

CHAPTER ONE

THE ONGOING QUEST FOR JUDICIAL INDEPENDENCE IN CONTEMPORARY CHINA

On September 23, 1821, an accident occurred while an American ship from Baltimore, named *Emily*, was loading cargo in Guangzhou. A woman on a nearby boat fell into the water and drowned. Her family accused a crewmember from the *Emily*, Francis Terranova, of hitting the woman with an earthen jar, which caused her death. The Americans insisted that the woman fell into the water inadvertently and Terranova had nothing to do with her death. The local magistrate of Panyu County heard the case on October 6 on the ship *Emily*, where the trial was held. According to British scholar Hosea Ballou Morse's account, the hearing was a complete sham:

He [the local magistrate of Panyu County] asked the Americans what defense they intended to put forward, and they delivered their defense as follows: "Our evidence can prove, that the Jar which is said to be the instrument that caused the death of the woman, was safely delivered by the accused into her hands, and that she fell overboard at the distance of thirty feet and upwards from the ship *Emily*, that she was seen from on board the *Hero of Malown* (an English ship laying near the *Emily*) to fall overboard whilst in the act of sculling her boat, that no jar or any such instrument was thrown at her, or caused her falling into the water, that

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from the relative situation of the boat to the ship, it was impossible to strike the woman on the side of the head on which the wound was inflicted, and that the jar could not have cut the hat in the manner in which it was cut—We declared as our belief, that the boat, having been swept by the strength of the tide some distance from the ship, the woman in her anxiety to regain her station had by a misstep fallen overboard and in the act had struck her head against the pivot on which the scull moves, or the sharp edge of the boat which caused her death.¹

Then prosecution witnesses delivered testimonies, which, in the eyes of the defense, were either self-contradictory or not indicative of what had really happened at the incident site at all. However, “the magistrate denied any argument for the defense . . . claiming that having seen the corpse of the woman and the earthen jar with his own eyes, he was convinced that the accused was guilty and that even if his judgment erred, it was the mandate of Heaven. He stood up from his seat in great rage. The trial seemed to have already been brought to an end.”²

To the astonishment and dismay of the foreigners, the local officials of Guangdong had the accused executed by strangulation within forty-eight hours without waiting for the final decree of the emperor. Moreover, “the report submitted to the emperor contained distorted information on the evidence and adjudication.”³

The *Emily* incident was concluded quickly, but the clash of legal systems and legal concepts between China and the West in their early interactions became a very difficult, ongoing problem.⁴ Although Western powers' colonialist policies were responsible for the modern military conflicts between the West and China, one must admit that if China's legal and justice system had not been so unreasonable either in concept or actual practice, many disputes would have been resolved fairly without resulting in war.⁵ However, it was China's failure in said war and the subsequent Western oppression that naturally led many Chinese to question the traditional legal system—in particular, to reflect on the judicial system as well as on the reform of law and the judiciary.

With its long history and advanced civilization, China is proud of its tradition of written law. According to the famous Japanese legal scholar Shiga Shuzo, the Chinese legal system achieved great accomplishments over the course of its development.⁶ Why then did Westerners become increasingly intolerant toward China's legal system and its enforcement in the early modern era? What exactly was the classical judicial system in China?

It is necessary to review the basic structure of the old judicial system as it provides context for its evolution in this century. In light of the theme and limited length of this chapter, I will only focus on the most basic characteristics in general terms.

Old Tradition

China's classical judicial system developed gradually through a long process of historical evolution, along with its political, economic, and other social systems. It also shared the same axiological implications with the other systems. With the recognition that judicial function is an essential part of government, the importance of the judicial system in China's traditional government structure was unique in the world. Therefore the main characteristics of this judicial system can be summarized by examining the relationship between the structure of government and society.

The government structure of ancient China can be divided into two levels: the central government and subnational governments. At the higher level, the central government included the "three departments" (the Department of State Affairs, the Chancellery, and the Secretariat) and the "six ministries," among which the Ministry of Punishment (*xingbu*), the Censorate (*duchayuan*), and the Court of Judicial Review (*dalisi*) were more concerned with law. Of course, the emperor was always the paramount authority when legal disputes or other issues were involved. But as far as the everyday life of ordinary people was concerned, the central government, or even government at the provincial level, was not that important. When disputes arose among people concerning reasons or amounts that were not significant enough and that failed to be solved privately, or when misdemeanors were involved, they would turn to the county government for help.

County officials were at the end of the power network by which the whole country was ruled. These officials were appointed by the central government and were responsible for collecting taxes, maintaining social order, and resolving disputes. Included in those functions was what we would today call the judiciary, which was very important at that time.

Much research has been done on the traditional judicial function of local officials.⁷ But here I want to explore the characteristics of this judicial tradition and its potential influence on today's society from another perspective—one that emphasizes the impact of the social systems and sociological factors on the actual work of the judicial system, as well as on the relationship between knowledge and power.

