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BETWEEN THE JUDGE AND THE LAW: JUDICIAL INDEPENDENCE AND AUTHORITY WITH CHINESE CHARACTERISTICS

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Abstract

What is the scope and nature of judicial reform? To what extent does borrowing from Western models also suggest an embrace of the underlying ideologies that frame those models? It is a common place in the West, whether in Common Law or Civil Law states, that the integrity of the judiciary depends on their authority to interpret law and to apply that interpretation to individual cases and the litigants that appear before the courts. That presumption, however, embeds premises about the organization of political and administrative authority that may be incompatible with those of states developing Socialist Rule of Law structures within Party-State systems. In Common law states those deep presumptions touch on the disciplinary role of judicial opinions as a constraint on judicial interpretation. In civil law states that discipline arises from the constraining principles of the legal codes themselves. In both the legislatures serve as the ultimate check in a complex dialogue with courts in three respects. First, judges serve a political role in their relation to law. Second, cases themselves serve an important political role as well. Third, courts begin to serve as the place where societal narratives are forged and popular expression is constructed and applied. In Socialist rule of law systems, the disciplinary systems are quite different and ought to produce a different relationship between courts, law, and the cases they are bound to apply fairly and consistently under law. This paper considers the way that the logic and grounding principles of Chinese Marxist Leninism may provide guidance in the construction of a judicial enterprise that is both true to its organizational logic and which enhances the authority of judges to serve litigants fairly. It suggests the points of compatibility and incompatibility in the ideologies of these distinct systems of judging and what it may mean for judicial reform in China. That consideration, in turn is based on a fundamental difference, in Socialist Rule of Law systems, between the authority to interpret law and the authority to apply law to an individual case. For Chinese judicial reform it is in the perfectibility of the judge that lies the perfectibility of law that in turn ensures the perfectibility of the judge. Part II considers in very broad strokes the relationship between the judge and law in the West. Part III then

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considers Chinese reforms touching on the relationship between the judge and the law, and the evolution of normative structures within which one can speak to judicial independence. Part IV then considers the project from the perspective of the grounding ideology of the Chinese state. From that fundamental distinction, the paper will propose a Socialist approach to the judicial function compatible with its own logic and legitimacy enhancing under global consensus principles for a well-organized and functioning judiciary.

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I. SITUATING THE TENSIONS OF CHINESE JUDICIAL REFORM.

Must judges have the independent authority to interpret the statutes and regulations they apply to disputes before them as a necessary element of the legitimate exercise of their authority? This essay argues that in China they do not. Judicial reform in China has emerged as one of the most important political, administrative and governance reform efforts of the last decade.[1] Judicial reform itself is deeply embedded within a larger discussion about the rule of law within the Chinese political and judicial systems.[2] Much of that reform has been technical, to make the institution of the judiciary better at producing results compatible with the larger political issues in China, from corruption to the training of judges and the management of dispute resolution.[3] Reform has been grounded in the attainment of pragmatic objectives.[4] But form follows ideology; always lurking is the specter of technical changes as the methodology of fundamental transformation of the political order.[5] Those tensions in the development of Chinese judicial reform were nicely summarized by Ben Liebman almost a decade ago at the beginning of the current waves of judicial reform.

Such reforms appear aimed at making the courts institutions for the fair adjudication of individual disputes. At the same time, commentators in China and in the West have argued for greater changes, contending that courts should serve not only as adjudicators of private disputes but also as checks on state power and as fora for the resolution of public rights—in sum, that the courts should play a significant role in the development of Chinese governance and society.[6]

The judgment has been made much more explicitly by other influential Western commentators: "today's PRC legal system is basically a perversion of the European

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[1] *See generally*, Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1 (2012); Benjamin L. Leibman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1 (2007).

[2] RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (Cambridge Univ. Press 2002); Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL RTS. J. 655 (2003),

[3] Susan Finder provides a good brief summary of the thrust of reform, focusing on jurisdiction (to reduce local protectionism), hearing centered process, changes to internal allocation of roles in proceedings, openness, transparency and accessibility of judicial proceedings, professionalization of court personnel, and insuring judicial independence while preserving the leadership role of the CCP. Susan Finder, *China's Master Plan for Remaking Its Courts*, THE DIPLOMAT (March 26, 2015), http://thediplomat.com/2015/03/chinas-master-plan-for-remaking-its-courts/. Most of these address longstanding criticisms. *See*, Jerome A. Cohen, *China's Legal Reform at the Crossroads*, COUNCIL ON FOREIGN RELATIONS (March 2006), http://www.cfr.org/china/chinas-legal-reform-crossroads/p10063. *See also*, Polly Botsford, *China's Judicial Reforms are No Revolution*, INTERNATIONAL BAR ASSOCIATION (Aug. 10, 2016) http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=846c87e8-a4aa-4a88-a7fc-e6fc136c2fca ("The changes improve governance, but do not challenge the foundation of the existing system, which is that the courts, the judiciary, must ultimately answer to the CPC.").

[4] Zhang, *supra* note 1 (describing the emulation of stare decisis through the mechanisms of the introduced concept of guiding cases).

[5] *E.g.*, Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016),

[6] Leibman, *supra* note 1.

civil law system easily recognized by continental legal specialists. . . "Judicial independence," as it is commonly understood outside China today, is the enemy and forbidden by Party rulers even to be discussed in law schools."[7]

The problem, then, revolves around the ideological baggage of technical improvements modeled on or borrowed from political systems whose organization of state power are quite distinct from that of China. It is, as well the tensions inherent in the assessment of such changes, especially assessment from foreign peers—whose standards of assessment are themselves grounded in and meant to further, the ideological foundation from which they operate. In other words, it is impossible to separate the techniques of judging and judicial administration from the principles and politics that gave the system its form. To embrace one requires embrace of the other.

At the root of the problem are the premises on which judicial systems are founded and assessed. That is, the problem of judicial legitimacy and authority, the way such authority is perceived and maintained within a political system in which it is embedded haunts not merely the efforts at judicial reform in China, but the way in which foreigners approach the evaluation of those reforms as legitimate (and thus the exercise of judicial power as legitimate). These basic premises are so deeply embedded in Western political cultures that they appear natural. For example, it is a common place in the West, whether in Common Law or Civil Law states, that the integrity of the judiciary depends on their authority to interpret law and to apply that interpretation to individual cases and the litigants that appear before the courts. That authority to interpret and apply law to the disputes before them is to be exercised autonomously of other political actors and with a strict fidelity to the fundamental legal principles of the system.

That presumption, however, embeds premises about the organization of political and administrative authority. In Common law states those deep presumptions touch on the disciplinary role of judicial opinions as a constraint on judicial interpretation. In civil law states that discipline arises from the constraining principles of the legal codes themselves. In both systems, the legislatures serve as the ultimate check in a complex dialogue with courts. And all actors, that is all institutional political actors—administration, legislature and judiciary—and the people who serve them, are constrained by the principles set forth in the document that memorializes the constitution of state and government and the delegation of sovereign power thereto by the people. Both systems provide for judicial authority to interpret and apply this "higher law" to both ensure against abuse of judicial and legislative authority. The authority of the judge, and the cultural expectation on which legitimacy and authority are based, are themselves meant to underline and strengthen the underlying ideological basis of the system of which the form an important part. That, in turn, is possible only because of the underlying ideal of the judge within a government in which all political and administrative power is vested, and then divided.[8] As a consequence, it comes as no surprise that Western academic

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[7] Maurits Elen, *Interview: Jerome Cohen*, THE DIPLOMAT (Sept. 1, 2016), http://thediplomat.com/2016/09/interview-jerome-cohen/.

[8] Discussed in Larry Catá Backer, *Reifying Law—Government, Law and the Rule of Law in Governance System*, 26 PENN ST. INT'L L. REV. 521 (2008), http://www.backerinlaw.com/Site/wp-content/uploads/2013/02/Reifying-Law.pdf.

and political criticism reflects these views. The criticism tends to fall into two categories. The first is the technical and administrative: focusing on how to make the courts more efficient and independent and very much in line with the thrust of Chinese reform efforts. The second is institutional and political. These touch on the role of the CCP and the authority of courts to constrain the power of the state. And ultimately, they tend to function as a particular application of the not uncommon Western academic literature about the illegitimacy of the Chinese political order.[9]

But the issues have become more complicated in globalization, as the vertical organization of power within states is also fractured by horizontal alignments of judges across states. Judges talk to each other.[10] They begin to feel they have more in common with each other—theirs is a singular community—than perhaps with the other branches of the government in which their functions are embedded.[11] Convergence of practices may also produce convergence of sensibilities—of the nature, role and character of the courts whose practices are tending toward a common set of principles.[12] Judges may find it important to cultivate legitimacy among their own class, and to conform to global class expectations. This may affect the way they approach reform within their own political orders. As important, perhaps, the expectations of global classes of important consumers of judicial resources—repeat player litigants,[13] business and the state, will also likely help shape the underlying

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[9] *See* Lance L.P. Gore, *The Political Limits to Judicial Reform in China*, 2 CHINESE J. OF COMP. L. 213 (2014), discussed generally in Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 29 (2006).

[10] Press Release, *Chinese Judges Meet with ALI,* AM. L. INST., (Jan. 11, 2016), https://www.ali.org/news/articles/chinese-judges-meet-ali/ ("A distinguished group from the Supreme Court of China, visiting the U.S., sought information about ALI and its law reform procedures."); Press Release, *First-Ever "U.S.-China Judicial Dialogue" Supports an Exchange of Views on Judicial Reform,* U.S. DEPT. OF JUSTICE, (Aug. 19, 2016), https://www.justice.gov/opa/blog/first-ever-us-china-judicial-dialogue-supports-exchange-views-judicial-reform ("Our three talented and experienced U.S. judges discussed with senior Chinese judges and other experts topics relevant to commercial cases, ranging from case management to evidence, expert witnesses, amicus briefs, the use of precedents and China's system of "guiding cases.").

[11] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press 2004); *Cf.* Jinting Deng, *The Guiding Case System in Mainland China*, 10 FRONTIERS L. CHINA 1 (2015) (convergence of Chinese practices and common law system).

[12] Jocelyn E.H. Limmer, *China's New "Common Law": Using China's Guiding Cases to Understand How to Do Business in the People's Republic of China*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 96 (2013).

[13] The reference here is especially to the large multinational corporations, international banks, large financial entities, global state-owned enterprises that tend to engage in a larger volume of litigation around the same general issues. The importance of repeat players in litigation has been the object of useful study. For the germinal study, *see* Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974); Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC. REV. 347 (1975). For its application within and beyond the United States *See generally.*, Flemming, Roy B. & Glen S. Krutz, *Repeat Litigators and Agenda Setting on the Supreme Court of Canada*, 35 CANADIAN J. OF POL. SCI. 811 (2002); McGuire, Kevin, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. OF POL. 187 (1995); Stacia L. Haynie Kaitlyn L. Sill, *Experienced Advocates and Litigation Outcomes: Repeat Players in the South African Supreme Court of Appeal*, 60 POL. RES. Q. 443 (2007).

normative base line within which judicial reform is understood and assessed.[14] As a consequence, it comes as no surprise that Chinese reformers begin to reflect global perspective, even when seeking to embed them within the political culture of China.[15] And these convergences make it difficult to contextualize even basic concepts like judicial independence.[16]

The direction judicial reform will take in China cannot be predicted; yet, its contours are increasingly transparent, even as it is buffeted between internal and external normative expectations. In March, 2016, the Chinese State Council released a White Paper on Judicial Reform prepared by the Supreme People's Court.[17] In the forward to its report, the Supreme Judicial Court announced the structures around which its analysis would emerge:

> The rule of law is the basic way of governing a country and the judiciary is the significant cornerstone of the rule of law system. Judicial courts apply laws to adjudicate cases in accordance with their statutory powers and procedures and play such roles as settling disputes, protecting rights and constraining public powers, so as to ensure the effective implementation of laws and maintain social fairness and justice.[18]

The White Paper comes on the heels of a series of reforms accelerating since 2013 that have focused on judicial reform without directly challenging the political premises on which the underlying system is grounded.[19] But the reluctance to challenge the underlying political system as a formal matter does not mean that the *effect* of reforms is not potentially transformative by the nature of its character.

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[14] *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Kevin T. McGuire, "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success," 57 J. POL. 187 (1995).

[15] *See, e.g.*, Stanley Lubman, *China's Highest Court Eyes Judicial Reform, While a Lawyer Criticizes TV Confession*, WALL ST. J. (March 11, 2016), http://blogs.wsj.com/chinarealtime/2016/03/11/chinas-highest-court-eyes-judicial-reform-while-a-lawyer-criticizes-tv-confessions/.

