxical couching of 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

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.

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).

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?

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.

Political Parties in China's Judiciary*

Zhu Suli**

I. THE ISSUE AND ITS SIGNIFICANCE

The Spring 2005 issue of the *Yale Law Journal* published a lengthy review by New York University Law School Professor Frank K. Upham¹ of my book, *Sending Law to the Countryside*. Professor Upham's central criticisms are two: first, my "uncritical acceptance of a linear version of modernization theory,"² a criticism that I will not address in this essay; and second, my "greatest flaw," "the absence of politics and political power." My work, he says, "is reticent to the point of timidity when it comes to politics," "[a]side from the *small-p politics*,"³ by which he appears to mean the internal conflicts and interpersonal quarrels of the workplace. I emphasize these words to show that Professor Upham intends to make his point absolutely clear and forestall any possible misunderstanding of the word by readers. Moreover, his choice of the word "timidity" implicates the author's academic honesty in the political dominance of the Chinese Communist Party (CCP).

Contrary to Professor Upham's characterization, my book actually repeatedly reveals the influence on the judiciary of politics, especially the CCP's policies, including local Party organizations' multifarious interference in cases. This coverage is most evident in Part I of the book,

* The Fifth Annual Herbert L. Bernstein Memorial Lecture in Comparative Law. Reprinted with permission from The Duke Journal of Comparative and International Law: Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 533 (2007).

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1. 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)).

2. *Id.* at 1700.

3. *Id.* at 1698, 1703 (emphasis added).

which analyzes the influence of politics over judiciary from macro, middle, and micro levels. Chapter I projects the sending of the law to the countryside as an extension of the power of the nation-state to the basic level of society and points out that the judicial system in contemporary China assumes a political role. Chapter II discusses how the political control over judicial affairs is possible through the judicial administration within the courts and the judicial system. Chapter III focuses on the adjudication committee (*shenpan weiyuanhui*), a judicial organization within each court designed to deal—at least according to statutory law—with hard and important cases, and analyzes the multiple function of this micro institution within courts. Other chapters also have abundant analysis of politics and political power.⁴ Thus, while I may not meet Prof. Upham’s expectations about how much discussion there should be of politics and political power, his judgment that there is none at all is without foundation.

Certainly, such analyses may not be enough and should be extended by other research. However, I want to emphasize that I wrote the book in Chinese for a Chinese audience and never intended it to satisfy the political and ideological tastes of any foreign readers; Professor Upham’s frustration or dissatisfaction is therefore understandable.

Nevertheless, Professor Upham’s review attracted my attention and needs to be countered, not because he has any new insights or makes any contribution to the study of law in China, but rather because his errors in methodology are typical of some Western observers of China and are influential in China. Such errors reveal not only the deep ideological bias that is central to the “moral authority” of the Western notion of the autonomy of law and “rule of law” (a shaky authority that has evaporated after 9/11), but also a theoretical mistake that is common in comparative or implicitly comparative studies of China. In other words, it is the impact of these and similar errors on recent legal studies in China over the recent decades that has prompted me to write this response. Moreover, precisely because Upham’s errors are characteristic of the shortcomings in analyses of Chinese law, this essay is not simply a response to Upham’s book review, but also a paper of its own independent significance.

II. IS A DISTINCTION NECESSARY?

Professor Upham’s criticism of my work as failing to address politics and political power is internally illogical and contradictory because his re-

4. Zhu Suli, *Sending Law To The Countryside: Research On China’s Basic Level Judicial System* chs. 7, 10, 14 (2000).

view also acknowledges, at least implicitly, that I did analyze the influence of various social actors, including the Party and government, upon the operation of basic courts. So, what then is Professor Upham's complaint? A careful reading suggests that what troubles Professor Upham is my failure to devote a chapter or chapters to a relatively systematic analysis of the CCP's interference in the operation of basic level courts. As I already noted, this charge is untrue. However, even if the criticism were valid, we need to note that it is based on three implicit presuppositions: first, that there is a unique political influence that comes purely from the CCP; second, that it is possible to create a standard model of a judiciary free from political influence or meddling; and third, that it is possible and necessary for researchers to examine and measure independently such influence. All three presuppositions are unrealistic.

In my own view, and in the view (explicit and implicit) of many Chinese and foreign scholars, the CCP's influence and control is ubiquitous; it penetrates every aspect of society. Despite the many political differences between the CCP and its former arch-rival, the Nationalist Party (known as the *Guomindang* or GMD) and despite the fact that the CCP never used the GMD's often deployed concept of the "party-state," in practice, the CCP inherited the political tradition, initiated by Sun Yat-sen⁵ and pursued by the GMD, comprised of a "party construction of the state," "party rule of the state," and "party above the state." Indeed, eventually, the CCP's influence over society and the machinery of the state would far exceed that achieved by the GMD.

The evidence is abundant. First, during the GMD's rule of mainland China (1927–1949), political control of entire regions remained in the hands of provincial strongmen or warlords, and the GMD's unification of China was more symbolic than real.⁶ Second, the same was true of political parties. Whether or not the GMD wanted to recognize it at the time, even during the GMD's rule, the CCP occupied a considerable amount of territory, enjoyed the support of a large number of the people, and controlled independent armed military forces. There were, as well, some other smaller political parties. Third, in the Nationalist government, even within the GMD itself, there was a group of relatively independent and socially influential scholars and technocrats. Fourth, because of the GMD's weakness, to a certain extent the traditional model of social control being exercised by a combination of imperial

5. Sun Yat-sen was the first President of the Republic of China, and founder and leader of the Gmd. Sun Zhongshan, *Sun Zhongshan Quanj* [*Complete Works Of Sun Yat-sen*], vol. 8, at 267–68, vol. 9, at 103-04 (1986).

6. 2 *Deng Xiaoping Xuanji* [*Selected Readings Of Deng Xiaoping*] 299 (2d ed. 1994).

(central) and gentry (local elite) power persisted, with the central government having rather weak influence in rural China.⁷ In conclusion, the GMD built only a superstructure and did not, because it could not, implement its will and policies down to the lowest levels of society.⁸ Indeed, this inability to achieve its goal of social transformation is what led to the GMD's loss of the mainland in 1949.

In the judiciary, too, the GMD fruitlessly sought to establish total control. From its earliest years, even before it had established national political control, the GMD insisted on “partyization of the judiciary” (*sifa danghua*). Subsequently, it continued to adopt systematic measures in this regard,⁹ and there is evidence to show that in some cases, the GMD exercised strong direct control.¹⁰ However, this insistence on partyization demonstrated that the GMD's control and influence over the judiciary was not complete. Because of this reality, it would be possible, though still very difficult, to distinguish GMD influence from other political or governmental influence.

