Reflections on the Rule of Law in China

Frank K. Upham*

ABSTRACT

The conventional approach to legal reform in China is to stress the need for the judiciary to attain the professional competence and institutional autonomy to enforce legal doctrine. This essay argues that developing judicial capacity to handle political, as opposed to legal, conflict may be equally important to Chinese legal and political development. The article acknowledges the legitimacy of CCP oversight of the legal system but argues that the very omnipresence of the Party means that it is usually on all sides in instances of major social conflict. The article draws on examples from the United States and Japan to illustrate this possible role of Chinese courts.

Keywords: Judicial Independence, Rule of Law, Law and Politics, Law and Development, Chinese Law

* Wilf Family Professor of Property Law, School of Law, New York University. E-mail: frank.upham@nyu.edu. The initial version of this essay was presented at the Mansfield Foundation’s Conference on Benchmarking the Ten-Year Development of the Rule of Law in Asia from 1999-2009, Taipei, Taiwan, September 9-12, 2009. I want to thank participants in the Mansfield Foundation conference and participants at a faculty seminar at the Beijing University School of Law where I presented a somewhat revised version on November 5, 2010, for their comments and suggestions and William Alford, HE Xin, Eva Pils, and Alex Wang for insightful critiques of an earlier draft.

251
CONTENTS

THE ‘BIG FOUR’ POLLUTION CASES IN JAPAN ............................................ 255

THE COURTS’ ROLE IN AGRICULTURAL LAND ‘TAKINGS’ IN CHINA........... 257

POLITICALLY ACTIVE COURTS AS PART OF THE RULE OF LAW ................. 262

REFERENCES ............................................................................................... 266
One of the most important measures of an effective judiciary in a “rule of law” country is its handling of political and social conflict. Typically, however, commentators on the Chinese legal system focus on individual rights and whether Chinese judges can perform their role from a strictly legal perspective. I do not here question that the professional competence to identify and articulate legal entitlements and the institutional strength and autonomy to enforce them effectively are central to the development of every legal system, but in this brief essay, I would like to direct our attention to another aspect of successful legal systems: their ability and willingness to play an openly political role in major social conflicts, which in contemporary China include being willing and able to intervene effectively in the areas like the labor, environmental, ethnic, and land disputes that are now plaguing China.

To illustrate this role, I compare the reluctance of Chinese courts to address inequities and illegalities in contemporary land development to the willingness forty years ago of the Japanese courts to intervene in that country’s political battles over industrial pollution, but there are many other possible examples, both of successful political interventions in other countries and of the passivity of Chinese courts. First, however, for those for whom my approach to law and development may be somewhat unusual, some explanation of my emphasis on the political, as opposed to legal, role of courts in the development process will be helpful.

Most people think law, particularly property and contract rights, is necessary to economic growth. I disagree. I don’t think that a formal legal system is necessary for economic development. I do not dispute, on the other hand, that law may be necessary to manage the dislocation and conflict that is the inevitable concomitant of rapid growth. One obvious but rarely acknowledged truth is that growth requires change and change is painful.

---

1. For a Chinese debate on the importance of judicial professionalism as opposed to their effectiveness in other social functions, compare Wei-Fang He, Zhongguo Sifa Guanli Zhidu Zhide Wenti [Two Problems in China’s System of Judicial Administration], 6 ZHONGGUO SHEHUI KEXUE [Soc. Sci. China] 117 (1997) (arguing for the importance of professionalization), with SULI, SONG FA XIA XIANG: ZHONGGUO JICENG SIFA ZHIDU YANJIU [SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA’S BASIC-LEVEL JUDICIAL SYSTEM] (2000) (Suli is the pen name of Zhu Suli, long time dean of Beijing University Law School). For an English discussion relating to this debate, see Frank K. Upham, Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China, 114 Yale L.J. 1675 (2005). Of course neutrally and professionally enforcing formal legal doctrine can be of extreme importance in protecting political and civil rights, but I am focusing here on the judicial role in broader social conflict.