[16] *Cf.* Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949–1959*, 82 HARV. L. REV. 967 (1969); XIN HE, JUDICIAL INDEPENDENCE IN CHINA 180 (Randall Peerenboom ed., 2010).

[17] *White Paper: Judicial Reform of Chinese Courts*, SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA (March 3, 2016), http://english.court.gov.cn/2016-03/03/content_23724636.html; for a summary, see *What China's judicial reform white paper says about its vision for its judiciary*, SUPREME PEOPLE'S COURT MONITOR (April 12, 2016), available https://supremepeoplescourtmonitor.com/2016/04/12/what-chinas-judicial-reform-white-paper-says-about-its-vision-for-its-judiciary/.

[18] *Id.*

[19] *See*, John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. OF L. & ECON. 263 (1992) ("Fundamentally, this implies that judicial interpretations – especially those that stand unchallenged—must be seen as reflecting the strategic setting in which they are announced, no matter how they are motivated or justified."). I have noted as well that the judicial role in that political context makes inevitable that judicial interpretation will be severely disciplined where pronouncements tend to wander too far from the customs, traditions and expectations of the polity for which it is made. *See* ; Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 B.C. THIRD WORLD L.J. 291, 340 (2000). ("Authority is measured by compliance.").

That structure reveals both the context and contradictions within which judicial reform proceeds in China.[20] Those presumptions may be incompatible with those of states developing Socialist Rule of Law structures within Party-State systems. In Socialist rule of law systems, the disciplinary systems are quite different and ought to produce a difference. Such systems are grounded in the political leadership of a vanguard party whose obligation to lead the state and people to a specified objective fundamentally orders the structures and operation of the state.[21] In China that has produced a system in which all political power is vested in the vanguard party and all administrative authority is exercised through the state and its organs. That division between political and administrative authority marks every level and every institutional structure of the state.[22]

Chinese judges are both looking to the West for innovation in the operation of their court system, and simultaneously seeking to induce change that is consistent with the fundamental Chinese political line.[23] Yet what is emerging is neither compatibility with Western notions of efficient operation nor a sense that technical reforms are compatible with the fundamental political ideology of the state and its working style[24]—and ultimately a challenge to the leadership role of the Chinese Communist Party itself. It reflects a dialectical model of inter-systemic engagement that tends to mark Chinese approaches to the foreign.[25]

One of the areas of critical importance in the enterprise of judicial reform is centered on the *relationship between the judge and law*. In more conventional terms, it focuses on the issue of the extent and practice of judicial interpretation of law, and with it the independence of the judge from the political and administrative organs of state in rendering a decision in an individual case. The two are interrelated—to resolve a case, a judge must first determine the meaning of law and then apply that meaning and the standards of liability that may be inferred from it, to the facts developed in the trial of the dispute among the litigants appearing before her. Within Chinese judicial reform initiatives, the Guiding Cases system[26] and the proposed rules on judicial independence are among the most important. The former

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[20] HE, *supra* note 16 (antagonisms between courts and CCP).

[21] *See* HU ANGANG, CHINA'S COLLECTIVE PRESIDENCY (Springer, 2014).

[22] Discussed in Larry Catá Backer, *Party, People, Government and State: On Constitutional Values and Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT'L L.J. 331 (2012),

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[24] San ba zuo feng. 三八作風; see, Gucheng Li, *A Glossary of Political Terms of the People's Republic of China* (Compiled by Kwok-Sing Li, Mary Lok, trans., The Chinese University of Hong Kong, 1995) p. 349. *See infra* Section III.

[25] Well described in the context of international law in Björn Ahl, *Chinese Law and International Treaties*, 39 HONG KONG L. J. 735, 737 (2009) (dialectical model of international law grounded in distinct systems infiltrating and supplementing each other).

[26] *See* Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People's Court Concerning Work on Case Guidance] (discussed and passed by the Adjudication Committee of the Supreme People's Court, Nov. 15, 2010, issued Nov. 26, 2010), https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/guiding-cases-rules-20101126-english.pdf; 〈最高人民法院关于案例指导工作的规定〉实施细则》(Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/.

seeks to harvest from Chinese rulings and judgments. "People's courts at all levels should refer to the Guiding Cases release by the Supreme People's Court when adjudicating similar questions."[27]

This essay considers the way that the logic and grounding principles of Chinese Marxist Leninism may provide guidance in the construction of a judicial enterprise that is both true to its organizational logic and which enhances the authority of judges to serve litigants fairly. Part II considers in very broad strokes the relationship between the judge and law in the West. Within that constructed relationship the nature of judicial independence and the relationship between the judge and the state can be sketched—along with the ideology from which it emerges. Part III then considers Chinese reforms touching on the relationship between the judge and the law, and the evolution of normative structures within which one can speak to judicial independence. Part IV then considers the project from the perspective of the grounding ideology of the Chinese state. That consideration, in turn is based on a fundamental distinction, in Socialist Rule of Law systems, between the authority to interpret law and the authority to apply law to an individual case. From that fundamental distinction, the essay will propose a Socialist approach to the judicial function compatible with its own logic and legitimacy enhancing under global consensus principles for a well-organized and functioning judiciary. It is in the understanding of those distinctions that it is possible both the read the utility of Western models of judging in China, and to develop a means of realistically assessing the effectiveness of Chinese judicial reform within the constraints of its own ideological bases.

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II. THE RELATIONSHIP BETWEEN THE JUDGE AND THE LAW IN THE WEST

To understand the relationship between the judge and the law in the West, one must be sensitive to framing structures that have permeated Western thought at least since Aristotle[28]—the first is the relationship between law and the state as a general matter (between *gubernaculum* and *jurisditio*); the second is the relationship between interpreting and applying the law in a specific matter (between *jurisditio* and *jus dicere*).[29] Together these framing concepts provide the foundation within which it is possible to think about law, rule of law, legitimacy and authority of law and the institutions that are established to apply, produce and safeguard them. There are two caveats worth mentioning. The first is that, as we will see below, this is not to suggest that these framing concepts are either straightforward or uncontested. Indeed the opposite is true, but the many variations, some incompatible, all revolve around the framing concepts: law and the state; law-state and the judge. Thus, what is important to remember is that the way one approaches thinking about the issues of law, rule of law, and the judge, tend to be framed by these basic orienting conceptions

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[27] Provisions of the Supreme People's Court Concerning Work on Case Guidance, *supra* note 26; *see generally Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016).

[28] *See* WILLIAM ELLIS, ARISTOTLE'S POLITICS: A TREATISE ON GOVERNMENT (Trans., E. P. Dutton &. Co., 1912).

[29] *See* L.G. Baxter, *"The State" and Other Basic Terms in Public Law*, 212 THE S. AFR. L. J. 213 http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5249&context=faculty_scholarship.

that then constrain the way in which one can understand a problem, evaluate its fidelity to "higher values" and the inferences one can draw from its functioning and "effects" (that is how it appears in the world). The second is that the West is by no means the only civilization that has gone to the trouble of constructing highly sophisticated world views around which it can then understand and manage the world around them. But its views on law, the state, and the judge tend to be highly influential at this stage in global development.

A. THE STATE AND LAW.

In medieval times in the West, the relationship between law, judge and the administrative apparatus of the state was fluid and quite fluid and dispersed.[30] Yet, medieval development grounded in these differences between *gubernaculum* and *jurisditio*, that is between government and law, played a substantial role in the way in which the ideals of law and of the state have developed.[31] *Gubernaculum*, of course has had a long and quite self-transforming history. For my purposes here, it signifies the principles of government as a self-constituted institution. Its purpose has been administrative from the first. Though the character of that administration has undergone substantial variation as the West's taste for distinct forms of executive and administrative authority has changed—from republic to monarchy, to aristocracy, to Empire, and even a little, towards theocracy. All of these forms remain true to the principles of gubernaculum—the notion of a separate institution (or person) in whom legitimately rested or from whom could there could be legitimately exercised, the prerogatives of government. With respect to these, law had little to say; "Gubernaculum was effected by what we might call 'administrative', not 'legal', orders."[32] Initially these were simple and direct; this meant of the affairs of those holding control of a territory, with respect to their affairs—which were both personal and eventually matters of state. They included the power to exercise authority, to keep the peace, and to order the territory over which those holding the authority of gubernaculum held control. It said nothing about the legitimacy of their control of territory, or of the character of the exercise of their power. Nor did it speak to constraint. The powers of the prerogatives of gubernaculum were, within their scope, uncontrolled. But the scope of those powers could be delimited. They were to be exercised only within the space left to within their jurisdiction. It is here that one notes the first iteration of the notion of government, and of its unrestricted exercise in the service of the prerogatives of those who hold that authority. It continues in vestigial form in those aspects of power used to protect the state—principally the power to engage in actions with and against foreigners.

Gubernaculum, of course, has evolved substantially since its emergence in the pre-modern era in Europe. It has escaped it personal and private boundaries—that is its ties to the person of the monarch or "lord" or "official" and has assumed a defining character of the institution of state through which the business of the state

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[30] PAOLO GROSSI, MITOLOGIAS JURÍDICAS DA MODERNIDADE 23-54 (Boiteux 2004).
[31] CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 79-94 (Cornell Univ. Press 1940).
[32] Baxter, *supra* note 28, at 215.

is conducted. Much of that is administrative in character. Though that administrative character itself has undergone radical transformation since the 17th century. Today, our gubernaculum references not just the administrative and executive power of the state but also its intertwining with the legal structures on which it is built and through which it is operated. But for our purposes the original conceptual marker remains strong—*the notion that there need not be an identity between law and the administrative apparatus of the state*. Thus, it is important to underscore the original distinction between the state (as a territory of a self-consciously distinct community) and the governing of it. Gubernaculum referenced the government as an autonomous element of a cluster of such elements that together ordered the political community and contributed to its constitution.

Though the original power of gubernaculum was uncontrolled, it did never occupy the entire field of power in social space. Indeed, gubernaculum could not be understood in the absence of the concept of *jurisditio*, in its own way a more complex term referencing both law and the instrumentalities for its expression and application.[33] But jurisditio itself was complicated by the structures of religion and religious government that was firmly entrenched in Western thinking by the 14th century when many of these concepts began to gel. Jurisditio meant law itself—those norms and rules of behavior that existed quite independent and apart from the prerogatives of those who controlled the territory where they were applied. But law itself—as an autonomous object—was itself fractured. Thus, law could be understood as both imposed from above (though religion) and imposed from below (though customs and traditions—as they might evolve—representing popular practice).

On the one hand, law was in origin completely outside the control of people. It was the word of God or some like constituted paramount force whose directions were handed down in the form of religious practice and the moral-societal rules that came as a consequence. These were eternal and specific. They provided a source of law that no one—including those exercising gubernaculum, could disregard, without themselves becoming illegitimate (and thus subject to removal as out-law).[34] This "higher law" also acquired an administrative structure that existed quite apart from gubernaculum (and eventually from the state) in the form of the religious officials charged with its development and application. These notions remain strong within Islam. They retain only a vestigial (but important) vitality in the West, supplying the

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[33] *See* GIANLUIGI PALOMBELLA, THE MEASURE OF LAW: THE NON-INSTRUMENTAL LEGAL SIDE FROM THE STATE TO THE GLOBAL SETTING (AND FROM HANDEN TO AL JEDDA), IN THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE 138-40 (James R. Silkenat, James E. Hickey Jr., Peter D. Barenboim, eds., Springer, 2014).

[34] The political consequences of excommunication in the West were not unknown and widely used as a political tool by Catholic Popes seeking to manage their authority through law. *See, e.g.*, ELISABETH VODOLA, EXCOMMUNICATION IN THE MIDDLE AGES, (Univ. of Cal. Press, 1986). They are still used today. Consider this, "Pope Francis Excommunicates Donald Trump from Catholic Church Citing Un-Christian Behavior," The National Report available at http://nationalreport.net/pope-francis-excommunicates-donald-trump-catholic-church-citing-un-christian-behavior/. The notion persists in modern times through the devices of "legitimacy" grounded in international normative principle and the consequences of illegitimacy remains as harsh—that is a lesson learned, for example by the regimes in Libya and other places in the first part of this century, so-called "soft coups." *See, e.g.*, Hector Perla Jr, *Here's Why Some People Think Brazil is in The Middle of a 'Soft Coup'*, THE WASHINGTON POST, (Apr.16, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/16/heres-why-some-people-think-brazil-is-in-the-middle-of-a-soft-coup/ .

moral foundation of much of what is now the basic law and legal principles of Western governments. But more generally, and especially in the United States, they serve as a source of "natural" or "moral" law tied to the structures and legal systems of religion that produces a strong effect on the law of the American polity. In any case it is important to understand this as an autonomous source of law that stands apart and above the state and its gubernaculum.