In the years immediately following the CCP's assumption of power in 1949, such a distinction became impossible—not because the CCP's influence weakened but rather because it was too strong. First the People's Republic of China (PRC) became a modern, nationalist state with a high degree of political, economic and cultural unity. Only Taiwan was under the control of the Nationalist government, and there were no regional strongmen. Second, although there were other legal, democratic parties, they all existed under the leadership of the CCP. Even after the space for these democratic parties' political activities expanded following the reform and “opening up” in 1978, the 1982 constitution pro-

7. Fei Xiaotong, *Huangquan He Shenquan* [Imperial Power And Gentry Power] (1988).

8. Some historical researchers testify that conflicts between GMD local branches and local governments always ended with the victory of local governments during the GMD's rule. Cf. Wang Xianzhi, *Kangzhan shiqi guomindang zuzhi jianshe yu zuzhi fazhan de jige wenti* [Issues on GMD's Organizational Construction and Development During the Anti-Japanese War], 1990 *Jindaishi Yanjiu*, no. 2, at 230-50 (1990); Zhongshen & Tang Sengshu, *Shilun Nanjing guomin zhengfu xunzheng qianqi (1928-1937) de difang dangzheng jiu feng* [The Local Party-Government Conflicts in Early Tutelary Period (1928–1937) of Nanjing National Government], 1999 *Shixue Yuekan*, no. 2, at 53-58(1999).

9. The earliest recorded statement available referring to partyization was made by Xu-qian in 1926; Ju Zheng, a founding member of GMD and later Chief Justice of the Supreme Court of National Government, elaborated it in 1934. According to Ju Zheng, partyization has three criteria: all judicial personnel must be GMD's members; GMD policies must be applied in adjudications; and all the judges must accept the Three People's Principles (the political ideology of GMD). Ju Zheng, *Sifa danghua wenti* [On Partyization of the Judiciary], 1934 *Dongfang Zazhi*, no. 10 (1934).

10. Cf. *Wo Suo Zhidao De Hanjian Zhou Fuhai* [Traitor Zhou Fuhai, As I Know] (Wen Fei ed., 2005); *Wo Suo Zhidao De Hanjian Chen Gongbo* [Traitor Chen Gongbo, As I Know] (Wen Fei ed., 2005).

vides that the system is still one of cooperation and consultation by multiple parties under the leadership of the CCP.¹¹ Through various formal (for example, the Chinese Political Consultative Congress) and informal irregular meetings with non-party figures and institutions, the CCP gathers and selectively adopts the political advice of other political parties. Some leaders of these democratic parties are also CCP members.¹² Third, the vast majority of social elites, whether in government, universities, commerce, or social organizations, are party members. Other elites who are not party members accept the political leadership of CCP and most of them are staunch communists.¹³ Finally, within the CCP are some “radicals,” whose political views might be considered dissident by Westerners. In this sense, though the Party consistently proclaims itself to be the vanguard of the proletariat and the working class, and describes its highest ideal and ultimate aim to be the realization of communism,¹⁴ even before the declaration of “the three representatives,”¹⁵ the Party also emphasizes that it was the vanguard of the entire Chinese people and that it sought to represent the interests of the greatest number of people.¹⁶ In this sense, the CCP is another “nationalist” party. Its political program, despite having suffered mistakes of the right and the left (including the serious mistake of the Cultural Revolution), is widely accepted by the people.

Owing to the CCP’s political program and tight organizational structure, its influence is ubiquitous at every level and in every aspect of contemporary Chinese society; it determines the direction of society and government. Though there may be differences and conflicts within the party-state, there is no external influence on the government other than the Party: there is no such thing as government policy independ-

11. Xian Fa [Constitution] pmb., para. 10 (1982) (P.R.C.).

12. As far as I know, the former or current leaders of such political parties as Democratic League, China National Democratic Consultation Association, Zi Gong Party, and Taiwan Democratic Self-government League were or are CCP members.

13. Two examples are the late and only non-CCP Vice Presidents of PRC: Song Qinqin, wife of Dr. Sun Yat-sen, applied and was approved for membership in the CCP right before her death; and Rong Yiren, China’s leading “red capitalist,” was identified in a New China News Agency obituary as a “soldier for communism.”

14. 16TH CCP Nat’l Conf., Constitution Of The Communist Party Of China general princs. (2002) [hereinafter CCP Const.].

15. It is emphasized that CCP represents the fundamental interests of the overwhelming majority of the Chinese people, represents the development trend of China’s advanced productive forces, and represents the orientation of China’s advanced culture. It is widely considered an important change of CCP in terms of its organizational constitution and political ideology.

16. Cf. 7th CCP Nat’l Conf., Constitution Of The Communist Party Of China (1945); 8th CCP Nat’l Conf., Constitution Of The Communist Party Of China (1956).

ent from the CCP; there is nothing else truly influential, not even the military policy imagined by Western scholars. In this view, as a matter of fact, the CCP is not only the strength at the core of every undertaking in China, it is also the mechanism for the mobilization, integration, and political representation of all social forces and classes of PRC. In contemporary China, nearly every political force has either been integrated into the CCP, or, as in the case of former and present capitalists, counter-revolutionaries, bad elements, and rightists during the Cultural Revolution (1966–1976), denied political expression. However, in the more than two decades since China began its reform and “opening up” in 1978, and especially following the inclusion of the concept of the “the three representatives” in the party’s and PRC’s constitutions, the CCP has pursued becoming a governing party that represents the basic interests *of the greatest number of people* and that has daily strengthened its ability as a governing party.¹⁷

Therefore, distinguishing the status of party and government officials is truly not that important. At every administrative level in the PRC, the head of the administrative unit is not only a party member, but the number two leader (for example, the deputy party secretary) of the party organization at that level, while among the deputy leaders of an administrative unit (for example, Vice Mayor of a city), only one person is generally not a party member. Party and governmental officials are interchangeable: for example, most governors eventually assume a position as provincial Party secretary, and many provincial Party secretaries have previously served as governors or other officials. This is the pattern from the center down to the lowest level. Indeed, historically, few officials who have specialized in or worked only in Party affairs and never in the government enter the highest, core policy-making positions of the Party organization.

This pattern holds true across all the branches of government and administration regardless of the breadth of their responsibilities. For example, at all levels of government, from the municipal to the national, the chairs of the People’s Congresses and People’s Political Consultative Conferences, as well as the chiefs of all but a few government agencies, are the party secretaries of the leading party group¹⁸ in those units.¹⁹

The institutions charged with administering justice (the People’s Courts and People’s Procuratorates) are certainly no exception. Since

17. Xian Fa art. 1 (1982).

18. A leading party group is a CCP organization set in a state organ, people’s organization, and other non-party organization.

19. Currently, probably the foreign ministry is the only exception.

1949, all the Presidents of the People's Supreme Court and the Chief Procurator of the Supreme Procuratorate, except Shen Junru, the first President of People's Supreme Court, have been CCP members and secretaries of the leading Party group of the organization. Although there is commonly a non-CCP-member Vice President or Deputy Procurator, they are all carefully selected by the CCP organizational branch and trusted by the CCP; in some particularly important policy decisions, these non-Party officials may be invited to participate in an expanded meeting of the leading party group of their institution.