2. For an overview of the pollution cases, see FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 28-77 (1987).

The United Nations pointed this out almost 60 years ago:

Ancient philosophies have to be scrapped; old social institutions have to disintegrate; bonds of caste, creed and race have to burst; and large numbers of persons who cannot keep up with progress have to have their expectations of a comfortable life frustrated. (United Nations Dept. of Social and Economic Affairs 1951)⁴

So, to the extent that economic growth cannot continue for the long term without social and political stability, law and economic growth may indeed be linked, but it is not in terms of enforcing contracts against underperforming companies or protecting property from grasping politicians. Those necessary functions are much better performed by the informal institutions and norms that are indispensible to and are in turn reinforced by a legitimate and stable state. The more likely role of courts has been to contribute to the creation of such a state by helping to alleviate, if not eliminate, the pain of structural change and social dislocation. We must remember, in other words, that while economic growth may be a good thing in some net utilitarian sense, it produces losers as well as winners and injustice as well as affluence.

No society – and certainly not a poor one – can manage these changes without a political structure that can perceive, understand, and address various sources of citizen discontent. A political structure that locates power within one set of institutions with a relatively centralized approach may have significant advantages in mobilizing the population and resources, but it may also have more difficulty comprehending the multiplicity of sources of social conflict and devising means to address them. Here is where a politically effective judiciary may come into play. At times when the dominant political structure – whether that is the Communist Party and the Standing Committee in China or the Liberal Democratic Party (LDP) and elite bureaucrats in Japan – is incapable of responding to a social crisis, the adroit handling of politically charged litigation can help a regime re-establish social stability and acquire or maintain the legitimacy that is necessary to manage economic growth and political development.

History is replete with examples. E. P. Thompson described in WHIGS AND HUNTERS how English courts played this role of during the Enclosures.⁵ The 1954 decision by the United States Supreme Court in Brown v. The Board of Education, 347 U.S. 483 (1954), is arguably another such instance although here the question was not so much economic suffering as political

stalemate. *Brown* departed from clear doctrine in overruling precedent that *had held that* segregated facilities for Blacks and Whites were constitutionally valid. In doing so, *Brown* played a crucial role in breaking the Congressional gridlock among Republicans, northern Democrats, and southern Democrats that had stalemated American civil rights legislation for decades, but we do not need to look for examples so far away from contemporary China in either time or distance. A brief description of a similar instance in contemporary Japan will illustrate my point.

### THE ‘BIG FOUR’ POLLUTION CASES IN JAPAN

Japanese courts are not known for their political activism. Indeed, they are often cited as a prime example of a timid and passive judiciary, and some scholars have portrayed them as nothing more than the political lackeys of the LDP, in other words, of totally lacking judicial independence.\(^6\) Although I believe that this view overlooks the role of the judiciary in shaping social values and structures,\(^7\) there is no question that Japanese courts are conservative by *most* criteria and no one would deny that they rarely went out of their way to challenge LDP dominance. The cases that I describe here, however, constitute a crucial exception and an important example of how courts can contribute to a regime’s legitimacy even while directly opposing its policies. Indeed, one could argue that the courts’ repudiation of LDP policy in the *Big Four* was an important reason that the Party stayed in power for another three decades.

We are all familiar with Japan’s fantastic economic growth in the fifty years following World War II, one of the few periods of sustained growth that can rival China’s last 30 years. Most are also familiar with the fact that during this period the LDP was the only political party to control effectively the national government. Japan was a full democracy – it has a history of democratic politics longer than do most European countries – but none of the other parties ever came close to challenging LDP rule. One important reason for LDP success was that in most issue areas the LDP was *diverse* and *flexible* enough to apprehend social and political changes and to adapt and change course to meet public demands, but industrial pollution was an exception, perhaps the most important exception in the postwar period. Here a combination of provincial power brokers and central industrial groupings paralyzed the Party and the bureaucracy so that pollution increased until

---


Residents of certain areas were being literally poisoned to death. Despite what was a disaster obvious to all observers, the political structure could not respond. Nor were various forms of direct action, i.e., controlled violence by victims groups, effective.