CONCENTRATION RATHER THAN SEPARATION OF POWERS

The most distinctive structural characteristic of the traditional Chinese local government was that there was no arrangement whatsoever for the separation of powers. The county magistrate had comprehensive responsibilities. The three basic governmental functions, namely, the enacting of rules (legislature), the execution of rules (administration), and the resolving of disputes (judiciary), which are taken for granted today, rested entirely with the magistrate alone. Although he was subject to the supervision of higher government, within the local government, he held absolute power and was beyond the supervision and check of any entity. All others working inside the government served as the magistrate's consultants or assistants and had no authority at all to check the magistrate's power. It was because of this fact that Wang Huizu, a famous consultant in the Qing dynasty, remarked, "Among the existing powers, except for that of province governors, the most important one is that of county magistrates. . . . Why? They have concentrated powers."⁸

The concentration of power was obvious in the judicial process. According to Ch'u Tongtsu's description, "[the] magistrate heard all cases under his jurisdiction, civil as well as criminal. And he was more than a judge. He not only conducted hearings and made decisions; he also conducted investigations and inquests, and detected criminals. In modern terms, his duties combined those of judge, prosecutor, police chief, and coroner, comprising everything relating to the administration of justice in its broadest sense, and the failure to carry out any of these duties incurred disciplinary actions and punishments, as defined in the many laws and regulations."⁹

To people today who have read Montesquieu's works and firmly believe in the value of separation of powers, and who hold the view that "power tends to corrupt, and absolute power corrupts absolutely," the government model from the past with its highly concentrated powers is most frightening. Indeed, there exist countless examples in the traditional politics of China that testify to the various defects of this despotism. But there is no system that is without at least some advantage. The highly concentrated powers in the county governments helped improve efficiency. Without other parallel powers to those of the magistrate, without an independent judiciary, a corrupt official could pervert the law and exploit the people at his will, but an upright and incorruptible official could also give full play to his administrative talents without any impediment. From the perspective of "rule by man," unity in government often made it difficult for people to gain rights to which they were entitled because there was nowhere to turn other than to this sole government. But on the other hand, the costs to people of dealing with the

government (including bribery costs) remained low because of the uncomplicated nature of government, and they were spared the trouble of coming to terms with the blinding array of government agencies that people today have to face. In addition, in a society with agriculture as its leading pillar, the simplicity of this government also helped reduce the number of officials and thus avoided imposing on people's livelihoods through high taxes.¹⁰

Of course, from the perspective of establishing a modern judicial system, the most significant impact of this traditional model of a highly centralized government is that it prevented the knowledge and development of judicial independence. It did not even provide a context for this principle. Although there have always been so-called upright and incorruptible officials and strong expectations of fair and honest judges, those were moral requirements of officials and quite apart from the notion of judicial independence.

RULE OF KNOWLEDGE

Still, the lack of institutionalized checks on this kind of government causes significant concern for modern observers. How could powerful county officials not become dictators? In fact, the traditional selection process for county officials contributed to important restrictions on the use of powers by these officials.

The Imperial Civil Service Examination system (*keju kaoshi*) had a significant influence on the traditional political and legal system.¹¹ It meant, first of all, equality. Gaining political powers was no longer solely decided by blood or status. There were, at least in a formal way, more equal opportunities open to people of obscure birth to compete for political positions. Furthermore, the standard for this competition was not physical ability, but *literae humaniores* based on Confucianism. Although it became rigid over time, the widespread use of Imperial Civil Service Examinations resulted in the administration of social affairs by the intelligentsia. In order to prepare for the exams, people needed to become extremely familiar with the ancient classical works and explanations of those works by Confucian masters of the past. Examinees were required to give persuasive explanations of some views themselves. Thus the process of preparing for the exams was also a process of Confucianization. The political philosophy of Confucianism and related theories became deeply etched in the minds of prospective county officials and constituted a potentially effective check on the use of power in the future.

It should also be noted that the combination of the above two features guaranteed the authority and legitimacy of the traditional government. Because the possibility of becoming an official was open to anyone, unfairness

deriving from selection standards based on status or blood disappeared.¹² Even people who failed could only criticize themselves for not being capable enough and admire or envy those who succeeded. As a result, this equality made reasonable the differences between the rulers and those being ruled and reinforced people's obedience to their rulers.