Given such a structure, it is not only hard to distinguish among social, administrative, or Party interference in the judicial system and its operation, it is also unnecessary to make this distinction. To insist on the distinction is to apply a standard Western model of a judiciary, inapposite for China. It fits China into a procrustean bed, akin to "cutting one's feet to fit shoes" or "marking a boat to see where one has dropped a knife in a river." This sort of "research" is not only meaningless; it also blurs and confuses the real problems to be dealt with in the Chinese judicial system and can, moreover, lead to mistaken solutions. In my view, what is truly important is for us to discover, examine, and study concretely the shortcomings and merits of influence on and interference in the legal system (whatever its sources), and to determine how to adjust and improve the performance of China's judiciary, as well as make it just, efficient, and effective.

It should be pointed out that because of the Party's ubiquitous institutional presence and because of the nature of the social revolution in China, the Party's organizations and leaders (through administrative and other agencies) have directly and indirectly influenced, interfered in, and even at times manipulated the judicial process. However, we cannot, indeed, we should not, simply look at this as unfair interference. To be sure, the Party's mistaken interference in the judicial system and its policy errors have led to some disastrous consequences. Yet even during the most extreme moments, such as the Cultural Revolution (1966–1976), there were CCP organizations and officials, who, within the scope of their ability and influence, prevented and reduced the unfairness or radicalism in some cases, including instances in the judicial sphere. Although today it is quite popular to attribute all the problems of the PRC to the CCP or the revolution led by the CCP, it is hard to imagine that the current state of Chinese society and the judicial system would necessarily be better off without the modern revolution and economic development led by the CCP. This is counterfactual, and I will not develop the argument here; I am willing to let history be the final judge. However, if one thinks the revolution led by the CCP was inevita-

ble and on balance improved China, then one has to accept the CCP and its modeling of China's modern judiciary. Though we can argue about whether the costs are worth it, there are no benefits without costs.

Today, although the CCP has adopted "relying on law to rule the country" (*yifa zhiguo*) and judicial independence is inscribed in the Constitution, party organizations and individuals persist in influencing and interfering with the judiciary. However, although these interferers are sometimes leading cadres who "wave the flag" of the local Party organization, it does not mean that this individual's interference represents the Party's or that particular party organization's interference. To the contrary, some of them are violating CCP principles, policies, and disciplinary rules. A county Party chief may interfere with a county court's handling of a case; if he or she acts out of personal interest, it is illegal; if the action is driven by "local interest," it is at a minimum unfair and inappropriate. The Court or Procuratorate has a basis in law and Party disciplinary rules to reject such interference, and both institutions have certainly resisted this sort of meddling, though not always successfully.²⁰ Moreover, sometimes the party's apparent interference is merely issuing an opinion (*pishi*) as a response to a "hot" social issue. Even in the absence of this opinion, the relevant court, acting solely on the basis of the law, would have reached a similar result. In a sense, the Party's issuing of an opinion is simply a necessary political or public relations gesture by the CCP, acting in its role as the governing party that is serving the people. It is a necessary political strategy that shows responsiveness to outcries from the people. Such gestures certainly do not fit the model of separation of powers and are often criticized by many legal scholars who, based on their knowledge of Western judicial practices, think that the CCP should keep quiet about a case awaiting trial. Yet *maybe* the gesture is necessary for the majority of Chinese people who are not interested in foreign comparisons, and want merely justice and social solidarity. From a legal perspective, I find the Party's interference unjustified and am sometimes disposed to join in the criticism. However, from a political perspective and from an objective or neutral position, I do not see why the legal perspective is necessarily more moral and more reasonable than the political perspective, and why the judicial position should always be privileged over the political position. Perhaps, my position is tendentious and conflicts with my self-interest as a legal professional. However, in my view, the Party's interference may reasonably be seen as a performance of its political functions of social integration and representation.

20. See Zhu, *supra* note 4, at 129-31, where I analyze such cases.

Another difficulty in making a distinction is that an administrative agency's interference may be arising directly or indirectly from a CCP decision or policy determination. For example, in order to attract foreign investment, a local Party organization, the local government, or government agencies may instruct (*zhishi*) the local court to "take care of" (*zhaogu*) a foreign investor in a particular case. Such actions do not comport with a pure model of judicial autonomy, but at the same time, the local Standing Committee of People's Congress or other government agencies may enact a local statute of general applicability that requires local courts to implement the CCP policy of encouraging economic development. Regardless of the form it takes, this sort of interference cannot be said to come from the government rather than the Party because it is, in fact, reflecting the political judgments and decisions of the Party center or its local branches. When we turn to the real world to look closely at how such influence is exercised, we find an even more complicated situation. In general, one can say that the final decision making power lies in the CCP. However, at the level of everyday experience, whether interference comes from the Party, the government, the People's Congress, or the media, or individuals within them all depends upon the position and actual influence of the interfering party, upon the institutions he or she thinks is the most effective instrument for intervening, and upon the actual channels he or she uses to affect the court's judgment. It is not always a CCP organization that is the most influential in such matters. Like other people, the Chinese are very practical. They will try anything and everything they think might be effective at exerting influence on the courts. Distinctions among the Party, government, People's Congress, or the mass media are not made. Nor are distinctions between lawful and unlawful methods, such as personal connections with and even bribery of judges.

Even within the judiciary (Courts and Procuratorates), there are various legal, semi-legal, and illegal interferences, both legal and administrative in nature. Sometimes, it is hard to determine whether the influence is Party or non-Party, institutional or personal, or legal or administrative. A Supreme People's Court's decision, even a judicial interpretation from its adjudication committee, the most professional organ within the Court, may still be a response to a policy decision by the Central Committee of the CCP. For example, in December 2003, Supreme Court President Xiao Yang announced that the Court had issued a "leading opinion" (*zhidao yijian*) following intensive study by the Court's Party branch of a statement from Hu Jintao, General Secretary of the CCP.²¹ In

21. Liaowang Xinwen Zhoukan, Oct. 13, 2003, at 20.

this case, it was not simply a matter of restating a CCP Central Committee policy. Rather, the decision addressed a real, pervasive internal problem of the court system. Moreover, a higher court judge or judges' unfair reversal of a lower level decision may be a product of undue social influences on those higher court judges disguised with CCP rhetoric. Finally, even if the Party interferes in a particular case, for example, through the increasingly less common practice of utilizing the Party secretary of the politics and law committee (*zhengfa wei*), the instructions, though written, are general rather than specific. Like any other texts, they need interpretation. Is such interference an interference, and in what sense? Actually, judges who try such cases may use such an instruction to hide their personal judgment, even their partiality.

Accordingly, I conclude, first, that the influence of the CCP upon the judiciary is general and diffuse; it comes not only from party institutions and party leaders, but also through many other avenues.

Second, although the CCP has its own ideology and exercises significant influence on the judiciary, taken as a whole, this ideology is not necessarily incompatible with the general view of justice shared by ordinary people. The organizational principles of the CCP are in conflict with the operation of professional logic in the legal/judicial system, but in concert with China's social development, the legal/judicial profession in China is institutionalizing itself. Third, as a concrete, operating political party within society, the CCP is not essentialist; every sort of person, interest group, and political force may try to use the mechanism of the Party to influence or interfere in the operation of the judiciary. Their actions have both a positive and negative effect on the formation and development of the judicial system. Fourth, on the level of everyday life, not only is it difficult to identify the pure party interference, it is also important to note that such interference has a strongly pragmatic and opportunistic character. Therefore, I would argue that separating Party interference from other interference cannot further our understanding of the operation of the basic level legal system. Moreover, other than exacerbating an ideological and essentialist understanding of the CCP and China, such distinctions have no intellectual significance.