Then a group of leftist lawyers, mainly affiliated with the Japanese Communist Party, dedicated themselves to the victims’ cause. While these lawyers hardly faced the grave personal danger of contemporary Chinese weiquan lawyers, their actions required not only an imaginative sense of what was possible through litigation but also a great deal of political courage. For the lawyers’ strategy to be successful, it required the Japanese judiciary to take action that would be not only against the short term political and economic interests of the LDP, but also directly contrary to the law as it stood before the Big Four suits were filed. But the lawyers went ahead and, to everyone’s surprise, they transformed Japanese environmental law and policy. Japan went from being the leading example of unchecked capitalist excess and government callousness – which is the way that China is often viewed today – to being one of the world’s leaders in environmental protection.

Over the course of a few years, four district courts and one high court sequentially found for the plaintiffs and awarded damages that were the largest in Japanese history. To do so, they had to ignore established doctrine on several tort issues, particularly the degree of “scientific” certainty of causation, but it was not the legal judgments that eventually broke the political stalemate and liberated the LDP to reform its pollution control policies. The process was as much political theater as ordinary litigation. Appallingly maimed plaintiff-victims appeared at each court hearing, commanding television coverage that brought the tragedy and injustice of pollution directly into Japanese homes and hence the political arena. As evidence of the “non-legal” nature of these decisions, the defendant corporations only appealed one district court judgment, and none went to the Supreme Court despite their clear deviations from established doctrine and the Supreme Court’s reputation as a conservative ally of the LDP.

The defendant corporations did not appeal because they knew that doctrinal reversals could not help their cause, which very few had considered to be a legal struggle from the beginning. Indeed, the plaintiffs and their lawyers had not expected to win. Nor had the fishermen and farmers been

---


9. For a description of the political, social, and psychological background to the litigation, see Frank K. Upham, Litigation and Moral Consciousness: An Interpretive Analysis of Four Japanese Pollution Suits, 10 LAW & SOC’Y REV. 583 (1976).
initially eager to challenge the LDP, for whom most had likely voted, to associate with Communist lawyers, or to use the courts. There simply was no other avenue open to them. They had pleaded with the polluting companies; they had entered government-sponsored mediation; and they had violently trashed company facilities, all in vain. By this time they saw their struggle in moralistic, almost millennial terms, and were willing to try anything, even seemingly hopeless litigation that not only directly confronted the established power of the Liberal Democratic Party and its big business allies but also did so on a very weak doctrinal basis. The lawyers were more dispassionate. They certainly were sincerely dedicated to the plaintiffs, but they also filed suit for partisan reasons – to enhance the Japanese Communist Party’s electoral prospects by embarrassing the LDP and exposing the ‘contradictions’ of capitalism. The irony, of course, is that their unexpected and dramatic success helped legitimate capitalism, decreased the prospects of the Japanese Communist Party, and helped the despised LDP retain power for another three decades.

The point that I am trying to make is that the Japanese courts were performing a political, not legal function. Of course the forum, language, and procedures of the action were all quintessentially legal and their legal form was necessary to their effectiveness, but the courts’ role itself was not legal in the formalist sense of courts following established rules. If these courts had ignored the political context in which these cases were brought, they would have found against the plaintiffs. They would also have missed a chance to contribute to the development of Japanese politics. Although Japanese courts do not play nearly the political role or have the media visibility of American courts, there is no longer any question that they stand as one significant institutional component of Japanese democracy and political stability. As a result, they have a legitimacy with the Japanese people that would have been impossible if they had simply followed established doctrine and found for the polluting industry or, worse, done what Chinese courts all too often do and avoided the cases altogether, which brings us to the next section, the treatment of land issues by Chinese courts.

THE COURTS’ ROLE IN AGRICULTURAL LAND ‘TAKINGS’ IN CHINA

One of the pressing realities of Chinese growth is urbanization. Hundreds of millions of rural Chinese have moved to cities over the last three decades and hundreds of millions more will follow them in the next three decades. To accommodate this shift, China must convert large amounts of agricultural land to new uses, and it must frequently do so against the will of those who have built their lives and livelihoods on their entitlement to land and homes. In this section after a quick look at the theory and practice
of converting agricultural land to urban uses, I will contrast the roles of Japanese courts in the *Big Four* with that of Chinese courts in the taking of farmers’ land for urban use.