On the other hand, jurisditio has long been understood as the customs and traditions of the people. That is, law has been understood as the societal rules through which people order their relations within a specific territory. They refer to those rules which form the common practices and understanding of "right" and of the measure necessary to, as the Institutes remind us as the core of justice, is meant to "give very man his due." But custom and tradition cannot be understood in their primitive sense, as the Europeans were fond of doing as they became more "developed" and "scientific" in their approach to the structures and content of law[35]. In common law jurisdictions these formed the elements of practice that, in the hands of administrators eventually socialized into a functional-societal class—the judge—became the basis for and the touchstone against which the law for settling private disputes emerged.[36] For our purposes here, the important point—whatever its current form as common law, or customs, the fundamental premise was that law arose outside the structures and control of the state or of the administrator of territory. And, indeed, as Aristotle would long have it, the administrator, the magistrate, was advised to interfere with these laws at her peril.

Yet that the relationship between law and the government was autonomous, in its fundamental ordering, did not mean that they were forever separate. It has long been the case that jurisditio can arise through an assembly of people as it can from the autonomous evolution of custom or religion. From pre-modern times it has been clear that a representative collection of people can manage or adjust the law. And later that collection of people could eventually exercise the prerogatives of gubernaculum as well as government fused together the powers of administration, of law making, and of adjudication within its apparatus. By the 18th century, the notion had become well settled that the people could, though government, exercise an authority to make law—instrumentally—to the same extent and with the same authority as the prior constitution of tradition. That is, that law could cease to be autonomous of the state apparatus—at least to the extent that this apparatus was legitimately vested with the authority of the people themselves. Law, then, could serve as an instrument of popular will within government as it had been understood to represent that will autonomously of its government in earlier periods. These principles became universally embraced in the centuries after the American Revolution. Indeed, in civil law systems, the idea that law can exist autonomously from the state was both reduced and transformed by the embedding of the source of custom and tradition—the people—within the apparatus of the state itself and by the embrace of the notion of sovereign authority delegated to this representative

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[35] *See* JAN M. BROCKKMAN & LARRY CATÁ BACKER, LAWYERS MAKING MEANING: THE SEMIOTICS OF LAW IN LEGAL EDUCATION II (Dordrecht: Springer, 2013) at ch. 8-9 (on the "science of law").

[36] *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (LibertyPress, 1966) (on the common law).

assembly (a set of principles long in the making in the West). As a consequence, in most civil law jurisdictions the law and the state appear conjoined and inseparable. Law cannot exist independent of the acts of the people now embedded in the state. And law must be understood as a positive act designed to achieve some objective and in that effort invoking the administrative and police powers of the state.

But this did not mean that jurisditio notions were now subsumed within the state apparatus. On the contrary, the absorption of law making power neither negated the existence of a superior "natural law" in some jurisdictions, nor did it overcome entirely the role and importance of customary law as developed within a common law framework (in the state). More importantly, the rise of constitutional law began to serve the same limiting power against the prerogatives of the people represented in the apparatus of government as notions of jurisditio had done in earlier centuries. Constitutionalism, especially since the middle of the last century, now increasingly assumes a place beyond the control of the state.[37] And it is in this complex of relations between law, the state, and the people that modern Western rule of law notions emerge. They tend to serve as the transformed expression of the ancient notion of legal autonomy while recognizing the critical importance of the embedding of law within the architecture of government. It carves out a space for extra-governmental rules while acknowledging the centrality of government to the administration of law and justice. Rule of law is meant to provide those constraints on the exercise of power in the making of law that preserves its connection to the polity (process legitimacy) and that limits its reach (though the notions of substantive rule of law limits on the power of the state to legislate or to use its executive or administrative powers). But this entire complex of notions, on which mountains of analysis have been produced, are grounded in a set of simple principles that recognize the autonomy of the state and of law, even as the one can be made or unmade by the other. While the state may interfere with law as it likes (to the extent it is not constrained by "higher law") it may not interfere with its autonomy once made (and made legitimately). That is the notion here is of the independence of law from the state once it has been made. It is that notion of autonomy that then carries over to mark the relationship between law and its administration.

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B. THE JUDGE AND LAW

The autonomy of law and the state helps clarify the role of the judge in the West before the state and before the law. The judge stands before the law the way that the state stands before the law. Both are bound by the word of law, but are heavily embedded in its development, interpretation and application.[38] And the judicial space serves both as the site for the resolution of disputes and for the political contestations

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[37] *See generally*, Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PA. ST. L. REV. 671 (2009).

[38] The issues continue to attract attention for its paradoxes and challenges as old systems are transformed by modern realities. *See*Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U.L. REV. 1239 (2002).

that have moved from society and the Church, into law. The interpretative function of the judge before the words that constitute law, then, serves to reinforce the embedded autonomy of the law.[39] The issue has been contentious as the 20th century saw legal intellectuals in the West divert their attention from the personality of law to the personality of the judge—to objectify the legal system within the body (and psychology) of the judge.[40] That obsession, too, travels with the transposition of Western law systems elsewhere, but does not displace the grounding reality of law as autonomous of the individuality that has sought to be imposed on it by the sometimes inward-looking and parochial predilections of a culture in transition (especially in the United States).[41] Let us briefly consider how this applies to common law and civil law jurisdictions.

In common law jurisdictions, the judge serves as the centering element of two complexes of law—judicially administered and statutory/regulatory rules. The first centers the judge in the determination of law—that it, it centers the judiciary within the nexus of cases produced by the judicial body the judge produces an interpretation of the law to be applied to the dispute to be resolved. The second centers the text of a legislative or administrative pronouncement in the determination of law—that is it reduces the function of the judiciary in common law to a methodology that is applied to the extraction of meaning from and around text from the nexus of cases that themselves have sought to produce not just clarity but meaning through application in factual context. The first necessarily places the judge at the center of law, the second does not. Let us further consider each in turn.[42]

The first are those law sub-systems that are entirely judge administered (tort, contract and the like). These are not memorialized—their scope and application are expressed in the sum of judicial applications of those rules over time. They represent the modern expression of custom and tradition that has been reshaped into a coherent and self-referencing system of rules and standards that are meant to guide behavior and allocate responsibility for loss. In that role, the judge does not create law so much as she develops and expresses it within the constraints of prior opinions of other judges and the sense of community expectations (which are themselves shaped by communal understanding of the aggregate of decisions). The law is extracted from its application over many cases. Here the judge plays a significant role in the recognition of law (usually and wrongly expressed as making law—though that argument is itself an expression of a political agenda aimed at destroying the role of the judge and of the autonomy of law as understood classically in the West).[43] The critical principle here is the link between the autonomy of law (from the state) and the necessary and equivalent autonomy of the judge as an instrument of the

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[39] The obsessive focus of the Western intellectual on what are usually reduced to issues of interpretation (a central element of the lawyer's "job") and hierarchy. *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281 (1989); Richard A. Posner, *Statutory Interpretation - In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

[40] *See generally*, Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV 527 (1982); Stanley Fish, *Working on the Chain Gang: Interpretation as Law and Literature*, 60 TEXAS L. REV. 551 (1982).

[41] *See generally*, Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003).

[42] *See generally* Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL OF RIGHTS J. 117 (2003); Backer, *supra* note 19.

[43] *See generally*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155 (1998).

expression and application (and thus the development) of the law in the resolution of disputes between litigants. *Judicial independence in these cases then acquires a twofold character*. First, it is necessary as an expression of the political role of the judge in extracting the law by reference to the autonomous judgments of judges as a class over time—that is it speaks to the independence of judges as a class to develop jointly an understanding of the meaning of law and its standards. That is, in this sense one can understand judicial independence as a means of avoiding *systemic corruption* of the autonomy of law. Second, it is a necessary expression of the role of the judge as an impartial administrator of justice in those individual disputes brought before her. In this sense, judicial independence can be understood as a means of avoidance of *individual or personal corruption*—the traditional failures of the cage of regulation in the face of interference by individuals for personal aims.

The second are those sub-systems consisting of statutes and administrative regulations. Here, the relation between the judge, the state apparatus and the individual litigants becomes more entwined.[44] But because the law is given and not within the province of the judge to derive it, the role of the judge in relation to the law is quite distinct.[45] The judge is no longer free to discern and apply the law from out of its reduction from custom and tradition contemporaneously applied. The law is now written as the expressed command of the people—either in statute or through the actions of an administrative agency to which quasi legislative authority has been vested. It is in this situation that one commonly speaks to the differences between civil and common law. In common law countries, the statute becomes embedded in the ancient common law system over which it occupies a superior space. While the words of the statute command, they do so the way an authoritative and unchanging pronouncement of a highest court might bind. That is, the statute itself provides the rule which it is then left to the courts to apply. And application requires interpretation and application within the dispute in which interpretation arises. Every statute now has a common law of interpretation, and in some respects, the common law of interpretation may sometimes overwhelm the language interpreted itself. It is in this sense, certainly, that the judges can be understood as well embedded within the

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[44] *See generally*, Jonathan R. Macey, *Promoting Public Regarding Legislation Through Judicial Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

[45] At its limit, of course, it is possible to suggest that such law, that does not require extraction from the body of cases, requires neither lawyer nor a judge trained in the common law. "As in many utopias, one of the objects of the Revolution was to make lawyers unnecessary … Fear of a gouvernement des juges hovered over French post revolutionary reforms and colored the codification process." JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA 29 (3rd ed. 2007).

political processes of common law states.[46] And yet it remains principally embedded within its own politics.[47]

In civil law countries, the principle was once clear but its application has become quite muddled since the middle of the last century. Judges under the Napoleonic Code were prohibited from introducing general principles of law, viewed as legislative in character,[48] but they could fill in gaps in legislation by reference to the code itself.[49] Eventually they could develop a jurisprudence for the application of the Code, always remaining loyal to its principles and constraints, and its decisions, though not binding, could serve as a gloss, more or less mandatory, on judges exercising their authority. Note the principles at work here. First, a distinction is made between law making and interpretation within the law. Second, that interpretation is itself to be exercised within the law. Third, so exercised, those interpretations, and those principles of interpretation—of reading the law—could be used as a basis for the application of law. *Taken together, the law is viewed as autonomous of both legislature and judge once produced.* And thus, autonomous it must be treated as self-referencing. The principles of its interpretation and application must be found within the code itself. The object of the judge, then, is to apply the law referencing the judicially extracted principles of interpretation, but not to make law in the process. Three points—first the judge was prohibited from applying or suggesting the application of constraints in higher law. For that purpose, most civil law states instituted a political apparatus, the constitutional court. To vest judges with the power to invoke this higher law would have vested them with an authority that was to be exercised by the people (through the legislature), and checked by another political institution (the constitutional court) itself divorced from the specifics of a particular case. And indeed, it might be understood that vesting the power of constitutional determination in a court would produce corruption in the sense that the law would not be applied evenly but would be varied to suit the circumstances of the cases. Second, the judge could not go beyond the law in seeking justice from out of the compulsion of statute or administrative regulation. Third, political constraint was exercised outside the law, though with effects within it—through the internalization of the risk of non- or mis-compliance by states and administrative agencies.[50]

These notions, of course, are inverted in jurisdictions with origins in the common law. In that case, the idea of self-referencing law, or of law restricted to its enactment through the state, is rejected. The older double autonomy of law is

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[46] *See*, John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. OF L. & ECON. 263 (1992) ("Fundamentally, this implies that judicial interpretations – especially those that stand unchallenged—must be seen as reflecting the strategic setting in which they are announced, no matter how they are motivated or justified."). I have noted as well that the judicial role in that political context makes inevitable that judicial interpretation will be severely disciplined where pronouncements tend to wander too far from the customs, traditions and expectations of the polity for which it is made. *See* Larry Catá Backer, *supra* note 19, at 340 ("Authority is measured by compliance.").

[47] *See generally*, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (Thompson/West 2012).

[48] A BARRISTER OF THE INNER TEMPLE, THE CODE NAPOLEON, art. 5 (William Benning, 1827).

[49] *Id*. atart. 4.