III. WHAT IS THE FRAME OF REFERENCE?

Even it were possible to identify a purely Party influence, such research is untenable because of the problem of an implied frame of reference. Indeed, there are many flaws in the PRC's judiciary, and they are probably attributable to the CCP's ideology. However, I prefer to trace them to the unprecedented social transformation of China during the

last one hundred years. One of my aims in writing *Sending Law to the Countryside* was to try to identify and find solutions for these flaws. Perhaps, because my effort was insufficient, my analysis not trenchant, my vision too narrow, indeed blind in places, my work has its shortcomings. Nevertheless, it is hard to construct, indeed even to imagine, a standard frame of reference, whether experiential or ideal, for the political-judicial relationship that could be used to objectively measure the CCP's influence and interference at the basic level of the judiciary and then evaluate the pros and cons of such influence.

All modern countries have political parties, which despite the commonly recognized principle of judicial independence, influence or interfere in judicial matters in various ways. The extent of the phenomenon may be less than in China, but it is nonetheless fairly common. Actually, without the active participation and influence of political parties, it is hard to imagine the existence or perpetuation of an institutional judicial independence. My language may seem a bit cynical, but it describes a historical and contemporary reality. Was it not out of loyalty to the Federalist Party and determined resistance to the Republic-Democratic Party that Chief Justice Marshall created the system of judicial review, which serves as the core of American judicial independence?²²

Some may dismiss my example as characteristic of the early stage of judicial independence. However, even in many Western countries today, judicial independence depends on and indeed is guaranteed to a great extent by party politics. Without party politics there would be no judicial independence in these countries. For example, in the United States, the two political parties exert influence on the courts and judicial process through the system in which the Senate advises and consents to the President's nomination of federal judges. Also, as the example of the Warren Court shows, some American judges voluntarily make their judgments in accord with their party's ideology. In addition, some states have institutions of election and recall.²³ To different degrees, all these institutions and practices are influenced by party politics. Personally, I regard these political parties' influence on the judicial system as generally acceptable and lawful. Moreover, I recognize that neither in degree nor character can they be equated to the political in-

22. Oliver Wendell Holmes, John Marshall, in *The Essential Holmes: Selections From The Letters, Speeches, Judicial Opinions, And Other Writings Of Oliver Wendell Holmes, Jr.* 206-09 (Richard A. Posner ed., 1992). I discuss the background of *Marbury v. Madison* in Zhiddu ruhe xingchengde? [How was the System Formed?], 1998 Bijiaofa Yanjiu [Res. In Comp. L.], no. 1 (1998).

23. Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* 37-42 (7th ed. 1998).

fluence or interference to which Chinese judges are subject. However, the acceptance by Upham and me, as well as by *many others* of the ineluctability of parties' political interference does not mean that we can deny that it is indeed political influence.

"Many" does not mean everyone or on all issues. In America, there have been instances of what Judge Robert Bork and other scholars regard as egregious interference—for example, the struggle in 1987 between Republicans and Democrats over President Reagan's nomination of Bork to the Supreme Court. At least Judge Bork regarded it as inappropriate interference, or in his words, a "political seduction of the law."²⁴ Is this an overstatement prompted by Judge Bork's anger? Let us imagine an alternative outcome in which a Republican-dominated Senate confirmed Bork. In the eyes of adamant Bork opponents Senator Ted Kennedy and Senator Joseph Biden (who in the Democratic-controlled Senate was chair of the Judiciary Committee), would that result not also have been political? Actually, the controversy over Judge Bork's nomination reveals only the tip of the iceberg of the influence of disciplined American party politics over judicial affairs. It was an exceptional case, but less controversy in a confirmation case does not mean the absence of politics and political influence; politically non-controversial is not politically neutral or politics-free.²⁵ The nomination and confirmation of federal judges in the United States is becoming more and more political.

Politics and political interference are evident not only in the process of nominating and confirming judges, but also in some concrete cases. The interference comes not only from politicians in their role as party leaders, but also through the willing cooperation of politicians serving as judges. Sometimes, such efforts may be out of bounds. The most famous or infamous instance is Chief Justice John Marshall's handling of *Marbury v. Madison*.²⁶ In that case, there was no party leader

24. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

25. A recent empirical study found that "the more important the court, the greater the difficulty of having the person confirmed. Although the confirmation rates have fallen and the length of the confirmation process has lengthened dramatically, the ex-post facto measures of judicial quality of circuit court nominees...or judicial independence have been decreasing over time....The most troubling results strongly indicate that circuit court judges who turn out to be the most successful judges...faced the most difficult confirmation battles . . ." The study speculates that "[p]ossibly, senators of the party in opposition to the President really care only about preventing the best judges from being on the circuit court because they will have the most impact." John R. Lott, Jr., *The Judicial Confirmation Process: The Difficulty with Being Smart*, 2 *J. of Empirical Legal Stud.*, 407, 443-47 (2005).

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

demanding that he handle the case in a certain way, but his aggressive personality and firm party ideology motivated him to make perhaps the greatest decision in the American constitutional system. In the last fifty years, the Berger and Rehnquist courts have, to a certain degree, been much the same: more political than juridical.²⁷ The most recent instance is the controversial case of *Bush v. Gore*.²⁸

Please note that in no way am I saying that American political parties' influence on the operation of courts is the same as the CCP's influence upon basic courts in China. The two are very different. The United States has a two-party system, while in China, the "[Communist] party is the leader of all";²⁹ in the United States, political influence on the judiciary probably comes mainly from judges' self-conscious loyalty to party ideology and platforms, while in China the influence is a function of the party's demands on and disciplinary control over judges; and in the United States, with lifetime tenure and high salaries as protection, some judges will not hesitate to "rebel against" their party,³⁰ while in China, judges, who are civil servants, can find comfort only in the supportive writings of a few scholars. Thus, I recognize that in terms of parties' political interference in the judicial system, the differences between China and the United States are ones both of degree and character.

Moreover, I want to point out that nothing I have said implies that in the course of transforming its judiciary, China should not study the United States and other Western countries. To the contrary, the PRC is in the midst of studying these examples, and out of a concern for the need to address China's problems, I approve and support this effort.

However, the position I have taken above has nothing to do with the frame of reference issue with which I want to engage. The question remains: what is the proper frame of reference for measuring and evaluating the relationship between party politics and the judiciary. The American? The British? The German? The French? Or should I construct a standard model based on the judicial practice of all of the nations in the world? But why should they be basis for the standard, and is that standard appropriate for China? From where does such a com-

27. Lucas A. Powe Jr., *The Warren Court And American Politics* (2000); Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969-1986* (2000); Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (2001); *Rehnquist Justice: Understanding the Court Dynamic* (Earl M. Maltz Ed., 2003).