Land in China is legally classified as urban or rural. Land in China is legally classified as urban or rural. Urban land is owned by the state, i.e., the national government. Rural land is owned by the relevant collective, typically an administrative village. Individuals cannot own land, but rural households can own usufruct rights to plots of collectively owned land, and these usufruct rights are gradually becoming the functional equivalent of ownership. It remains illegal, however, for collectives to sell land or individuals to sell usufruct rights to land to anyone for urban use. For rural land to be legally used for urban purposes it must first be converted to state owned land through the expropriation process run by the local municipal government. Thereafter, the city typically sells use rights at market prices to urban real estate developers.

Expropriation must satisfy legal criteria. It must be in the public interest; those affected must be consulted; and compensation must be paid. The requirements of public interest and consultation are similar to eminent domain doctrine in most countries, but the measure of compensation departs substantially from common international practice and from what most commentators believe to be both fair and efficient in a capitalist economy like China’s, i.e., fair market value. Although we are primarily concerned here with the courts’ role in supervising the correct application of the substantive law, not the wisdom of the law itself, some explication of the process will help us understand why farmers are so often dissatisfied with the process even when legal criteria are fully met.

The first reason is the gross disparity between their individual loss and the gain of real estate developers and city officials. In return for the loss of their way of life and homes, what had been their past and what they may have assumed would be their future, farmers get the discounted value of 30 years of crops, compensation for their homes as rural dwellings, and resettlement as landless members of the working class. Exacerbating this fundamental and involuntary change in their lives, they then watch as the acquiring government resells to real estate developers at market price, invariably many multiples of what the farmers received. While one can argue that market value would be an unearned windfall, it is the universal practice in capitalist countries and the farmers well know that someone else is getting rich off of what used to be their land. The second reason for farmer...
dissatisfaction is that the inevitable resentment to exercises of eminent domain\textsuperscript{11} in any country is exacerbated in China by the rapid pace of social change and the increasing inequality between the rural masses and the urban elites.

Thus Chinese farmers would often be angry even if the process worked as intended.\textsuperscript{12} Unfortunately, however, legal procedures are not properly followed in many instances, and farmers receive only a fraction of the small sum that is their legal due. All too often the local government and its officials take the entire amount. It is these instances that have become one of the major sources of the growing number of often violent “mass incidents” now worrying the Chinese central government.\textsuperscript{13} To get a sense of how these disputes arise and the role of the courts, we turn to one dispute near the Sichuan city of Zigong. There is no need to get into the details of the case, but an overview will illustrate how far actual practice falls short of the legal framework described above and the frequent failure of Chinese courts not only to resolve disputes but also and, more importantly, to contribute to the social harmony and substantive justice that are at least rhetorically the regime’s goals for its legal system.

Given demographic trends, one can assume that virtually any reasonable addition to urban land will satisfy the statutory requirement of being in the public interest, but that seems to have been the only way in which the Zigong requisitioning met legal standards. The process appears to have begun and ended with secret meetings between city officials and village leaders. None of the public notifications or consultations took place, and the written “agreements” of the villagers to both the requisition and the terms of compensation and resettlement were forged, backdated, or both. In other words, the procedural safeguards designed both to protect rural residents’ interests and to improve the accuracy and efficiency of the requisitioning

\textsuperscript{11} Even in the US, where market compensation is guaranteed and corruption is relatively minimal, government takings of private property can be politically explosive. \textit{See}, for example, the political impact of \textit{Kelo v. City of New London}, 545 U.S. 469 (2005). The most sensitive issue in \textit{Kelo} was the resale of taken land to private parties as part of an urban re-development plan. The similarity to Chinese practice was not lost on the Chinese Central Party School, which sent a law professor to interview me about the case.

\textsuperscript{12} It is important to note, however, that resentment is not universal. As we shall see in the description of the Zigong expropriation, \textit{infra} p.10, farmers often welcome the chance to gain urban residency.