[50] *See generally*, Clifford J. Carrubba, Matthew Gabel & Charles Hankla, *Judicial Behavior Under Political Constraints: Evidence From the European Court of Justice*, 102 AM. POL. SCI. REV. 435 (2008).

preserved (that is the autonomy of ordinary law and of the higher law of the constitution). Judges in these courts exercise a substantial authority with respect to the preservation of that dual autonomy. Their only substantive check (and it has been an effective one through the current period) is the judiciary itself. Where in the civil law system the law is autonomous of the judge (and the legislature after enactment), in the common law system the judicial role is viewed as autonomous of the state in the service of the law which is itself viewed as autonomous. Judicial power, then, is both interpretative and normative. While this is inherent in common law, it also became a feature of the role of judges in the interpretation and application of statute. It is in the role of the common law judge as the interpreter of statute that the connection between judge and law becomes clearest in its administrative and political elements. That quite important relationship was accomplished by the transference of the methodologies of the common law to the project of the interpretation of statutes and administrative regulations. What does that mean? The judge in common law systems, and especially that of the United States, treats the statute like any expression of law. While the words of this form of expression of law cannot be changed, everything else around it is subject to interpretation. And that interpretation is subject to application in specific cases. And those applications are then subject to standards of assessment for conformity with larger frameworks—the statute, the law in general, the intention of the framers. And ultimately all of this complex of interpretation and application is subject to the judicial understanding and application of the higher law of the constitution to the extent these may apply—directly or indirectly. Cases become the vehicle for this development through interpretation-application. These cases become an increasingly dense gloss on the statute. And because at the center of the common law methodology is the autonomy of judges, disciplined through the notion of the binding effect of superior judgements and a socialized tradition of respecting prior opinion, at some point the aggregate of cases may in some instances supplant or so cover the statute that the actual words of the provision may be lost within its gloss.

What does all of this mean for the comparative project of judicial reform in China undertaken within the globalized networks of judges and their common cultures and embedded within ideological systems contextually quite distinct? It means for my purposes here, that when one seeks to embed the forms of the system of judging that have developed within the strong and ancient ideological contexts of the West, the effects or functions that these forms serve will migrate with them. It is on the shoals of that migration—the cultural and historical framework within which systems arise and operate—that migration tends to flounder.[51] Form and function are to a great extent *impossible to separate since the conception of the form is the product of its effects*. These effects are now easy to summarize:

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[51] This is particularly apparent within the context of understanding the nature of judicial independence in China. The difficulty is especially apparent when one seeks to import Western notions of judicial independence, dependent on a broad scope of interpretative authority vested in the judge and grounded in the ethos of common law, onto a political system in which such interpretative functions are as inherently political and bound up in the authority of a vanguard party. Qianfan Zhang, *The People's Court in Transition: The Prospects of the Chinese Judicial Reform*, 12 J. OF CONTEMP. CHINA 69, 99-101 (2003).

First, judges serve a political role in their relation to law.[52] Judges are an essential component in the production of law, not merely through their interpretive and glossing power, but through their application of these judicial glosses in the case. Judges themselves, as a group, serve as a political actor, and an independent source of law making. The judiciary, as a class, is a political class. Certainly, they exercise, as an institutional class, their authority quite constrained by both the logic of their role (as limited to cases and to the law brought to them in disputes) and by the cultures of their practice. But within those constraints they exercise a certain gubernaculum in relation to law. In the West that is an important and necessary element—a strong constraint on the power of government as a whole to strip the people of their customs, traditions, and habits. And in political systems in which the preservation of popular values is a significant value, this makes sense.[53]

Second, cases themselves serve an important political role as well. Especially in the United States, the move toward legalization of the societal sphere has produced, in equal measure, the growing political role of the courts. Not the judges. The *courts themselves* now serve as a space where mass mobilization, political rhetoric and mass actions are now situated.[54] There are a number of well known examples. The most successful was the attack on the structures of racial segregation in schools culminating in Brown v. Board of Education. But there were others—the rights of sexual minorities to the decriminalization of their sexual activity, and ultimately the right of same sex couples to marry, and now the rights of transsexual people have all been sited in the courts, especially when agitation in the political space has been unavailing. Where courts operate as the interpreters of law, where they can, as a supplemental matter produce the grounding principles through which statutes may be interpreted and applied, and where they may also evaluate these by reference to the "higher law" of the state, it is inevitable that political culture will also begin to center on the courts.

Third, courts begin to serve as the place where societal narratives are forged and popular expression is constructed and applied.[55] That is, the judicial function is not limited or focused on law and law making, or even the politics of those efforts. Rather, and perhaps more importantly, this form of judicial culture also transforms the courts into a site of the production of strong societal narratives.[56] By choosing among facts to emphasize, facts to marginalize, by choosing the methodologies of inference, by applying societal conceptions to the evaluations of facts, courts become a critical place where society's self-conception is formed and reinforced. The courts, more even than the political classes, are instrumental in the construction of the perceptions and practices of popular culture. Its only competition in the United States, for example, is the tale-spinning of our modern troubadours—television and movie

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[52] *Cf.* Larry Catá Backer, *Inscribing Judicial Preferences into Our Basic Law: The Political Jurisprudence of European Margins of Appreciation As Constitutional Jurisprudence in the U.S.*, 7 TULSA COMP. & INT'L L.J. 327 (2000).

[53] *See generally*, ARISTOTLE, *supra* note 28.

[54] *See* Backer, *supra* note 19.

[55] *See generally*, Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611 (1998).

[56] *See generally*, Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 U. ARK. LITTLE ROCK L.J. 845 (1999).

production. For states in which the direction of societal mobilization matters, this ought to be an important consideration of the choice of form, especially in its American iteration.

Fourth, the independence of the judge, the judiciary as a class, and the proceedings in court is a function of the autonomy of law from the state. The state as an administrative apparatus—its gubernaculum, stands at arm's length from statutes once produced. It is to the judge that the political task of interpretation and the personal task of application in specific instances is assigned. Judicial independence is then understood as a means of avoiding both systemic corruption and individual corruption. Even when the state is the sole source of law, this remains true. The connection between the state and its law is severed at the time of its enactment. From that point, it becomes the province of the judge. As long as judges have an interpretive function, and as long as they must apply the law, they must remain as autonomous of the state as the law they apply and interpret.

Within this conceptual context, it is easy to suggest that transposition, especially to Marxist Leninist systems, becomes nearly implausible. Yet that would not necessarily be true. Rather, a fundamental understanding of cultural fracture beneath methodological practice is helpful for a perhaps more successful engagement with foreign systems. Western models of judging, and notions of independence, remain important to the Chinese project of judicial reform—not necessarily as models mindlessly imported, but rather as irritants that might help develop an indigenous system within its own context.[57] To that end, understanding how judges think[58] in a specific political and cultural context becomes a central element of analysis that connects concept to reality.

III. THE CONCEPTION AND OPERATIONALIZATION OF CHINESE JUDICIAL REFORMS

Chinese judicial reforms fit uncomfortably within this ideological framework of Western judging. That is not to say that there aren't great points of convergence of both form and effects. It is to suggest, though, that the overlay of the quite specific framing principles of the Chinese political system point to areas of necessary divergence between not merely the effects of the forms of Western judging, but of the forms themselves. There is a sense of the need for the Chinese judiciary to achieve the same level of institutional autonomy as a class—and among individual judges—as is common in other advanced states, but that such independence not challenge the leadership role of the CCP.[59]

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[57] Gunther Teubner's notion of legal irritants as the key focus of transplantation is useful here. *See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

[58] *Cf.* RICHARD A. POSNER, HOW JUDGES THINK (Harvard Univ. Press 2008).

[59] "The vision that the SPC has for the Chinese judiciary and judges can be seen from the description of the reforms above. The SPC intends to create a more professional judiciary (with a lower headcount), that is better paid, more competent, has performance indicators that look more like other jurisdictions, with an identity and operating mechanisms separate from other Party/government organs, that will be more autonomous, no longer under the thumb of local authorities, but operates within the big tent of Party

And, indeed, the overarching framework for reform in its current iteration suggests points of divergence with the judicial models from which judicial reforms, including the vision in the White Paper, have emerged. That overarching framework embeds judicial reform as part of a much larger political and economic project—the project of Socialist modernization. Reform and the continued development of Socialist modernization in its economic, political, social, legal and cultural forms[60] are now organized through the Central Leading Group for Overall Reform,[61] which was created in 2013 to oversee that the Decision of the CPC Central Committee on Comprehensively Deepening Reform ("Decision Deepening Reform").[62] Indeed, one ought to read the White Paper through the overall structure and substantive objectives of the Decision Deepening Reform. Chapter IX focuses on Rule of Law and the judiciary, which are tied together.[63] The lynchpin is the establishment of the supremacy of the State Constitution as the operative source of administrative and institutional (though not political) norms.[64] But the constitutional supremacy principle is read institutionally as well as normative. The Decision Deepening Reform makes this clear: "We will establish a system of legal counsel universally, improve the review mechanisms concerning normative documents and major decisions, set up a scientific indicator system and assessment standard for legal system building, and improve review mechanisms concerning laws, regulations and normative documents. We will improve the law education mechanism and raise the public's awareness of the rule of law."[65]

This institutional approach to constitutional supremacy then guides the necessary reforms to the administrative apparatus that is meant to operationalize the principles and structures in the State Constitution. Law enforcement mechanisms and

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policy." *What China's Judicial Reform White Paper Says About its Vision for its Judiciary*, SUPREME PEOPLE'S CT. MONITOR (April 12, 2016), https://supremepeoplescourtmonitor.com/2016/04/12/what-chinas-judicial-reform-white-paper-says-about-its-vision-for-its-judiciary/.

[60] The General Program of the Constitution of the Chinese Communist Party describes a coordinated leadership role for the CCP in all these areas and ties them all within the greater Project of Socialist Modernization. *See* Constitution of the Chinese Communist Party, General Program, discussed by Larry Catá Backer, *Introduction: On a Constitutional Theory for China – From the General Program of the Chinese Communist Party to Political Theory*, LAW AT THE END OF THE DAY (Feb. 14, 2015), http://lcbackerblog.blogspot.com/2015/02/on-constitutional-theory-for-china-from.html.

[61] Zhongyang Quanmian Shenhua Gaige Lingdao Xiaozu was established in the wake of the 3rd Plenum of the 18th CCP Congress in December 2013. It is tasked with determining guidelines for further reform within the CCP Basic Line, which was also reaffirmed. It is meant to sidestep the usual bureaucracy to establish reforms more efficiently. It is chaired by Xi Jingping and its deputy leaders include the Premier of the State Council, the Politburo Standing Committee First Secretary and its Vice Premier.

[62] *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform*, CHINA.ORG.CN (Jan. 16, 2014), http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

[63] *Id.* ch. IX ("We will deepen reform of the judicial system, accelerate the building of a just, efficient and authoritative socialist judicial system to safeguard the people's rights and interests, and ensure that the people are satisfied with the equality and justice in every court verdict.").

[64] *Id.* ¶ 30 ("We will further improve the supervision mechanism and procedure for the implementation of the Constitution and raise to a new level the comprehensive implementation of the Constitution. We will establish and improve the system within which the whole society is loyal to, abides by, upholds and applies the Constitution and laws.").

[65] *Id.*

institutions are to be made more efficient.[66] Law and its enforcement are critically tied together in the objective to strengthen, together, the independent exercise of the judicial and procuratorial powers, in accordance with law.[67] This is further refined by the objectives of improving the mechanisms for the use of judicial powers, through systemic reform of the judiciary.[68] This includes extending principles of transparency and popular participation.[69] But it is also embedded within the larger project of reforming the working style of officials.[70] Working style improvement brings with it more muscular systems of assessment and monitoring.[71] Lastly, the human rights enterprise in China is to be furthered[72] by centering the conception of human rights through the legal and judicial mechanism.[73] The conceptualization of human rights within the judiciary and law is framed within a quite specific set of objectives.

What emerges are the outlines of a quite distinctive conceptualization of law and the judiciary as embedded in each other. Law is the object of which the judiciary, as well as the police and the procuratorate are the instruments. Each has their role—and their relation to law—but each is autonomous of and embedded within law. Autonomous to the extent that they are the instruments of the application of law within the spheres of their jurisdiction and function. Embedded to the extent that their instrumentality is itself defined by and constrained within law, the same law that each administers and applied. Independence, then, is a necessary predicate of their operation. But not independence from but through law. And independence from each other, and from individuals whose positions might otherwise invite either systemic or individual corruption (through the influencing of interpretation or application in a particular case). But the independence to apply law is quite distinct

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[66] *Id*. ¶ 31 ("We will integrate major law-enforcement bodies, relatively centralize the law-enforcement power, press ahead with comprehensive law enforcement, and do our best to resolve problems such as overlapping functions and duplicate law enforcement to establish an authoritative and efficient administrative law-enforcement system with the integration of power and responsibility.").

[67] *Id*. ¶ 32 ("We will establish a judicial personnel management system fitting their professional characteristics, improve the system for unified recruitment, orderly exchange and level-by-level promotion of judges, procurators and the police, improve the classified management system of legal personnel, and guarantee the job security of judges, procurators and the police.").

[68] *Id*. ¶ 33 ("We will optimize the distribution of judicial functions and powers, improve the system of judicial power division, coordination, checks and balances, and strengthen and standardize the legal and social supervision over judicial activities.").