28. Cf. Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts* (2001); *The Vote: Bush, Gore, and the Supreme Court* (Cass R. Sunstein & Richard A. Epstein Eds., 2001).

29. 2 Mao Zedong, *Mao Zedong Zhuzuo Xuandu* [Selected Readings Of Mao Zedong's Works] 852 (1986).

30. Cf. Laurence H. Tribe, *Constitutional Choices* (1985).

parative law model or statistical standard derive its normative force? From where does its justness come? If, as Speaker of the U.S. House of Representatives Tip O’Neil said, “all politics are local,” why should local judicial politics adopt a universal standard? We cannot get to this form of universal standards unless I adopt a linear version of modernization theory, which I steadfastly reject, but Professor Upham believes I support.

Should I dismiss all the empirical evidence and directly develop an ideal model frame of reference by which to examine the relations between the judiciary and political parties? This is, of course, possible and really not that hard. Or, should I derive such a model relationship from the separation of powers (with its Western origins and cultural coloring) or other similar concepts? I believe I can do it quite well if practice is not considered. But then, unless we are essentialists who not only believe that there is one true, correct, universal, and transcendent definition of the relationship between political parties and the judiciary, but also believe that we have perfect access to that definition, we still cannot prove that this ideal or deduced model for political party-judicial relations is indeed legitimate. Perhaps it is possible to broaden or loosen the standard a bit, consider the national context where a judiciary is located, and construct a “comparatively reasonable” relationship between political parties and the judiciary. But methodologically, this would still be an artificial construct which would certainly deviate from the American standard implicit in Upham’s critique, comparative law’s ideal model, or the essentialist standard, because one would have to return to the contextualized, consequentialist, functionalist model by which I abide in my book. One must come back to China’s social context, where the judiciary operates, and evaluate the relationship between party politics, the government, and the judiciary in considering the systematic consequences of such a judiciary in the Chinese society. Even if all this is possible, it is hard to avoid innumerable controversies over the reasonableness of the construct. For example, I consider that in *Sending Law to the Countryside*, I constructed a reasonable analytical structure and frame of reference for evaluating the relationship between the Party and the judiciary, and provided a focused discussion of a series of related issues. However, Professor Upham finds in it an absence “of politics and political power.” Through numerous, useless publications, we could debate forever the reasonableness of the framework, but we will get nowhere.

I say useless because not all debates end in agreement or intellectual enlightenment, and even if we can reach an agreement over the frame of reference, does this frame have any practical uses? Whether

we deduce it from the general, abstract it from empirical materials, or make a standard directly out of American or some other national experience, in the end, it mainly provides us with just another frame of reference for criticizing contemporary Chinese judicial practice, making us think that we have truth and justice in our hands. But it does not help us either to understand China's reality or to transform that reality. Indeed, we may be worse off than we started. This sort of frame of reference is doomed to fail because from the beginning, the current relationship between political parties and the judiciary is neither derived from a concept or ideology, nor modeled on a foreign standard. The current state of China's judicial practice is a product of China's modern historical and social development, a social reality constructed from various social variables.

IV. THE PARTY AS AN INSTITUTIONAL ALTERNATIVE

My response cannot stop here. Otherwise, readers may think it is not a strong response, but rather at most a defensive pleading for my methodology that, even if successful, merely dodges Upham's arrow. It might enhance the misimpression about the relationship between the CCP and the judiciary within China and the implied universal, normative character of American-type judicial politics.

More importantly, such a brief response leaves unexplored topics that are inherently deserving of further consideration and it is therefore unfair to Chinese contemporary history, the CCP, and the Chinese judiciary to stop here. So, in this section, I want to engage in a thought experiment and argue for the *contextual reasonableness* of the relationship between the CCP and the judiciary and for its necessity in China's social transformation. If my argument is sound, it will further demonstrate the problems with Professor Upham's criticism of my book, not only in his methodology, but also in his value judgments. Further, such a social science analysis of the relationship between Party and the judiciary may provide a new frame of reference for understanding and evaluating the issue of the relationship between the CCP and the PRC's judiciary. Even if my effort fails, it will advance the academic research on China's judicial system.

The relationship between the party-state and the judiciary in China evolved over the course of China's modernization. Since 1840, China's most important task has been to transform itself successfully—economically from an agricultural society to an industrial and commercial society; politically from a community unified by culture to a modern nation-state unified by politics; and culturally from a rural society dominated by Confucian humanities to an urban one led by the social

sciences.³¹ In terms of key variables such as time, population, and geographic size, this was an unprecedented historical transformation. Without a vigorous, core political power, it is unimaginable that this change could have occurred in such a short time and in the face of a fiercely competitive international society. The early history of the Republic of China is clear evidence. Only when the GMD and CCP appeared as national, revolutionary parties and twice cooperated, did Chinese society begin its first steps toward unification, and only in the Second World War, with the assistance from Soviet Union and the United States, did China win its first war against foreign invasion since 1840.

It should be noted that the GMD and CCP are profoundly different, but looked at from another angle, whatever their differences, both are different from contemporary Western political parties. Both the GMD and CCP were aware that the task and historical burden of the nation was the economic, political, cultural, and social transformation of China. To achieve this goal in the wake of imperial China's collapse and in the face of an intensely competitive world, they had to use every possible means to mobilize and integrate all political forces in the service of national unity, independence, and freedom, which are preconditions to social and economic development. What I have described is the process of *jianguo*, which is commonly translated as "state-building." I prefer to translate it as the *constitution* (or re-constitution) *of the nation-state*. It is in this historical context of constituting the nation-state that the CCP and GMD came into being. In contrast, the political parties in the West were established and operated within already-constituted nations. They were political organizations that served as vehicles for common interests within these constituted nations, and generally speaking, did not confront the historical problems and tasks that faced the Chinese political parties, nor did they have the long-term political goals of the Chinese parties.

Because of this historical task, both the CCP and GMD were revolutionary parties, rather than merely political parties holding power. They had to engage in armed struggle to gain the power, and then, even after they gained political power, they had to continue to play the role of a revolutionary party, leading society in the completion of social revolution, land reform, and industrialization. All of these historical tasks dictated that both parties be elitist: they had not only to be able to propose national reform, but also to mobilize and lead the masses to

31. Zhu Suli, *Daolu Tongxiang Chengshi—Zhuanxing Zhongguo De Fazhi Of [All Roads Lead To Cities—Rule Of Law In A Transforming China]* Intro. (2004) [Hereinafter Suli, *All Roads Lead To Cities*].

accomplish the transformation in order to construct or constitute a modern nation-state, precisely the original meaning of constitution. However, this task could not be accomplished by the political elites without the collective effort of the nation. Thus, both parties had to be capable of integrating all kinds of other social forces, representing different interests, and in this sense, they became the parties of the masses.³² As a consequence of this historical context, the CCP and GMD developed not only strong political ideologies, but also strict party discipline and tight internal organizations to insure effective implementation of party policy. Their party structures emphasize “democratic centralism,” “organized democracy,” and “disciplined freedom,” which all seem to be antinomies or oxymorons, but are actual practices within the parties. Party members who violate Party discipline will be sanctioned or even expelled.³³

Therefore, such parties are not only an important motivating and leading force for social change; they have also been a critical institutional alternative in modern Chinese society. Before they take power, they are organizational mechanisms and social mobilizers.