\textsuperscript{13} The Chinese government reports that the number of “mass incidents”, its term for collective protests, increased almost tenfold from 1993 to 2005 and other sources report that the number has continued to rise. \textit{See} Xin He & Yang Su, \textit{Street as Courtroom: State Accommodation of Labor Protest in South China}, 44 \textit{Law & Soc’y Rev.} 157, 157 (2010) [hereinafter He and Su]. Land disputes are often cited as the most frequent of such protests with labor another major source: “A senior Party source was quoted as saying that the number of “mass incidents” in 2008 was 127,467, perhaps one-third of which were labor-related; that would represent a 50 percent increase over the last officially released figure of 87,000 in 2005. Cynthia Estlund and Seth Gugel, \textit{China’s Labor Question: Mapping Contested Terrain Through a U.S. Lens}, at 6, unpublished paper on file with the author.
process were ignored.

Compensation was similarly deficient. The villages surrounding Zigong were relatively prosperous, but their residents nonetheless initially welcomed the promise of urban residency status for the same reasons that many rural residents do — urban residents receive a range of services denied rural residents, and factory jobs are considerably easier and better paying than agricultural work. These villagers, however, ended up substantially worse off. Their demolished homes were valued as rural homes, even when they were demolished after the land had been reclassified as urban, making the purchase of suitable urban housing impossible. Many went to substandard temporary housing; others became homeless. Compensation for their land was destined to be grossly inadequate, but as it turned out, the amounts were irrelevant because the funds went not to the farmers holding the usufruct rights, but to the same village leaders who had colluded with the development agencies from the beginning. It is not surprising, therefore, that the amounts reaching individual households were piteous indeed. In the course of the over a decade that the process entailed, what had been stable farming households lost their homes and their means of livelihood. The city of Zigong, on the other hand, pocketed the difference between the amount of compensation and the amount paid by the developers, with large fractions siphoned off to various corrupt city and village officials.

We now turn to the courts, where those of us interested in the rule of law reflexively put our hopes for rights enforcement, if not substantive justice. By the late 1990s, when it had become apparent both that the promised jobs were not forthcoming and that required procedures had not been followed, a group of displaced residents led by a relatively rich and well educated farmer named Liu Zhengyou brought an action in the Sichuan Intermediate Court to declare the expropriation illegal. The court immediately dismissed the action and prohibited any appeal. Liu then re-filed the action, this time with 1300 co-plaintiffs. This was also rejected, but Liu did not stop and headed to Beijing in 2000 to pursue both legal and less formal means of redress. For the next few years, he continued to press his case, succeeding at times in getting central authorities to pay some attention, including orders from the center to Sichuan authorities to look into the complaints. In the end, however, all legal and political appeals failed. Despite what appear to have been substantial grounds for both administrative and judicial review, Liu and his 1300 co-plaintiffs never got their day in court.

This pattern of courts’ simply refusing to hear politically charged cases has been repeated time and again in China, from village disputes such as the property rights of “married-out” village women or the imposition of illegal local taxes to disputes arising from internationally known incidents such as
the Sichuan earthquake or the poisoned milk scandal. The reasons are complex. First, the bureaucratic and financial structure of local courts makes it extremely difficult for judges to challenge local interests even if they accepted that as their ideological and institutional role. Local courts are integral parts of local governments, and judges are fully integrated into local personnel structures. As such they are dependent on local government financial support and ultimately on the 30-50% of local government revenue gained by the expropriate-low/sell-high land acquisition policy that leads to many of the abuses and farmer dissatisfaction.

Institutional incapacity is exacerbated by a fundamental ideological issue: the decision by the CCP to complement and complicate its rule of law rhetoric with the overarching goal of creating a “harmonious society.” Like the Japanese government for much of the post-Meiji period, the CCP believes that litigation exacerbates social conflict and engenders political opposition. In Japan the government policy actively discouraged litigation with a series of procedural barriers, limits on the number of legal professionals, and institutional alternatives like government sponsored mediation. When these material disincentives to use law contributed to dramatically lowering the litigation rate, the government then attributed the drop to Japanese culture: a desire to cooperate and live in harmony and a concomitant aversion to litigation. China, on the other hand, has continued to call simultaneously for both the rule of law and a harmonious society, what to a Japanese social engineer would be tantamount to mixing oil and water.