[69] *Id*. ("We will increase the persuasiveness of legal instruments and press ahead with publicizing court ruling documents that have come into effect. We must strictly regulate the procedures of sentence commuting, release on parole and medical parole, thereby enhancing the supervision system. We will extensively implement the people's assessor system and people's supervisor system to expand channels for the people to participate in legal affairs.").

[70] *Id*. ¶ 37 ("We will speed up institutional reform to fight formalism, bureaucracy, hedonism and extravagance. We will improve the system under which leading officials take the lead to improve work style").

[71] *Id*. ("We will improve the examination and accountability system of selecting and appointing officials, and make efforts to correct such erroneous practices as craving for official positions. We will reform the evaluation process for the performance of official duties and focus on solving the problems of completing projects for the sole purpose of showing off or boasting about their performance, as well as nonfeasance and misconduct.").

[72] *Id*. ¶ 34 ("The state respects and protects human rights.")

[73] *See id*. (setting out a list of specific objectives).

from the independence to interpret and create it. And with respect to that the judiciary would exceed its authority. That is a function of the Socialist Democratic System itself.[74]

This conceptual framework, then is useful for understanding both the thrust and scope of the latest round of judicial reform. The reform is not meant to alter the basic premises under which the judiciary has been developed since the time of Reform and Opening Up.[75] Rather, the reforms tend toward technical improvements in the delivery of dispute resolution services—they touch on judicial competency and those methodologies that enhance the sense of legal certainty and predictability. These can be usefully divided into judicial system reform, trial system reform, and supervision reform.

Judicial system reform targeted systemic corruption and efficiency. It furthered judicial autonomy from other administrative units. It has included rules for the separation of the duty of executing verdict from judges, the restructuring of the financial system for judicial organs, and the establishment of circuit tribunals for Supreme Court with jurisdiction on civil dispute and disputes with government. In addition, there have been efforts to explore innovation in the hierarchy system that are the connection with local government hierarchy system, to clarify the jurisdiction of different judicial organs on different levels, and to improve the internal supervision mechanism. Most important, perhaps, are efforts to align CCP discipline and judicial discipline mechanisms with criminal investigations—an important element of the current focus on anti-corruption efforts.

Trial system reform, including its manifestation as the expression of the state's view of human rights has also produced some reform since 2013. These include reform of the trial evidence system, the establishment of case record tracing system and accountability systems, reform of litigation procedure to improve people's litigation rights and to build in basic human rights in criminal justice system. The latter is to be improved by certain measures, including prevention of extorting confession by torture and better control and mitigation of judicial error. The latter is especially to be understood as tied, again, to efforts to mitigate the effects of corruption. Human rights, and the democratization of the judicial process, are also meant to be furthered through the greater popular participation in the judicial system.

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[74] *Id.* ¶ 27 ("We will improve the socialist legal system with Chinese characteristics, and perfect the system of legislative drafting, argument, coordination and review to improve the quality of legislation and prevent regional protectionism and legalization of departmental interests. We will improve the system within which people's government, people's court and people's procuratorate are elected by, responsible to and supervised by the people's congress.").

[75] *See* Mei Ying Gechlik, *Judicial Reform in China: Lessons From Shanghai*, 19 COLUM. J. ASIAN L. 97 (2005); Wang Yaxin, *Judicial Cost and Judicial Efficiency: The Financial Guarantee for Courts and Incentives to the Judges in China*, 2010(4) JURISTS REVIEW. *See generally* Qu Jingdong, Zhou Feizhou & Ying Xing, *From Macromanagement to Micromanagement—Reflections on Thirty Years of Reform From the Sociological Perspective*, 2009(6) SOCIAL SCIENCES IN CHINA.

This includes improvement[76] of the People's Assessor system,[77] which had been criticized for its empty form.[78]

Supervision reform targeted individual corruptibility. It thus focuses more on the judge than the system in which she is embedded. Reform has included improving regulations on illegal meetings between judicial employees and lawyers or other interested parties, separating the duty of executing verdict from judges, restructuring the financial system for judicial organs, and establishing circuit tribunals for the Supreme Court with jurisdiction on civil disputes and disputes with government. Supervision reforms have explored new hierarchy system that sever the connection with the local government hierarchy system. These efforts seek to clarify the jurisdiction of different judicial organs on different levels and improve the internal supervision mechanism. There have also been corresponding efforts to establish and institutionalize coordination of procedures between the Party disciplinary and inspection mechanism with criminal investigation.

But legal certainty and predictability has also pushed the courts to seek to develop their own internal cohesion as the course of legal doctrine and the standards for its application. The Guiding Cases system presents the best example of this effort to develop institutional self-referencing cohesion. The Guiding Cases system was announced officially in 2010.[79] It adds a new component to the Chinese legal system by effectively introducing a new legislative form—cases that must be considered by judges in deciding their own cases.[80] The Guiding Cases System was given approval in the 4th Plenum Decision's statement of objective that courts "strengthen and standardize judicial interpretation and case guidance."[81] The 2013 Supreme Judicial Court Reform Plan emphasized the objective of expanding the important role of guiding cases.[82] There was a sense of their possible utility in augmenting the autonomy of the judiciary from law, and the law from the state apparatus through the development of a strong interpretive authority in the Courts.[83] But the construction

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[76] The reform includes greater authority to participate, a clarification of their roles. *See* Terry Ng & Laura Zhou, *China to Expand Court Assessors System as Part of Judicial Reform*, S. CHINA MORNING POST (Oct. 30, 2014), http://www.scmp.com/news/china/article/1628174/china-expand-court-assessors-system-part-judicial-reform.

[77] On the initiation of the People's Assessor System, *see, e.g.*, Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PAC. RIM L. & POL'Y J. 569 (2000).

[78] *See* Ng & Zhou, *supra* note 76, ("Tong Zhwei, a professor at East China University of Political Science and Law, said many assessors just followed the instructions of judges without careful examination because of a lack of legal knowledge.").

[79] *See supra* note 26.

[80] *See generally*, Wang Chenguang, *System Construction and Technique Innovation: Challenges Our Guiding Cases System is Facing*, CHINA GUIDING CASES PROJECT, Feb. 1, 2012.

[81] *See CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward*, CHINA COPYRIGHT AND MEDIA (Oct. 28, 2014), https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/.

[82] *See* Susan Finder, *Using Model Cases to Guide the Chinese Courts*, CHINA POLICY INSTITUTE ANALYSIS (April 7, 2014), https://cpianalysis.org/2014/04/07/using-model-cases-to-guide-the-chinese-courts/. Finder notes that this innovation is not new, but its emphasis is. Model cases have been circulating in some form since the 1980s and are understood as inherent in the power of the Supreme Court to supervise lower courts. Ibid.

[83] *See supra* note 5.

of the Guiding Cases remained very much a top-down project, relying on the review and determination of the administrative apparatus of the Supreme People's Courts for the determination of those cases to select and those to ignore.

But the relationship between these Guiding Cases and other law is unclear. First the Guiding Cases are not mandatory in the sense of statutory law—they are meant to be taken into account, the actual effects of which are ambiguous. It is unclear how one can measure the effectiveness of this obligation or police its uniformity. But then, that has been an issue of the common law and its methods of statutory interpretation. "The ambiguous status and function of the Guiding Cases in the Chinese codified legal system means that the Guiding Cases play only a supplemental role, by illustrating and improving codified rules through cases."[84] And indeed, the object is not necessarily to introduce common law judging in China, but rather to amplify and coordinate the supervisory authority of the higher-level courts. Professor Susan Finder notes that these Model Cases serve substantive and well as political purposes (noting the direction of higher level thinking), they might serve as supplements to legislation, or to publicize the accomplishments of noted lower courts.[85] But they may also serve as a means through which the state communicates with stakeholders about political matters, for example with respect to domestic violence.[86]

The Guiding Cases are also subject to some suggestions for improvement. These suggestions are grounded in quite distinct principles that tend to define their purpose and effect. For those who seek to increase the binding authority of these cases as well as the autonomy of the Judiciary suggestions tend to focus on citation rates, internal monitoring and evaluation systems, and supervisory efforts to reward lower court judges actually referencing Guiding Cases in their decisions.[87] Those seeking greater autonomy of law through judges suggest a closer analogy to the common law practices of opinions with "natural authority" to reduce reliance on administrative power.[88] Yet others reject the project as little more than window dressing—they are selected precisely because they are not controversial thus making them meaningless additions to the jurisprudence.[89] And it remains rarely invoked, though it is hoped that the use of Guiding Cases in more specialized courts will produce better usage.[90] Interpretive power, to the extent it is exercised remains

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[84] Wang, *supra* note 80. Dean Wang notes as well further ambiguity – the lack of guidance with respect to the weight to be accorded to holding versus dicta, or the standards for distinguishing cases based on differences in facts. "While the SPC may have intended to introduce some elements of the common law tradition into the Chinese legal system through the Guiding Cases, the current Guiding Cases System overlooks some of the common law's most important embedded skills and techniques and this may impair meaningful interpretation of Guiding Cases in lower courts." *Id.* (I'm not sure what this id. is referring to).

[85] Finder, *Using Model Cases*, *supra* note 82, at 3; Deng, *Accord, supra* note 11, at 10.

[86] Deng, *supra* note 11, at 10.

[87] *Id.* at 10.

[88] *Id.* at 13.

[89] *Id*. at 15.

[90] Jeremy Daum & Jacob Clark, *Unprecedented: Beijing's IP Court's Use of 'Guiding Cases*, CHINA LAW TRANSLATE (Aug. 31, 2016), http://www.chinalawtranslate.com/beijing-ip-court-making-new-precedent-on-guiding-cases/?lang=en (Guiding cases are so few they are easy to distinguish, they have no mandatory effect and they not be cited).

administrative—inherent in the authority in the Supreme People's Court to issue judicial interpretations, binding on lower courts.

The March 2016 Report of the Supreme People's Court, Judicial Reform of Chinese Courts,[91] gives us a sense of the future direction of reform. We consider those here. The conceptual foundation is the connection between the judiciary and the rule of law; the notion is that the judiciary in its application of law manifests the most intimate connection between people and law (in the old sense they are the instrument of justice or injustice).[92] But the connection of the judiciary is not merely to rule of law, but also to rule of law within the context of socialist modernization; improving the judicial system and its administration "are conducive to . . . accelerating the modernization process of China's governance system."[93] It follows that the structure of reform are not merely top down. They are also intimately connected to the general reform of the state and its apparatus in a coordinated way.[94] And indeed, the White Paper explicitly embeds itself into the comprehensive reform under the leadership of the CCP undertaken through the Central Leading Group for Deepening Overall Reform.[95]

The White Paper focuses on eight areas of reform: (1) Ensuring Independent and Impartial Exercise of Judicial Power Pursuant to Law; (2) Strengthening the Judicial Protection Mechanism of Human Rights; (3) Improving the Functional Mechanism of Adjudicative Powers; (4) Promoting Judicial Transparency; (5) Expanding Judicial Democracy; (6) Strengthening People-friendly Justice; (7) Improving Professionalism of Court Personnel; and (8) Enhancing the Information Technology Capacity of Courts. Much of this highlights reforms already well under way, and suggests their systematization. The White Paper concludes with its emphasis on its structural objectives—problem oriented approaches, incrementalism, and coordination with national policy and objectives. Judicial independence is understood as the development of centralized institutional mechanisms and contro Human rights through the judiciary are understood in a very specific sense—avoid unjust, false and wrong cases (the law is always presumed to be right), protect attorney rights to exercise their duties in accordance with law, preserving prisoner dignity in proceedings, regulate state compensation and standardize judicial procedures. Improving the functional mechanisms of adjudicative power is understood as focusing on systemic corruption through judge shopping and interference with decision-making. It also touches on accountability and the reduction of individual corruption. And it also focuses on improving the Guiding Cases system, noting its particular utility for specialized courts. Transparency is limited to case reporting and "big data" issues. Judicial democracy touches on reform already underway for the People's Assessor system and its challenge to the Western jury model. But it is also meant to tie the judiciary to the legislative apparatus, especially the NCP and the CPPCC. Lastly, it focuses on another aspect of institutional integrity—the system of supervision by case parties. People-friendly

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[91] SUPREME PEOPLE'S COURT OF THE REPUBLIC OF CHINA, *supra* note 18, at Conclusion.
[92] *Id.* at Foreword.
[93] *Id.*
[94] *Id.* at Ch. 1.
[95] *Id.* (six specialized sub groups consider judicial reform issues; these are supplemented by leading groups for judicial reform established under the auspices of the Chief Justice of the Supreme People's Court, with mirror groups set up in lower levels of the judicial administration).

justice is meant to reduce the transaction costs of accessing courts. They speak to the construction of litigation service centers, national judicial aid systems, and people's tribunals and alternative dispute resolution institutions. Improving professionalism touches on judicial selection and appointment and the conduct of judges and judicial personnel outside of their duties. Technological reform includes improving case management systems and case information.