RULE OF UNSPECIALIZED KNOWLEDGE

Although the imperial examinations represented the traditional model of rule, with the knowledgeable ruling the ignorant, they did not promote the division and specialization of knowledge but rather impeded it by narrowly emphasizing the Confucian standards and poetic techniques. As Max Weber pointed out, "The educational qualification, however, in view of the educational means employed, has been a 'cultural' qualification, in the sense of a general education. It was of similar, yet of a more specific nature than, for instance, the *humanist* educational qualification of the Occident. . . . The Chinese examinations did not test any special skills, as do our modern rational and bureaucratic examination regulations for jurists, medical doctors, or technicians. . . . The examinations of China tested whether or not the candidate's mind was thoroughly steeped in literature and whether or not he possessed the ways of thought suitable to a cultured man and resulting from cultivation in literature."¹³ Though people who succeeded in those exams were involved in the judgment and resolution of disputes, because of the singleness of their knowledge and background, the officials' judicial activities were not able to contribute to the growth and development of independent and specialized legal knowledge.¹⁴

In fact, the traditional Chinese legal concept was a direct result of a judicial process dominated by laymen. In Western history, the independence of legal professionals as a group originated with and was connected to the restrictions inherent to the accessibility of the profession, based on the pursuit of profits. In fact, a profession could not obtain broad social resources without the establishment of a so-called abstract expertise system. Judges apply strict legal procedures to their assigned cases and make decisions without interference. Those decisions become unshakable once they obtain procedural validity. All of those principles are taken for granted in the West.

But in China, the judges were not lawyers, and they usually did not specialize in law. When they dealt with disputes and cases—mostly what we would label as civil cases today—there was no certainty of law. What they were applying was a combination of law, ethical standards, and the community's customs. As the origin of modern law, this provided no clear boundaries

between the different sources of this mixed body of rules. When local officials handled cases, they were not able to apply different legal rules and sources as the judges do today. At the same time, because of their training for the imperial examinations, in order to support certain decisions in a case, they always relied on resources from the teachings of Confucianism or historical works, which had no legal implications. When the records of some of the “famous trials” are seen from today’s point of view, they are more valuable as literary or rhetorical references than legal documents.¹⁵

JUDICIAL PROCEEDINGS WITHOUT ADVERSITY

The lack of involvement of lawyers in legal proceedings further reinforced the uncertainty of rules, which had been established by county magistrates rather than by lawyers. Even though dialecticians, such as Deng Xi and Gongsun Long, had appeared in court representing petitioners from very early times, Confucianism and Taoism adopted a negative attitude toward them. They were considered to know only logic but not right or wrong, and thus posed a threat to the social order. The joint influence of Confucianism and Taoism inhibited the development of logic as a discipline throughout China’s two thousand years of history.¹⁶ According to Chinese American historian Tang Degang, it was this different legal concept that created the sharp contrast in the development of logic between China and the West.¹⁷

Of course, there always existed the profession of the pettifogger. Although pettifoggers have always been despised by the government, according to the research of the Japanese scholar Fuma Susumu, pettifoggers became more active during the thousand-year period between the Song dynasty and the Qing dynasty. Based on abundant research, Professor Fuma concluded that they existed against all odds, within the loopholes of the judicial system.¹⁸ They met both their clients’ needs and shared interests with government officials. However, the work of advocates then was quite different from that of lawyers today. For example, they could not represent clients and argue in court. Almost all of their work was done outside the court. As a result, the claims of parties could not be developed into an exploration of legal theory. Rules of evidence could not be created without the participation of lawyers. Neutrality and passive jurisdiction amid professional confrontation were not possible either. As a result, officials in local government played a dominant role in the proceedings. At the same time, even though the pettifoggers did survive as a profession, their exclusion from the social mainstream, in addition to the fact that most pettifoggers were people who had failed the imperial exams, made them a powerless group that lacked support from legitimate

sources. This humble class's influence on social affairs was further impaired by the lack of a guild, which usually establishes a set of professional guidelines to gain wide support for the conduct of business activities. During the process of constructing a modern legal system and structure, people repeatedly confronted the problem of lack of legal professionals.

In sum, this review of China's old government structure and the operations of its judicial system indicates that some of its characteristics still exist today and might be a potential impediment to the process of creating a new legal system in China. To some degree, the evolution of a modern judicial system in China was the outcome of both a collision between and a fusion of traditions and foreign knowledge, which occurred in connection with changes in China's social structure and social life.

After the mid-eighteenth century, despite China's increasing contact with the West and the constant legal clashes during the process, the Chinese were not particularly interested in the legal system of Western nations. Even missionaries to China seldom made efforts to introduce their law. This was partly because the Chinese people were traditionally more interested in knowing about things they already had, and partly because the deeply held beliefs of the Middle Kingdom made it difficult to acknowledge any superiority of the "barbarians." As a result, when the Western powers arrived with guns in the nineteenth century, the Chinese were equipped to confront them only with disdain, an underdeveloped social structure, and an army that was incapable of confronting foreign powers due to its poor management system.