One resolution to this apparent contradiction at least in labor conflicts involving the non-payment of wages has been to use the courts not as loci for the public explication of differences, but as part of a coordinated bureaucratic response with other local government offices to preempt open conflict by proactively addressing the underlying cause of dissatisfaction without the formalities of traditional adjudication. Courts are asked, not to apply the law as doctrine but to become part of an inter-agency effort to “discover early, report early, control early, and handle early” social conflicts.


conflict and thereby “sterilize” unstable factors in their conception stage.”

In other words, instead of marginalizing the courts by providing alternatives to litigation and channeling potential legal conflict into bureaucratic structures controlled by the administration as Japan has done, the Chinese are attempting the same result by incorporating the courts into these institutions. By “reporting, controlling, and handling” social conflict early and in active cooperation with local state entities, the conflictive and politically dangerous aspects of litigation can be eliminated. By integrating the courts into bureaucratic taskforces aimed at obscuring, diffusing, and pacifying conflict, the Chinese hope to avoid the presumptively divisive role of litigation of, first, explicitly articulating contradictory arguments, interests, and principles and then explicitly choosing winners and losers.

**POLITICALLY ACTIVE COURTS AS PART OF THE RULE OF LAW**

It is important to stress what I mean when I argue that Chinese courts should take a more active political role. By political I do not mean the partisan politics that is the usual referent in such discussions in the West. In that sense, i.e., that courts should be somehow insulated and autonomous from political parties, Chinese courts are intrinsically political because they are inextricably embedded in the Chinese Communist Party. Unlike political ties between the LDP and the Japanese judiciary or the politicization of the American Supreme Court, there is no ideological tension between the political reality and some separation-of-powers ideal: Chinese judges are supposed to follow Party leadership. As long as the CCP is the only game in town, as long as there is no division between the Party and the government, and as long as powerful persons in the judiciary are Party members, Chinese courts will be political in this sense and legitimately so.

In other words, as long as the CCP is everywhere, politics will be everywhere. Ironically, however, the Party’s omnipresence means from the perspective of this essay that it is not only everywhere, but also nowhere. If all sides of a land or environmental dispute, for example, include Party members and as long as Party orthodoxy can be plausibly called on by both sides (expand residential housing but preserve agricultural land; increase

---

16. He & Su, *supra* note 13, at 164. The clarity of the equities in cases of unpaid wages is a powerful reason that it is in these cases that a pre-emptive approach has been tried. Even if bankruptcy law may excuse payment in some cases, there is little chance of strong protests that the niceties of bankruptcy doctrine should trump workers’ moral right to be paid for work performed. It would be much more difficult, however, to apply this approach to disputes with strong opposing interests or mixed equities, such as pollution sources employing large numbers of workers.

17. I am grateful to Prof. William Alford for pointing out that the courts are playing an analogous role in administrative cases by encouraging judicial mediation despite the fact that the Administrative Litigation Law specifically bars mediation of disputes between citizens and officials.
employment and economic growth but preserve environmental quality), the
dispute loses its partisan character. My definition of politics, paradoxically,
has little to do with the Communist Party, but instead with politics as clashes
of social and economic interests that co-exist, albeit often unequally and at
different levels, within the Party.

Addressing mass conflict by reference to fundamental social values is
the role that the Japanese courts played when the Liberal Democratic Party
was incapable of dealing with industrial pollution 50 years, and it is
analogous to the effect of the US Supreme Court in the *Brown* case. The
parallel is not perfect of course. In Japan and the US pollution and civil
rights were topics of democratic politics in a partisan sense that is impossible
in contemporary China, and I am certainly not advocating either the
American or Japanese judiciaries as “models” in the law and development
sense of technical fixes for what ails Chinese courts and politics. Such legal
models are best restricted to the imagination of theorists, not in the building
of actual legal systems facing entrenched political issues and actual conflict.
Even more fundamental to the discussion, Chinese leaders are fully aware of
the threat that inequality and injustice pose to the regime and of the
stabilizing role that politically empowered courts have played in similar
conflict at other times and places. So far, they are betting that a judicial
system that is integrated into and subordinate to the rest of the government
bureaucracy can help manage conflict without the polarizing drama and
concomitant political risk of the *Big Four* or *Brown*.