Taken together, the trajectory of Chinese judicial reform emerges clearly. First, much of the focus appears to be on the office and functioning of the individual judge. An ideal of that office emerges, one in which the judge is a highly sophisticated administrator of law expert in applying the law to the cases before her. To the protection of that ideal that reform points. Protection against coercion, interference, and the indicia of judicial independence are cultivated in the service of the ideal. Second, just as the ideal judge must be protected from outside forces, so must internal discipline be cultivated. The judge herself must be socialized in a cluster of traits that make it possible for her to fulfill her office and administer the law appropriately. To that end monitoring and assessment, training and self-criticism are important. Important as well are vehicles like the Guiding Cases that serve as a hornbook of preferred administration of law. Third, the public must have confidence in the ability of the judge to appropriately administer law. To that end transparency and access to the courts must be developed. The people must be guided to the judge as the judge is guided to the administration of law. Fourth, the judiciary as a whole represents the institution of the judge which serves to protect its members and advance its development collectively. It serves to advance the narrative of the ideal judge and ensure that the systemic qualities of judging work appropriately—from the courtroom to the management of personnel and the budgeting of resources necessary for the administration of justice. Fifth, while the judge and the judiciary stand apart and independent in the administration of the law they do not have the power to create or change the law. Even the practice of gap filling is one with political implications. With respect to that, the judge must be cautious—it exceeds her authority to administer the law, and the judiciary must be mindful of the limits of its jurisdiction. Sixth, the judiciary is at its most powerful when it interprets the law in ways that serve the administration of justice. It is at its weakest when it seeks to interpret and advance law through cases or other pronouncements beyond the regulatory framework it is charged with administering.

The curious thing that is missing in analysis, therefore, is the tie between judicial reform and the General Program and CCP Basic Line. Yet, the center of gravity remains the CCP and not the judiciary.[96] That absence of connection substantially weakens the vision of judicial reform precisely because it detaches that vision from the fundamental ruling ideology on which the operation of the state and its political culture rests. Is it possible to discern that connection between the judicial vision for reform, the importation of foreign forms and ideologies, and the basic first principles of the People's Republic? It is to that question that the last section turns.

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[96] *See* Shan Yuxiao & Li Rongde, *Party Orders Judges to Follow Due Process in Commercial Cases*, CAIXIN ONLINE (Sept. 5, 2016), http://english.caixin.com/2016-09-05/100985637.html ("The party's Central Leading Group for Overall Reform, headed by Party Secretary Xi Jinping, released a document on Sept. 2 that aims to protect the interests of private firms and investors who face trial for fraud, flouting work safety or environmental rules, or are charged with other forms of illegal business dealings.").

IV. TOWARD A LENINIST APPROACH TO THE ROLE OF THE JUDGE IN A MARXIST-LENINIST STATE.

This essay suggests that the criticisms suggest only the surface of the problem—the recognition of the dissonance between the embrace of the forms of the Western judge and difficulty of then successfully grafting that form onto a system that rejects the effects of the graft. The effort either produces empty vessels or they suggest the need for further reform that tends toward the direction of embracing the normative structures that make the forms of the judge imported effective. This is only natural—the form of the Western judge is only effective as the cumulative product of its effects—and indeed it effects define the form. To have one without the other produces . . . contradiction. Or the need for new forms.

If that is the case, then what do these efforts at judicial reform, what does the accumulation of reform, reveal about the direction of reform thinking? Let us approach the question from the framework of the ideological relationship between the state, law and the judge that was developed in Part II. The relationship between the state and the law on which judicial reform efforts are grounded are quite precise and yet incompatible to those that have now become established in the West. Gubernaculum continues to exist in both in ancient and modern forms. The CCP exercises the prerogatives of governance, of the political authority that is the mark of a vanguard party. But the distinction between gubernaculum and jurisdiction does not exist. For the prerogatives of the gubernaculum include that of jurisdiction precisely because of the nature of the vanguard itself. The state and law stand in a relation of autonomy to each other, but the CCP and the law do not. Neither does the state stand in an autonomous relation to the CCP. Where are the delimiting constraints on the prerogatives of the gubernaculum of the CCP—they are those of the fundamental character of the mission of the vanguard itself. Jurisditio, then as an autonomous and constraining (though not controlling) force is quite strong. But it has no connection to law—understood in its traditional sense. Instead, the *jurisditio* of Marxist Leninist states is founded on the overall jurisditio of its objectives and the founding ideology on which the legitimacy of the vanguard status rests. In China jurisditio is easy to identify—it is embedded in the General Program of the Communist Party and it is memorialized by the constraining notions of the CCP Basic Line. These are not mere propaganda or idle slogans. Rather they represent the strongly controlling law, understood as framing principles, within which the gubernaculum of the CCP can be exercised and through which its jurisditio with respect to law can be ordered.

Thus, within China, the principle of an autonomy between the state and law has been rejected as incompatible with its societal and political order. Likewise, there can be no autonomy between the state and the prerogatives of those who wield the entirety of political power in the state. The principles that constrain power in the West, grounded in memorialized constitutions, is exercised instead through the binding authority of the principles and objectives which constrain the exercise of legitimate authority by the vanguard party. As such, law is understood to be deeply embedded in governance authority of the wielders of political authority and

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exercised in accordance with the administrative structures that they, exercising their prerogatives, establish. That identity between the state and law, then, presumes a subordinate relationship between the law-state axis and the prerogatives of the vanguard party. But the vanguard party does not exercise gubernaculum unconstrained. Indeed, their constraints are to some extent far stronger and more precise than those of jurisditio as understood in the modern West. Where in the West jurisditio can be understood as law as an autonomous enterprise, in Marxist-Leninist China jurisdictio can be understood as the principles of its vanguard authority—and more specifically in the General Program of the Chinese Communist Party. That General Program assumes the character and role of the higher law of the West.[97] And in this context, it assumes the role of the higher law of the political order that both constrains and orders it, that provides the basis of legitimacy in conformity to it and that serves as the basis of the assertion of the authority of gubernaculum by the CCP. The state, then, assumes a quite distinct character—as an expression of government but not as the home or vessel of the authority of state.

This relationship between the law and the state clarifies the relationship between the judge and the law—and evidences the difficulties of appropriating the methodologies and practices of a system grounded in a different relationship between law, the state and the judge. The judge stands before the law the way the state stands before the law. Both stand as the instruments of a higher power, and their operating space is constrained by the autonomy the gubernaculum of the CCP. It is in that context that one can understand the nature of the constitution and operation of the judge and of the judiciary. There is an autonomy to both, but only a subordinate autonomy that must respect the limits of its independent operation constrained by the higher authority of the CCP. The path toward judicial reform in China suggests that the judge does not serve as the centering element of law. Rather, the judge is the mechanism through which law flows through from the vanguard party to the people and back again. The judge is the administrative agent of law but neither its source nor its guardian. The judge guards the institutional and administrative apparatus of law but not the law itself. For to guard the law one must be in a relation of autonomy with it—and that role is reserved within the prerogatives of the institution with the prerogatives of gubernaculum—the CCP. And thus, the role of the judge is to see to it that the law is properly administered, that it is properly applied to the people. In this way, the state apparatus can complete its self-referencing complex—law giver, administrator of societal, political and economic structures, and institutional protectors of the obligations of the state toward its masses. Indeed, that notion of obligation, of administrative burden grounded in law but not in an autonomous relation with it, is the essence of the relationship between the judge and the edifice of human rights as conceptualized and applied within the judiciary.

It is in this sense that one understands as well, the essence of the independence of the judge, and its centrality to the system of law. The judge stands between the law as an abstract obligation, and its activation in the relations among the masses and between them and the administrative officials of the state. The judge

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[97] *See* Larry Catá Backer, *Pt. 31 (The Constitutional Character of the General Program) – On a Constitutional Theory for China – From the General Program of the Chinese Communist Party to Political Theory*, LAW AT THE END OF THE DAY (Sept. 12, 2016), http://lcbackerblog.blogspot.com/2016/09/part-31-constitutional-character-of.html.

must stand in a subordinate or administrative relation to the law, but in that relation must be absolutely independent of all of the rest of the apparatus of *state*. As the conduit of law, she stands alone and untouchable. That is the great limit of the gubernaculum of the CCP and the state in relation to the judge before whom stands litigants in need of the settlement of a dispute, or the state procuratorate seeking to *administer justice through law*. But that also delimits the boundaries of judicial independence. Just as the judge stands independent as the conduit of law, so she must remain the recipient of the of law which she must apply. Thus, the judge must be viewed as completely dependent on the political authority, and through the political authority on those vested with the power to make law for the interpretation thereof. The judge, therefore is as incapable of administering the law as she must be fully vested with the authority to administer justice through law. That is a distinction that is unknown in the West and incompatible with its basic construction of the law and the judge. The essence of judicial independence in the context of judicial reform in China is tied to the *protection against individual or litigation corruption*—the corruption of the case and the corruption of the individual understood as having its greatest effects in the ability of the judge to administer the law in the cases before her.

If the judge is a conduit, then the judiciary stands as the institutional edifice within which that authority may be developed and exercised. That authority, however, is not concerned as much with the development of law as with its application—with the science of the administration of justice and not its construction. The judiciary itself is meant to serve as the aggregated authority of the judges to administer law in accordance with its terms. That is, just as Western judges are disciplined in their relation to law and to the application of law in the cases before them through the institution of the judiciary—its customs, traditions, working style and the accumulated precedents that serve to guide and constrain the exercise of the judicial function—so the Chinese judge is disciplined in their relation to the administration of law through the cases they must determine through the institution of the judiciary, which serves to develop and promote a distinctive working style. But the Chinese judiciary focuses not on precedents but on the behaviors of the judge and the better application of law.[98] That is the object of reform and the great problem at the center of judicial reform efforts: how does the judiciary develop the institutional capacity—the cultures, mores, and authority—to cultivate a distinctive working style among judges. It is to the perfectibility of the judge rather than to the development of law that the judiciary derives its greatest authority. Indeed, even the great Guiding Cases System[99] can be understood in this light, a project that is meant to provide those narratives that help a judge to better administer law through the internalization of the behaviors of the perfect judge—*qingguan* (清官). And the perfect judge stands in a perfect relationship to the law which she receives and administers. "Pure, orthodox

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[98] Fu Hualing, *Building Judicial Integrity in China*, 39 HASTINGS INT'L & COMP. L. REV. 167, 168-69, 175, 180 (2016) (describing the Chinese context).

[99] Jiang Xiaoyi & Shao Ling, *The Guiding Case System in China*, 1 CHINA LEGAL SCI. 106 (2013);see also, Chen Xingliang, *China's Guiding Case System: A Study on the Mechanisms of Rule Formation*, 1 PEKING U. L. J. 215-58 (2015) (providing a historical view)

and incorruptible in his own behavior, he unfailingly establishes the true nature of the crime and its culprit."[100]

Even as the judiciary stands to ensure that judges strive toward perfectibility in their roles—rewarding the good and disciplining the bad, so the judiciary thus stands as the protector of the *systemic integrity of the office of the judge*. The aggregate of judges stands as the institutional protector of the individual judge against the failures of other officials who themselves seek to corrupt the system for their own ends. The judiciary stands against the official—whether administrative or CCP official—who fails in their own obligation to law and the administrative burdens of the state. Judicial reform must focus not merely on the corrupt judge, but on the corrupt official—including the corrupt Party cadre. It must develop the institutional infrastructures so that it may develop an institutional autonomy from the administrative apparatus with respect to the administration of law, even as it must develop the capacity to receive and apply the law that is produced by the administrative apparatus itself.

Who then, stands in a direct relationship with jurisditio? It is not the administrative apparatus. Their obligation is to memorialize law and to serve as the vehicle through which law is produced and delivered to the masses. The direct relationship, must, in the first instance develop between the CCP itself and the law. That relationship is primary and complete in itself. The *law, in this sense, does stand autonomous of the state, but only because it shares an identity with the vanguard Party*. But that identity is itself constrained by a higher law that constrains but does not control—the "higher law" of the CCP itself. It is that dual relationship between state and law and between law and Party that shapes the administration of law in China. And that is also the operational heart of judicial reform. It is an operational heart that is practically incomprehensible to those raised on the complex ideologies of the Western judge. But it is just as complete and just as authentic, in its own sphere. *For Chinese judicial reform it is in the perfectibility of the judge that lies the perfectibility of law that in turn ensures the perfectibility of the judge*.