The party organization, party leaders, and even ordinary party members are thus alternatives to the conventional bureaucracy and bureaucrats. Given the absence of the professionals and bureaucrats China needed to order its society, after taking power, besides continuing their function of social mobilization and organization, the parties, to a certain extent, could not but assume the role of the bureaucracy, and in the course of that process, their members became the bureaucrats that modern China needed. The so-called party-state, or rule by the party, that the GMD first proposed and emphasized³⁴ is therefore not only natural, but also inevitable. The CCP always opposed the GMD’s idea of “party-state,” but in reality, such a pattern characterized the CCP both before,³⁵ and certainly also after its victory in 1949. Indeed, the CCP’s party-state was even more pronounced than the GMD’s. Thus, ei-

32. Cf. CCP Const., supra note 15, general princ. ; Const. Of The Guomindang preface [hereinafter Gmd Const.].

33. CCP Const., supra note 15, general princs. Gmd Const., supra note 32, arts. 3, 4, 5, ch. 12.

34. In 1928, the Standing Committee of the GMD stated that the Party was the Supreme Tutelar of the nation. In 1931, the Nationalist Government invited selected representatives of rural society, labor, business, and the education sector to convene and draw up a Tutelary Period Provisional Constitution of the Republic of China, Article 30 of which specifies that during the Tutelary Period, GMD will represent the National Conference to direct and supervise the National Government. Xu Juhua, *Jiang Jieshi Chenbai Lu [A Record Of Jiang Jieshi's Success And Failure]* ch. 12.

35. 1 Xiaoping, supra note 6, at 12.

ther the GMD or the CCP has been the most important part of the constitutional and governmental structure of modern China and the core force of that modernization.

The Party's objective is social transformation. Accordingly, it cannot base itself directly on democracy—the people, after all have a tendency to be conservative and short-sighted—but must insist on the central role of the Party's elites and leadership group in guiding the revolution and social transformation. But at the same time, in order to lead the masses, the Party cannot abandon them. In order to be representative, both the GMD and CCP had to maintain a certain degree of internal democracy (whether it was called “democratic centralism” or “democracy with organization”). Parties become a quasi-constitutional structure in another sense as they serve as an alternative for or a necessary stage on the road toward constitutionalism.³⁶ Within the party, party discipline and guiding principles perform the function of law and statutes. In his analysis of the party-state of China during the twentieth century, Harvard professor William C. Kirby pointed out that the goal of a party-state is not to lead the government, but to reform the Chinese people and recast them into citizens of new nation-state. The party-state, he noted, is a political entity pursuing social and economic development; its aim is complete mobilization of all China's people and total industrialization.³⁷

This historical task cannot be fulfilled within a short period, so the party-state structure may last quite long since the taking over of power does not equal constitutionalism, nor accomplishment of the self-imposed historical task. Parties want to accomplish their ideals through the coercive state and governmental powers under their control. However, when in power, the requirement of effective and stable governance will force parties to gradually adjust their policies; to enact laws; to establish conventional institutions, such as the National Congress or National People's Congress; to recruit qualified civil servants and set up bureaucracy; and to establish a judiciary and improve its function. It is a long process of transformation from a revolutionary party to a governing party; a process of transformation from a pioneer and elitist party to a popular party. Because these processes of reformation of the

36. Sun Yat-sen proposed three stages to China's constitutionalism: the period of military government, the period of political tutelage, and the period of constitutional government. See Sun Yat-sen, *Guomin zhengfu jianguo dagang* [A Constitutional Program of the National Government], in *Zhongshen*, supra note 5, at 126–29.

37. William C. Kirby, *Renshi 20 Shiji zhongguo* [Understanding China of Twentieth Century], 2001 21st Century, no. 10, 114–24 (2001), available at http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1523.

Party and institutionalization of modern nation-state take time, they are still ongoing in the PRC.

Thus, it is understandable why in contemporary China, complete judicial independence is impossible and why the relatively low degree of party interference in the judiciary in the developed countries of the West is not likely to be systematized in China. Actually, in contemporary China, the entire modern state apparatus, including the judiciary, consists of inventions created by the governing political parties on the basis of their political ideals, policies, and organizational structures. The specific forms, such as the GMD's "partyization of the judiciary," or the CCP's "sending law to the countryside" and political and judicial committee (*zhengfawei*) may be accidental, but the comprehensive leadership, influence, and control of the parties was inevitable and pervasive. Thus, we have the phenomenon that I have described above: in contemporary China, it is well nigh impossible to distinguish what is and what is not the CCP's influence and interference, for in fact the judiciary is the CCP's creation.

Although GMD and CCP had some commonalities, there were also significant differences between them, most notably the different social forces that they integrated and represented. From the 1920s onward, the GMD inherited most of the technocrats from the late Qing dynasty, as well as the vast majority of professionals and mid- to upper-level intellectuals, for, as the party in power, the GMD provided them with room for their knowledge and skill. Moreover, another major constituent force of the GMD was the group of military officers who had graduated from the Huangpu Military College and who served as another institutional alternative to the bureaucracy.

By contrast, despite consistently seeking a united front during its military struggles, the CCP had no way to attract the broad participation of such groups, not only because it had no space to deploy their skills, but also because for these elites, the CCP was a much riskier choice, especially in its military struggle for national power. Moreover, unlike the GMD, the CCP also did not have a captive military college to train its officers, who instead got their experience and skills on the battlefield. During wartime, most military officers of the CCP were trained in the battlefield. Thus, the CCP was less capable than the GMD of utilizing modern or Paramodern institutions and professionals.

The CCP membership came mainly from peasants and other mid and lower social classes. Because of the peasants' mode of production, they tended to be less modern, less disciplined, and less likely to be long-term thinkers. Thus, in order for the CCP to rely on this mass base to make a successful revolution, it had to develop stronger party orga-

nization and leadership, stricter discipline, and a more radical ideology.³⁸ There is substantial research to show that during the time that the GMD held power on the mainland, the actual political power and influence of its party organization and party members was substantially weaker than similarly situated CCP party organizations and cadres. For example, the GMD's propaganda and organization ministers were much less influential than the CCP's. Such evidence is abundant.³⁹ The differences between the CCP and GMD lie in the social conditions from which they were constructed; the ideological differences may not have been as important as many people think.