Nonetheless, even after all the qualifications, reference to instances in
political development where courts have intervened visibly to break political
stalemates can be instructive of general directions of institutional growth.
But to perform this role, Chinese courts must be politically aware enough to
recognize fundamental fractures in the polity and powerful enough to play
contending sides of the CCP off against each other while being aware and
sensitive to the wishes of the Chinese public. These political skills do not
mean that the legal process and judicial professionalism are unimportant. On
the contrary, the ability of the courts to dress their intervention in legal form
is necessary simply because it is the legal form that gives courts a degree of
legitimacy and hence the power to play any role beyond dispute resolution at
the lowest level. The judiciary must play its political role as a distinct source
of political power, not simply an extension or instrument of one of the
political, ideological, or economic interests that constitute the pre-existing
players.

What legal form requires will vary in any given circumstance even
within the same jurisdiction. In the US and Japan, it will usually include a
degree of procedural openness and formality, an opportunity for both sides to
present their arguments, and a judicial opinion that responds to the parties’
arguments and that passes what American lawyers refer to as “the laugh test” of coherent legal reasoning: Is the reasoning plausible enough that someone could make it without breaking down in giggles. In other words, legal form means cloaking political intervention in the guise of legal decision making but simultaneously reminding political elites of the fundamental values of the society.¹⁸

To conclude with a return to the Chinese situation, I do not dispute that the CCP is ‘everywhere’ in Chinese society and politics and therefore cannot be analyzed within the same theoretical construct as courts within political systems with an established separation of powers or a multi-party political system. But the omnipresence of the CCP does not mean that it is a monolith. Nor does the fact that Chinese judges are likely to be Party members mean that they will normatively agree with or have the same perspectives, values, or interests as members trying to make a profit within state owned enterprises, in agricultural villages trying to ensure some level of economic survival, or devising health policy within a ministry in Beijing. In other words, precisely because the Party is ‘everywhere,’ it will in many instances be on all sides of major social conflict, and it will not be so much “the Party” that prevents it from, for example, protecting farmers whose land has been illegally or unfairly taken, as it will be coalitions within the Party and the judiciary, the local government, and the central authorities.

My point is not that the Chinese judiciary must break free of Party control. If the CCP is going to retain political control, it is unlikely that the courts are will operate in a manner inimical to the Party’s interests, however attractive that image may be to those of us embedded in a particular vision of judicial independence and the rule of law. But, as we saw in the Zigong case where the central authorities were on the side of the farmers, at least in principle, Chinese courts have the ideological room to work on the side of the vulnerable segments of society. For them to do so, however, they must

¹⁸. Of course legal form will not always successfully disguise political decisions. Conservative southerners in 1954 deeply committed to continuing racial segregation undoubtedly dismissed the Supreme Court’s role in Brown v. Board of Education, 347 U.S. 483 (1954), as nothing more than politics, but the decision was unanimous and drew directly on a broad and growing national consensus that racial discrimination was morally wrong. The court was on the correct side of history and political morality, if not legal doctrine. Here a contrast can be drawn with the court’s role in Bush v. Gore, 531 U. S. 98 (2000), the case that gave the presidency to George W. Bush in 2000. The latter is much more likely to be viewed as a partisan decision despite its obvious use of legal form. There are many reasons for the difference. The decision was 5-4 with all the liberals voting for Gore and all the conservatives voting for Bush. The partisan appearance was strengthened by the strange legal reasoning employed: The liberals adopted what would normally have been a conservative constitutional interpretation while the conservatives did the reverse. But the most basic reason that legal form failed to disguise politics in Bush may be that unlike Brown, where the court was articulating fundamental and broad based social values, in Bush it was resolving a single dispute and, not incidentally, choosing for president the candidate who had received fewer popular votes. In disputes like that one, legal form can only disguise so much.
acquire a degree of autonomy within the structures of the Party and bureaucracy where they can contribute to resolving the structural obstacles now preventing the attainment of the “social harmony” that Party leaders claim to desire.
REFERENCES

Su, Li (2000). Song fa xia xiang: Zhongguo jiceng sifa zhidu yanjiu [Sending law to the countryside: Research on china’s basic-level judicial system]. Beijing, China: China University of Political Science and Law Press.