And thus, there is something to the criticisms of the path toward reform, from left and right, and both within and outside China. These reflect both the contradictions of a grafting process that seeks to import the forms but avoid the effects of forms of judging developed in the West and now, to some extent internationalized *and* the difficulty of extracting the forms of the judge from its ideological context. For example, Jerome Cohen, an influential commentator, has rejected the idea of judicial independence, precisely because of its inability to move the judiciary towards independence from the CCP.[101] Chinese commentators, on the other hand, view the reforms, especially for example the new judicial selection

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[100] *See,* WILT L. IDEMA, JUDGE BAO AND THE RULE OF LAW: EIGHT BALLAD STORIES FROM THE PERIOD 1250-1450, ix (World Scientific 2010).

[101] Cohen, *supra* note 7. Professor Cohen argues: "The Party totally dominates the legal system, including the education, training, and day-to-day operation of its personnel and institutions. "Judicial independence," as it is commonly understood outside China today, is the enemy and forbidden by Party rulers even to be discussed in law schools. The term is only used in a positive way in Beijing to describe efforts to insulate local prosecutors and judges from local influences including corruption, social connections, local protectionism, and other forces that divert local legal officials from following the central Party authorities' instructions."

committees as a means to reducing judicial corruption in individual cases.[102] The difference, of course, is perspective. The external view focuses on systemic corruption through a standard of systemic autonomy from the state. The domestic view tends to focus on individual corruption through a standard of individual independence from local officials and litigants. The thrust of criticism is the inability of the judiciary to establish itself as autonomous and to protect and expand the autonomy of its relationship with law as against the administrative and political institutions of state. For that is, of course, the fundamental ideological basis on which the conceptualization of the judge and judging rests in the West. Taking the forms of judging from the West opens the door to the insertion of its ideological foundations as well. And the resistance to that "door opening" produces tension and controversy over the efficacy and direction of reform. The answer, of course, is that such autonomy of the judge and the judiciary from the political and administrative institutions of state, and the protection of the autonomy of the relationship between the judiciary and law cannot be in China.[103] *And indeed it should not be*.

That does not mean—as is sometimes adopted by the simple minded, that autonomy of the judge, the judiciary and law ought not to be developed. The answer appears to be more complex. And the direction of that answer lies in an initial distinction between the relationship between the judiciary and law (the interpretive function) which retains its political and therefor its deeply embedded character, and between the judge and state apparatus in the application of the law to disputes to be resolved (the application function) which retains its autonomous function an on which judicial independence from both state and party must be based as the foundation. Thus, clarity of ideological foundation and further reform that is better and more consciously tied to that foundation is necessary to align the judge, the judiciary and law in a more coherent manner, consonant with the governing ideology of the state.

But what it does suggest is that the process of interpretation—both the process of interpretation and application at the heart of common law judging, and the art of glossing statutes, developing standards for their application and a common law of their meaning, must be exercised—*but need not be exercised by the courts to retain their legitimate character*. What Chinese judicial reform makes quite clear is that it represents only half the effort at the reform of the judicial role in the development of truly Socialist rule of law in China. Current efforts focus on the administration of law. To focus on the interpretation and development of law as a living part of the administration of the state, it will be necessary to develop a robust institution that exercises the power to make the political determinations that are at

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[102] Shan Yuxiao & Li Rongde, *China Pushes Ahead with Independent Committees to Select Top Court Officials*, CAIXIN ONLINE (Sept. 8, 2016), http://english.caixin.com/2016-09-08/100986809.html ("The committees also aim to tighten oversight on the conduct of judges and prosecutors inside and outside the courtroom. Four Shanghai prosecutors, including a deputy head of a unit handling civil cases at the Shanghai People's High Court, were expelled or demoted in August 2013 after they were shown on video soliciting sex workers that a businessman paid for at a private club, the court said … Analysts said an independent committee may also help rein in corruption among judges.").

[103] Larry Catá Backer & Keren Wang, *The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order*, 23 PAC. RIM L. & POL'Y J. 251, 289, 340 (2014).

the heart of both statutory glosses and judicial interpretation around classes of issues. What that requires, then, is the exercise of an interpretive capacity within the only institution with the political prerogative to make those determinations—*it must be made within the institutions of the CCP itself*.[104] This is not a call for the development of parallel courts. Far from it—such an institutional development would be subject to the same ideological constraints that those that now attach themselves to the Chinese judge. Instead, an interpretative facility must be created as part of the political work of the CCP. It may be staffed by experts—perhaps academics or other well-qualified officials who serve as the instruments of CCP authority and who provide guidance. And the institutionalization of this facility will be significant, most likely housed within the NCP complex of institutions and under the oversight of the Politburo Standing Committee or its designees. Its role would be to develop a web of interpretation that mimics the jurisprudence of the West. Perhaps all judges must seek a statement of the law (and standards) applicable to the particular case before them. Once that opinion—a political judgment—is rendered, then the judge is free to act independently in the administration of that law to the dispute before her. The institutions of that interpretive facility would then develop interpretive coherence that the Guiding Cases were meant to deliver but in a direct and coordinated way.

And that leads one again to *first principles*. Underlying all of these debates—some normative and some technical/methodological, is a fundamental issue that tends to go unexamined. That issue touches on the connection between the judge-judiciary and the exercise of the judicial function. When people speak to judicial reform, they use that as a shorthand to speak to the judge embedded within the institution of the judiciary. That, I suggest, overly narrows and centers the issue of judging and its connection of political system legitimacy on the institution of the judiciary rather than on the systems created for judging—and the legitimacy enhancing normative constraints of judging detached from the institution of the judiciary, though also applied to the institution of the judiciary itself. This requires a sensitivity to the normative context in which such an exercise must be undertaken.

In the West, there has always been a detachment between the institution of the judiciary and the role of judging.[105] The common law judiciary, from which the modern institution of the judge was derived in large part, was in its origins just one of many institutions for the settlement of disputes, one that ultimately proved more successful than other systems for meeting the needs of litigants, and of the state under the conditions of English feudalism. Those institutions have been consolidated to some extent, adjusting its structures and methodologies to suit changing historical conditions. But with every consolidation arose new manifestation of judging power

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[104] This represents an extension of the arguments made with respect to the higher law of the Chinese Constitutional state for which a similar proposal has been advanced. *See* Larry Catá Backer, *A Constitutional Court for China Within the Chinese Communist Party?: Scientific Development and a Reconsideration of the Institutional Role of the CCP*, 43 SUFFOLK U. L. REV. 593, 596-97 (2010).

[105] *Consider* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 354, 362-63, 381 (1998-1999); CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (Oxford, 1996); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 879, 885-86 (1975); Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL RTS. J. 117, 118, 124, 178 (2003), http://scholarship.law.wm.edu/wmborj/vol12/iss1/4.

outside the institutions of the traditional judge.[106] The consolidation of law and equity in the United States, for example, was implemented even as the administrative state arose, and with it the creation of a large "quasi-judicial" power (notice the way in which Americans are taught to reference these judges—by the very language of the judges themselves in their cases)[107] exercised by hearing officers and the like. But consolidation prevailed through the institution of hierarchy in which the most legitimate and superior institutional manifestation of the judicial power is vested in the institution of the judiciary—that society of judges whose cultures and habits are meant to be autonomous though connected with, the rest of the state apparatus. It is that hierarchy that has permitted the detachment of the judicial function from the judge—precisely because at some point the institution of the judge will pass on the soundness (one way or another) of the actions of inferior administrative hearing officers, arbitrators, or secondary officers with judicial roles (for example bankruptcy court judges). The structure of Article III of the U.S. federal constitution provides the hint—vesting the entirety of the judicial power of the federal apparatus *in courts* and thus consigning all judging undertaken elsewhere as inferior in form and effect.[108]

This is the model mimicked throughout the United States, less so elsewhere in the West, but enough so that a set of ordering premises can be discerned—and taken for granted in speaking with or engaging other systems. First, judging is best done by courts overseen by properly trained judges. Second, these judges must cultivate institutional solidarity with other judges, and thus unified, represent the institution for resolving disputes and "protecting" the law against other public or private institutions that may deploy or apply or interpret "the law" in the course of their own exercise of authority. Third, the connection between the judges, the institution of the judiciary may not be interfered with by other institutions of state. Fourth, within the institutions of the judiciary, all inferior judges owe a duty of obedience and loyalty to judges of superior courts, or better put, to those portions of opinions that are rendered in courts hierarchically superior, to the extent required within the specific judicial culture in which the judicial institution operates. Fifth, judging cannot be detached from the institution of the judiciary and must be exercised by the individual judge, alone or in groups as provided by law or judicial custom. Sixth, others who purport to exercise the power of judging may do so legitimately only to the extent their actions, to some minimum extent (as specified by the judicial institution itself through its own interpretation of its own constitutive powers, its *kompetenz-kompetenz*),[109] are subject to review or conformation by the

[106] Harold A. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991).

[107] Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 321, 327-29 (2002); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1256 (1989).

[108] U.S. CONST. art. III, § 1.

[109] The power by an institution to determine the scope and allocation of its own competences, usually a sovereign power of states, but also exercised in some form by any institution with the authority to interpret the extent of its own power. Klaus Dieter Wolf, *Contextualizing Normative Standards for Legitimate Governance Beyond the State*, PARTICIPATORY GOVERNANCE: POLITICAL AND SOCIETAL IMPLICATIONS 35-50 (Jürgen R. Grote, & Bernard Gbikpi, eds., SPRINGER 2002). The issue was particularly well developed in Europe as the Member States of the European Union sight to determine the nature of their relationship to the European Union; *See*, *e.g.,* Tobias Lock, *Why the European Union is*

judiciary. Seventh, only the judiciary, either generally or within specialized tribunals created for that purpose, may interpret the extent, limit and lawful application of governmental power. Eighth, only the judiciary (either generally or through specialized tribunals designated therefore), may interpret and apply authoritatively as against other institutions of states and non-state actors.

But are these premises, all or any of them, absolutely necessary to protect the integrity, such as one wants it, of the judicial process (and not necessarily of a particular judicial institution)? *It is possible to suggest that the answer is no.* For that purpose, one might consider the theoretical arrangement of the judicial authority in China. It is divided in two quite distinct respects. First, the authority to decide a particular dispute is divided from the authority to interpret the law to be applied to that dispute. Second, the authority to hear and decide a particular dispute is itself divided in accordance to the status of the disputants and the character of the dispute. For example, at the 11th Annual General Conference of the European China Law Studies Association (欧洲中国法研究协会).[110] There were three quite interesting discussions that brought home the challenge and possibilities of an assertion of the judicial power detached from the judiciary itself. S. Beth Farmer spoke to the issue of the assertion of judicial authority by agencies in the context of the Chinese competition law.[111] Keren Wang spoke to the ambiguous context in which the role and power of a judge is understood.[112] And Shaoming Zhu spoke to the exercise of judicial powers of interpretation within the legislative apparatus itself, even in the face of the reform of a vigorous judicial apparatus.[113] These investigations frame a quite different way of approaching the construction of a judicial power, and of the administration of law. It suggests that the review of disputes need not be aggregated within a single institutional authority. A state need not necessarily constitute a single institutional structure (the judiciary) for the purpose of authenticating the actions of judges and other hearing officers with respect to their actions resolving disputes or interpreting law or regulation in the course of resolving disputes. It suggests as well that the function of interpreting and of applying law to a dispute can be separated and administered through distinct institutional means. The former authority can be reconstituted as a political activity reserved to the political authorities of the institutionalized state; it represents the application of the generalized power of the

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not a State: Some Critical Remarks, 5 EUR. CONST. L. R. 407, 408-09 (2009). But a powerful variation has been part of the political theory of the United States almost since the founding of the current Republic. *Marbury v. Madison*, 5 U.S. 137, 146-51, 174-78 (1803); *McCulloch v. Maryland*, 17 U.S. 316 (1819). In China one would expect that the ultimate exercise of *kompetenz-kompetenz* would be undertaken under the leadership of the CCP and through the appropriate state institution.

[110] Conference Program: 11th Annual General Conference of the European China Law Studies Association (欧洲中国法研究协会), http://lcbackerblog.blogspot.com/2016/09/conference-program-11th-annual-general.html.

[111] S. Beth Farmer, Ideology, Theory and Anecdote, 11th Annual General Conference, *supra* note 110, Judicial Reform and the Structures of Socialist Rule of Law. Persistently Emancipating the Mind.

[112] Keren Wang, Fractured Legal Theology: Tension between Socialist Doxa and Confucian Pistis in Chinese Judicial Reform Discourse, 11th Annual General Conference, *supra* note 110, Judicial Reform and the Structures of Socialist Rule of Law. Persistently Emancipating the Mind.