The CCP's stronger party organization and ideology compensated for its lack of a bureaucratic system for modern government, but they also impeded the creation and development of such a bureaucracy. Of course, the CCP felt no urgent need for a bureaucracy, and long after it took power in 1949, it remained a revolutionary party in character. There was no quick transformation into a governing party; there was no effective formation of a decent bureaucracy with technocrats, civil servants, and professionals, such as judges and lawyers. In all aspects of governance, the CCP played a decisive and dominant role. Political loyalty and ideological purity became the important criteria for selecting government employees, including those in the judiciary.⁴⁰

Not until the 1980s did the CCP begin to emphasize knowledge and human talent, seeking to create a reformed cohort of cadres who were more knowledgeable, professional, specialized, and younger. This trend was fostered by the steady, rapid development of higher education and a dramatic increase in university graduates. The 1993 Provisional Civil Service Act,⁴¹ which replaced recruitment through political channels with selection by open, competitive exams,⁴² symbolizes this

38. Cf. 1 Mao Zedong, On Correcting Mistaken Ideas in the Party, in *Selected Works of Mao Zedong*, vol. 1, Peking, Foreign Language Press, 1975.

39. See *supra* note 8.

40. Cf. Dong Biwu, *Dong Biwu Faxue Wenji [Legal Works Of Dong Biwu]* (2001).

41. Guojia gongwuyuan zanxing tiaoli [Provisional Civil Service Act] (promulgated by the State Council, Aug. 14, 1993, effective Oct. 1, 1993), available at <http://www.china.org.cn/chinese/MATERIAL/385908.htm>. On January 1, 2006, the Provisional Act was superceded by the Civil Servant Law (Zhonghua Renmin Gongheguo Gongwuyuan Fa). For the Chinese version, see the website of the National People's Congress, <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=337350&pdmc=110106>. For an English language version, see http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/t20060620_50863.jsp.

42. For a discussion of this Act, which is compared to the Pendleton Act that created the United States Civil Service, see King K Tsao & John Abbott Worthley, Chinese Public Administration: Change with Continuity during Political and Economic Development, 55 *Pub. Admin. Rev.*, Mar.-Apr., 1995, at 169-74.

fundamental change. Similarly, the 1990s appearance of criticism of the practice of discharged military officers serving as judges⁴³ was not accidental. Though it was initiated in academic circles, it found an echo in the court system itself, indicating the rise and increasing influence in the judiciary of the first generation of post-Cultural Revolution trained legal professionals (most of whom were around forty years old). They constituted a challenge for the established institutional structure in the judiciary and led a series of judicial reforms.⁴⁴

In the mid-1980s, the CCP proposed separating party and government, but progress has been neither fast nor significant.⁴⁵ It seems to me that a prominent (though not the only) problem is that parallel duplicative systems address the same matter—the Party and the government have separate but corresponding organizations and personnel. Moreover, the logic of the Party organization impedes its becoming the logic of an organization with specialized functions.⁴⁶ High transaction costs sharply reduce work efficiency. Also, because of the Party's hold on power, opportunists can use their position to use ideological language to expand their influence and serve their self-interest. Thus, the Party has consistently promoted strengthening and improving party leadership,⁴⁷ as well as establishing a new relationship between the Party and the judiciary.⁴⁸ China still faces an enormous task of reform, and its performance is still subjected to withering criticism from West-

43. He Weifang, *Fuzhuan junren jin fayuan* [Discharged Military Officers Come to the Courts], Nanfang Zhoumo, Jan. 2, 1998.

44. Renmin fayue wunian gaige gangyao [A Five-Year Program for the Reform of People's Courts], 1999 Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao, no. 6 (1999).

45. Deng Xiaoping raised this idea in June 1986. 3 Xiaoping, supra note 6, at 164. In September of that year, he further pointed out that the separation of Party and state should be the top priority political reform. Id. at 179. Then, in October 1987, the 13th meeting of the CCP Party Congress adopted Party General Secretary Zhao Ziyang's report, *Yanzhe you zhongguo tese de shuihuizhuyi daolu qianjin* [Advancing Along the Road of Socialism with Chinese Characteristics], thereby formally listing party-state separation as the key to and the primary task in reforming the political system.

46. Su Li, *Fayuan de shenpan zhineng yu xingzheng guanli* [The Adjudicative Function of Courts and Administrative Management], 1999 Zhongwai Faxue [Chinese Foreign Jurisprudence], no. 5 (1999). Su Li is a pen name used by Zhu Suli.

47. *Dang he guojia lingdao zhidu gaige* [Reforming the System of Party and State Leadership], August 18, 1980, in 2 Xiaoping, supra note 6.

48. For some of the most recent attempts, see *Shenzhen jiangcheng dangzheng fenli zheng'gai xianfeng* [Shenzhen at the Forefront of the Political Reform Separating Party from Government], Gongshang Shibao, Jan. 14, 2003. According to the article, this was the largest political reform since the Party took power in 1949. Its key component was the separation of the Party from the administrative and legislative systems, leading toward a Shenzhen municipal government with a Western-style separation of powers, in which the municipal government and the courts were in a mutual balance of power.

ern governments and scholars, much of which is driven by their own ideology. I admit that some criticism is justified and deserves the CCP's attention. However, historically, functionally, and consequentially, China under the CCP's leadership and governance has achieved great success. Most notably, the CCP created a unique, innovative path to modernization in a country with a large peasant economy and no modern constitution or political institutions. Today, China's political system may not entirely meet our expectations, but the practical question is whether abolishing the current system of CCP leadership would make China better off and develop faster in the future, or, to put it as a counterfactual, without the CCP, could China have accomplished what it has accomplished. I think not. In the last thirty years, to an extent, the CCP actually has transformed itself and successfully led China's reform and social modernization.

This statement holds true for the judiciary. Although the recent judicial reforms have, to some degree, been in response to pressures accompanying economic transformation, the real organizational and motivating force has been the CCP, including its leaders and intellectuals. Reform has been implemented as a consequence of Party principles and policies and through the exertion of party organization discipline within the judiciary. I do not think every reform measure is good or desirable, but on balance their benefits outweigh their defects.⁴⁹ For example, although the CCP's control seriously compromises the independence of the judicial system, especially the independence of judges, in the absence of alternative institutions that are not yet fully in place during this time of social transformation, to some extent Party control has limited the corruption, laxness, and partiality of the judiciary. This last point, I should note, is the subject of considerable controversy among lawyers and legal scholars. I, personally, respect others' criticism, but conclusions about China's judicial system cannot be reached simply through debates; they will come as the result of empirical research, which requires time. I do not want to rush to judgment and am willing to be critiqued and rebutted, but if we are to research China's modernization, especially the relationship between the Party, the state, and the judicial system, then we must look at the question with an open mind and take into account the historical and social context of these institutions. Evaluations and judgments based solely on Western experience or ideology or out of the strategic considerations of Western politicians have no academic value or possible practical applicability. From the perspective of democratic theory and evolutionary

49. Suli, *All Roads Lead To Cities*, supra note 31.

economics, valid institutional development and innovation arises from competition. The vicissitudes along the road of social development are not predetermined. The same is true for the evolving relationship between the party-state and the judicial system. It is therefore critical for us to examine this relationship as scholars and not as ideologues.