[113] Shaoming Zhu, Judicial Reform and Legislative Reform: Conflicts and Mutual Promotion, 11th Annual General Conference, *supra* note 110, Judicial Reform and the Structures of Socialist Rule of Law. Persistently Emancipating the Mind.

political community to refine its reading of law. The latter reconstituted as an administrative mechanism in which the highest forms of integrity and the greatest protection against interference by the political bodies ought to be cultivated.

On the one hand, one could ask—what does any of this have to do with judicial reform? But *that question could only be asked by one oblivious to the power of the assumptions of judging* described above. In the Chinese context, the *better question* might be to consider the need either for a unitary judiciary or for a unitary legal sphere. Within China, then, the grounding question should be the one that is never asked in the West--the extent to which the judge and the judicial authority *must* be exercised exclusively or completely by or through the institution of the judiciary and by judges. In other words, does the political system suggest the possibility a different approach to the fracture of judicial authority consist with its own political logic. That poses the further question—must judicial modernization necessary require Westernization?[114] The answer within the Chinese context must be no—the fracture between the political-legislative exercise of legal interpretation (especially in a Chinese civil law context)

That fracture would see in the judges a mechanism for the resolution of disputes among private parties. But it might strip away from that institutional apparatus all authority of interpretation of law (to be given to a legislative authority, a separate political body charged exclusively with issues of interpretation in the context of disputes or some other body perhaps in the CCP itself). It might also strip away from the judge—and the institution of the judiciary all authority over disputes involving the state itself. The issue of relief from administrative excess, wrong decision making, corruption and abuse of power might itself be treated as executive in character and assigned to another and distinct competent authority. Within the Chinese context, and with the close connection that some of these issues might have with breaches by CCP cadres of their paramount duty to the CCP and its Basic Line, the institution might combine both CCP disciplinary and state disciplinary structures. And lastly, it might create, within the administrative strictures of the state structures of administrative hearing that can exist as judicial decision-making independent of a judiciary. In each of these cases, though, the one thing that must be respected—the lynchpin of judging, is the independence of the judge to decide the dispute before her on the basis of whatever received law and interpretation is demanded by the system. That judicial independence in the face of actual decision making in a live dispute, might be the only point of connection among those who might exercise the judicial authority in distinct and partial ways. Coordination and compatibility with western institutional forms of deploying the judicial power, and matters of legitimacy will then follow.

The result is medieval in the sense of the proliferation of multiple venues and institutions for judging—for exercising the judicial craft.[115] What is suggested as both possible and likely within a Marxist-Leninist state apparatus true to its

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[114] YUWEN LI, THE JUDICIAL SYSTEM AND REFORM IN POST-MAO CHINA: STUMBLING TOWARDS JUSTICE 245-47 (Routledge 2014).

[115] ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (Liberty Fund 1985) (on proliferation in pre-modern England).

theoretical foundations[116] is institutional multi-hierarchies in judging. The result is anarchic from an institutional level. But it has several advantages for a Marxist-Leninist system committed to the construction of socialist rule of law. First, it detaches law from the judiciary. There is no special relationship between law and the judiciary in a Marxist-Leninist system—other than the requirement that the judge apply the law, and that the law reflect the leadership and guidance of the vanguard and be appropriately drafted by the state organs with legislative authority. Indeed, the only special relationship or necessary connection ought to be between the vanguard party which guards the integrity of lawmaking as a whole, and the law as an expression of the protection of society and its forward movement along the objectives for which the vanguard has been constituted and empowered. This is inimical to Western thinking, but this is not a Western democratic polity. Second, that detachment permits a management of the administrative aspects of judging without the contradiction of also dealing with a latent political authority in the actions of judges. In other words, to reduce the judge—in all her variations—to aspects of administrative roles, to strip the judge of her relationship as curator of law (and thus with a political authority that might rival the Communist Party itself in implementation and interpretation), permits the advance of judicial reform in a manageable and attainable way. It does this by making it easier to manage corruption (without the complexities of defenses based on arguments that prosecutions are based on retaliation for exercise of political authority in judging or interpreting law), and to manage the craft of judging through assessment that should itself be fee of politics. Third, it frees the development of law—statutory, administrative and Party law, within the context of its own politics. And it ensures that those with political authority are made responsible for their failures of leadership in law making, law enforcement and the interpretation of law. It is to the CCP itself that the responsibility belongs, and it is necessary to ensure that the CCP itself embraces that responsibility directly—by becoming directly accountable for its operation. That accountability should take two forms, indirect with respect to the disciplining of judges as administrative officials, and direct in the construction and interpretation of uniform law applied uniformly and fairly to the masses.

But it also suggests that this separation might be itself fragmented among different institutional mechanism, functionally distinguished by the subject matter of the dispute or the identity of the parties. Here one can at least touch on the great "elephant in the room" (an obvious element of judicial reform that goes unaddressed) —the problem of the reform of the judicial authority and judicial institutions that deal with actions involving the state. The thrust of judicial reform has tended to focus on two distinct but related forms of disputes— those between private parties both of whom are Chinese, and those between parties at least one of whom is not Chinese. More importantly, it remains problematic when an instrumentality of the state—a state-owned enterprise, for example, is involved, or where SOEs and local officials collude to avoid their respective obligations to the local people they ought to serve. It is in this context that China might most usefully draw on elements of judging from

[116] *See*Larry Catá Backer, *Introduction: On a Constitutional Theory for China – From the General Program of the Chinese Communist Party to Political Theory,* LAW AT THE END OF THE DAY (Feb. 14, 2015), http://lcbackerblog.blogspot.com/2015/02/on-constitutional-theory-for-china-from.html (considering the Constitution of the Communist Party of China, General Program)

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the West, though it bears repeating that such "inspiration" might touch on techniques rather than ideology. But it is in the matter of disputes involving officials--because their decisions violated law, or because of corruption or other failures, that the thrust of judicial reform remains substantially silent. And yet it is in this context that reform is most needed. The focus of that reform might not lead one either to the judiciary as an institution or to law. The CCP Basic Line, for example, might suggest that where the conduct of officials is involved specialized procedures ought to be created within specialized bodies. There is a precedent for this sort of status specific fracture—the hearing structures of the Central Commission for Disciplinary Inspection.[117] That model lacks a necessary connection between the function of accountability and the remedial obligations of the state toward its masses. That omission could be addressed through the creation of specialized bureaus that would serve both to discipline officials and to also provide remedies for those injured by official misconduct. That, in turn, would require the state, under the leadership of the CCP to develop a mechanism for assessing damage and a procuratorate of trusted officials to enforce the state's paramount duty to ensure that officials, in their conduct toward the people, exercise the care that their responsibilities demand.

The object of this essay is not to map out its operationalization. It is, however, to suggest that all roads of judicial reform that retain a fidelity to the highest expression of the ideology of the state must lead, inevitably to the understanding that the courts may not assert the political role of interpretation or glossing law, and that this function must inevitably derive from and be overseen by the only institution with gubernaculum in jurisdictio in China—the CCP. It may be time, though, to start from first principles in the approach to the analysis of the construction of a judicial power in China and its alignment to the state apparatus. Clearly the fundamental objectives of justice according to law, predictably and concisely applied ought to guide the analysis. But the normative foundation does not necessarily dictate a particulate institutional result and certainly not a singular institutional design. It is to those matters that Chinese efforts at judicial reform ought to be directed. Coordination and compatibility with western institutional forms of deploying the judicial power, and matters of legitimacy will then follow.

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CONCLUSION

What is the scope and nature of judicial reform? To what extent does borrowing from Western models also suggest an embrace of the underlying ideologies that frame those models? The issue of judicial reform, and of the working style of the judge, has been at the forefront recently in China. Both national and foreign scholars, politicians, civil society elements and the like have weighed in on the issue. Each of them have their own axes to grind. Foreigners are looking for convergence with their own standards, ideologies, and practices—however contested these may be in their own home states. The national debate on judicial reform reflects

[117] Guo Yong, *The Evolvement of the Chinese Communist Party Discipline Inspection Commission in the Reform Era*, 12 CHINA REV. 1, 2-8, 16-21 (2012); *see also* David Gitter, *Chinese Communist Party Education: Now New and Improved: The CCP is using a two-pronged approach to ensure discipline among its cadres*, THE DIPLOMAT (May 13, 2016), http://thediplomat.com/2016/05/chinese-communist-party-education-now-new-and-improved/.

playing out of more complex politics involving not merely the technical issues of judicial efficiency and operations, but also touching on the character of the judge, the judicial role, the relationship between judge and law, and the role of law within a Marxist-Leninist political framework. These issues remain at the center of the debate in China. "People's Courts at all levels must disregard erroneous western notions, including constitutional democracy and separation of powers, Chief Justice Zhou Qiang was reported by the news agency as saying at a Supreme People's Court meeting on Saturday."[118]

This essay has suggested an approach to an answer. That approach is grounded in the importance of the underlying ideology of models of judging which are quite distinct among Western states and in the Socialist Law system being developed in China. If one is to understand the suitability of legal or administrative transplants, or their effects (intended or unintended) then it is necessary to understand the effects of ideology on the construction of judging systems and the need for reforms to retain a fidelity to the principles of the systems in which they are embedded.[119] The usual caveats apply here and generally when discussing Chinese institutions with foreigners: the reality of judicial action "on the ground" and its theory (or idealized forms) may be quite distinct, the level of corruption may make theoretical constructs fantasy, the disciplinary element where the CCP might be the worst offender when it comes to CCP cadres failing to follow their own Basic CCP Line in relation to the deployment and operation of a judicial authority (the problem if interfering with judicial administration). But these caveats need not necessarily concede the fundamental points of a theory of a detachment of the judge from the judicial function.

It is a commonplace in the West, whether in Common Law or Civil Law states, that the integrity of the judiciary depends on their authority to interpret law and to apply that interpretation to individual cases and the litigants that appear before the courts.[120] That presumption, however, embeds premises about the organization of political and administrative authority that may be incompatible with those of states developing Socialist Rule of Law structures within Party-State systems. In Common law states those deep presumptions touch on the disciplinary role of judicial opinions as a constraint on judicial interpretation. In civil law states that discipline arises from the constraining principles of the legal codes themselves. In both the legislatures serve as the ultimate check in a complex dialogue with courts in three respects. First, judges serve a political role in their relation to law. Second, cases themselves serve an important political role as well. Third, courts begin to serve as the place where societal narratives are forged and popular expression is constructed and applied.

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[118] *China's Top Judge Warns Courts on Judicial Independence*, REUTERS (Jan. 15, 2017, 1:56 AM), http://www.reuters.com/article/us-china-policy-law-idUSKBN14Z07B.

[119] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 10-30 (U. Ga. Press 1974) (for the perils and promise of legal transplantation and the importance of fidelity to contextually embedded normative orders); Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 120 (1997); *see also* Donald C. Clarke, *Lost in Translation? Corporate Legal Transplants in China*, GW LAW FACULTY PUBLICATIONS & OTHER WORKS. http://scholarship.law.gwu.edu/faculty_publications/1068 (for the Chinese context).

[120] *Cf.*, JOHN MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA 705-98 (Mich., 1994).

In Socialist rule of law systems, the disciplinary systems are quite different and ought to produce a different relationship between courts, law, and the cases they are bound to apply fairly and consistently under law.[121] This essay considered the way that the logic and grounding principles of Chinese Marxist Leninism may provide guidance in the construction of a judicial enterprise that is both true to its organizational logic and which enhances the authority of judges to serve litigants fairly. It suggests the points of compatibility and incompatibility in the ideologies of these distinct systems of judging and what it may mean for judicial reform in China. That consideration, in turn is based on a fundamental difference, in Socialist Rule of Law systems, between the authority to interpret law and the authority to apply law to an individual case. For Chinese judicial reform, it is in the perfectibility of the judge that lies the perfectibility of law that in turn ensures the perfectibility of the judge. Part II considered in very broad strokes the relationship between the judge and law in the West. Part III then turned to Chinese reforms, reforms touching on the relationship between the judge and the law, and the evolution of normative structures within which one can speak to judicial independence. Part IV then considered the project of judicial reform from the perspective of the grounding ideology of the Chinese state. From that fundamental distinction, this study pointed to a Socialist approach to the judicial function compatible with its own logic and legitimacy enhancing under global consensus principles for a well-organized and functioning judiciary.

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[121] *See generally*, Larry Catá Backer, *Jiang Shigong 强世功 on "Written and Unwritten Constitutions" and Their Relevance to Chinese Constitutionalism*, 40 MODERN CHINA 119 (2014).