V. A NEW MODEL FOR THE STUDIES OF CHINA'S JUDICIAL SYSTEM

Once we understand the role that the CCP has played in modern China in social mobilization and representation, in nation building, and in the creation of institutions, then we must maintain a degree of moderate academic vigilance against the apparently successful Western experience with the judiciary and rule of law. Vigilance is not hostility. Rather, simply because of current Western institutions' ostensible success, we should not take them as a decontextualized standard when they are in fact embedded in and abstracted from particular historical and theoretical contexts. And then, once China fails to comport with this standard, it becomes an object for politicized academic criticism and reform. Such an approach is fairly common among both Western and Chinese scholars. I am not accusing them of intentionally using ideology as a critical standard. Many of them work hard to understand China and wish it well. However, their social experience imperceptibly impedes them from placing themselves in the position of the Chinese and considering China's current situation from a value-neutral perspective. Inevitably, our life experience impedes and defines the scope of our imagination.

Beyond their social environment and history, what has also influenced Western scholars, and through them some Chinese scholars as well, is Western scholarship on the relationship between the party-state and the judiciary in the former Soviet Union and communist countries in Eastern Europe. This scholarship and its underlying theoretical framework may have prevented them from realizing the uniqueness of China's experience. In the Soviet Union and formerly communist Eastern European countries, the major function of the Communist Party was seen to be, and indeed is, to control the bureaucracy, including the judicial professionals who had been in place before the Communist Party existed. This research not only enhanced the notion of an inherent separation of and conflict of interests between the Communist Party and the bureaucracy, it also left the impression that the bureaucracy always came first and that Party control followed. This conclusion is reasonable and, considering the context of these countries, possibly correct. For example, in the Soviet Union's early years, many Red Army generals, such as the famous Marshal Mikhail Nikolayevich Tuk-

hachevsky and the hero of World War II, Marshal Georgy Konstantinovich Zhukov, were previously military officers of the Tsar. In order to secure its leadership and control, the Communist Party sent political commissars to ensure the implementation of the party's lines in the Red Army. The Party followed the same approach in many enterprises and governmental agencies, and this practice was followed by other Eastern European countries.

China, however, was not like this. Long before CCP took power in China, its leaders clearly understood that China was different from the Soviet Union. In 1936, when a presidium political commissar, Yang Chengwu, was reappointed as the military commander, Mao Zedong explained the difference between the Soviet Red Army and the Chinese Red Army: in the Soviet Union, political commissars were sent to supervise military officers, most of whom were former White Army officers, while in China all the military officers and political military officers in the Red Army were trained by the CCP and experienced in combat.⁵⁰ Yang Chengwu later became one of the most famous generals of the People's Liberation Army (PLA), but few knew that he had previously served as a political commissar;

Yang was not unique in the PLA. His career path, like that of individuals in other professions, was common.

Therefore, the model abstracted from the experiences of the former Soviet bloc is not entirely appropriate for modern China. In modern China, whether the GMD or the CCP, and whether before or after one of these parties held power, to varying degrees the general pattern was that the party preceded the government, the judiciary, and the armed forces. Before the GMD and CCP, there was hardly a modern nation-state, government, judiciary, and army.⁵¹ There is some truth in the CCP propaganda, "without the CCP there is no new China." Thus, the time sequence of the appearance of the Party and the modern institutions of China demand a new framework or model of research.

As I have said, this paper aims partly at Chinese scholars of the current legal system because some of them avoid any discussion of political parties. It may be from disgust with the extreme leftist politics of the Cultural Revolution, fear, or excessive sensitivity. However, as I have argued in this essay, their unwillingness to deal with the CCP may

50. Yang Chengwu, *Yang Chengwu Huiyilu [Memoirs Of Yang Chengwu]* 334 (1987).

51. The first national conference of the GMD convened in 1924, and the first military college, Huangpu Military Academy, which became the major source of soldiers for the national army under the GMD, opened in 1925. The national government of the GMD took power in 1927. The first national conference of the CCP convened in 1921, the Chinese Red Army was founded in 1927, and the CCP national government took power in 1949.

also simply reflect their practice of labeling the particular experience of the West as a universal theoretical framework for legal systems. This approach leads to two sorts of responses in dealing with the issue of Party influence. One is to list examples of the glorious history of judicial independence in foreign countries. Either they think that they will persuade the Chinese people, government, and Communist Party to carry out judicial reform or even revolution on the basis of the Western model, or they hope that by not talking about Party influence on the judiciary, it can be made to gradually disappear. This is not an unreasonable strategy for pushing judicial reform, but I doubt that it can be successful and find it naïve. It cannot be successful because the Party and government's influence are a historically constructed and established fact. Whether one likes it or not, the Party is an integral component around which the judicial system revolves. If one wants to reform the legal system, then one has to face this situation directly.

Another common approach by some Chinese scholars is to oppose the Party's involvement and treat it as a historical mistake rather than understand how the current system happened. They do not look for or do not see the variables that constitute the causal relationship that explains China's current system. Because they insist on using an idealistic historical point of view rather than a materialist one from which to understand the history of the judicial system, they cannot see that the Party was, from the outset, an external force in the system, but one that is now fully integrated. They persist in imagining the glorious moment in which an unsullied legal system emerged and thereafter and forever remained innocent, flawless, and pure. This sort of hope is very important in establishing the courage and commitment for judicial reform, but it is of little advantage in successfully accomplishing that reform.

Against these two approaches, I would argue that in studying contemporary China, one must treat either the GMD or CCP as a constituent element of the political and legal system or as a constitutional structure. That implies that no matter how much it deviates from "the standard" or the experience of Western countries, the system should be seen as something normal and not as a freak or an anomaly produced by mistaken theories and viewpoints. And despite the current system's weaknesses, problems, and even mistakes, nearly all of which are in some way directly or indirectly connected to the Party's influence, one cannot ignore the Party's positive contributions, which are often the flip-side of what is perceived as negative.

Without question, what was reasonable and ideal yesterday does not necessarily remain so today. Today, in the wake of China's reform and development, the relationship between the Party and the judicial

system certainly needs adjustment and reform. Whether the path to reform is the 1980s approach of separating Party from state, Jiang Zemin's "three representatives" (*sange daibiao*) approach of enlarging the party's representativeness, or something else, they all require careful, attentive, long-term work from those involved with the law. However, the effect of history means that we cannot start anew. If we cannot treat seriously China's adjudicature of yesterday, then there is no way to understand its adjudicature of today or to anticipate what it will be in the future. The past is one of the variables in the current system and will certainly influence tomorrow's. For the sake not only of legal scholarship, but also of legal practice, the Party's role in the judiciary and in administration of justice must be objectively understood and not treated as an abstraction.

I am not making a value judgment about whether the Chinese model of the Party as preceding and shaping government, judiciary, and even the army is good or right. What I am suggesting is that we revise the theoretical model for studying and understanding the relationship between the Party and modern China and base it on the Chinese experience. My aim is to make effective, practical, and, most importantly, constructive suggestions for China's social, political, and judicial reform. Even though I am expecting to be criticized or even condemned by people from both the left and right for what I have written in this essay—in particular for my undifferentiated treatment of the CCP and GMD and for my depiction of the CCP as a constitutional alternative in China's social transformation, I welcome such criticism because it may prove that I have done something right.