Under such pressure from the outside, China's legal system began to change. Because of this, the Chinese first had to make superficial alterations. For example, without the pressure from the West, especially the tremendous impact of the Western invasion of Beijing after the Boxer Rebellion and the Eight-Nation Alliance, the Qing dynasty would not have made fundamental changes to its traditional legal and judicial systems, which had been in place for more than two thousand years. But Western influence made it increasingly evident that the traditional legal system was not effective enough to retain control of such a large country with a growing population. Some progressive thinking asserted that changing the legal system was the only way for China to survive.

Experimentation in the Separation of Powers in Modern China

The defects of China's traditional governance model had been fully exposed by the time of the Qing dynasty. Under the absolute monarchy of the emperor, there was naturally no separation of powers. In addition, the system

was beset by many other flaws, such as an outdated bureaucratic establishment and temporary organizations (such as the unofficial Grand Council [*junjichu*]) coexisting with and encroaching upon the authority of official organizations. To prevent any potential threat from any single powerful official, each administrative organization had at least two heads, and one official could hold multiple posts in different organizations, resulting in confusion, low efficiency, and a lack of responsibility. This mechanism also existed for official posts outside the imperial court, such as between the governor-general and the provincial governor. High-ranking officials often did not have the specialized knowledge required for performing their duties, and many responsibilities were given to petty officials who, with a meager salary, often resorted to all sorts of malpractice, which damaged the government's image among the people.

This government structure had been criticized by scholars as early as the late nineteenth century. In 1865, for example, the Englishman Robert Hart observed that although the Chinese system was formulated with considerable prudence, the system had become too worn-out to be effective. The local officials were mostly corruptible and self-indulgent, and officials in the capital were overburdened with often overlapping responsibilities. He also held that good scholars did not always make good officials as they often lacked knowledge of practical matters. He predicted that if these defects could not be remedied, it would be difficult for the government to rise to new challenges.¹⁹

Conversely, some Chinese acquainted with the political and legal system in the West expressed their appreciation of the system. In 1877 Ma Jianzhong sent a letter to Li Hongzhang from Europe:

I have been in Europe for more than one year. When I first came here, I thought the rich and powerful European nations were only concerned with developing their manufacturing capacity and military strength. Later, as I review their legal codes and literature, I have come to realize that their richness lies in their protection of businesses and their power stems from their national solidarity. . . . Their schools bring up a great number of talents, and their parliaments have a good knowledge of the concerns of the ordinary people. Their manufacturing and military strengths are merely the natural results of these factors.²⁰

In his letter, Ma Jianzhong explicitly expressed his commendation and admiration of the separation of powers and the independence of the judiciary in the West. "With the separation of the executive, legislative and judiciary powers rather than concentration and mutual interference, their national

affairs are handled in great order . . . everyone may take initiative and so has more self-esteem."²¹

During the Hundred Days' Reform (*wuxu bianfa*), the reformists gave more straightforward criticism of the country's traditional government structure.²² Kang Youwei, for example, presented a lengthy memorial to the emperor calling attention to the shortcomings of the existing government organization.²³ According to Kang, it had become imperative to initiate government reform at both the central and local levels. He pointed out the main structural problem of the central government: "The six ministers are inundated with myriad affairs while petty officials, great in number, have no clearly defined responsibilities. At the imperial court session every day, the officials simply stand by waiting for orders. . . . Petty officials are neither assigned to a specific duty nor hold their positions on a part-time basis. . . . Facing such a messy state of things, even a sage will be at his wit's end." Concerning the prefecture and county-level governments, the problem is that "one official is put in charge of military, judicial and cultural affairs so that it is simply impossible for him to attend to them all." As a result, officials were primarily concerned with preserving themselves rather than serving the people. Even worse, bribery and the sale of official positions were commonplace.²⁴ In the memorial presented to the emperor, Kang Youwei proposed that the bureaucratic system should be reformed so that every official has clearly defined responsibilities and authority, that the practice of one official holding multiple posts be changed, and that efficiency of local governments be improved by, for example, canceling superfluous government positions. By 1898 he advocated an even more radical proposal to overhaul the existing government system and put in place a new government structure with separation of powers like that in the West.²⁵

The Hundred Days' Reform eventually failed, which greatly frustrated the reformists. However, seen from the perspective of China's legal evolution, this frustration was like a rest in a musical composition: the short period of quiescence after the failure was soon followed by an even greater wave of calls for reforms. At the turn of the century, when the legitimacy of the traditional government model was universally doubted and challenged, and with increasing internal and external crises, foreign concepts and knowledge had a growing impact on this time-honored land and culture. And an increasing number of people aspired to follow the developmental path of the West.²⁶ In 1901 the Qing court, pressured from within and without, had no choice but to declare the implementation of "political reform," and the measures subsequently launched embraced almost all the propositions of Kang Youwei and, in some respects, even surpassed them.²⁷

During this period, Yan Fu translated in full Montesquieu's masterpiece *The Spirit of Laws*.²⁸ As a matter of fact, long before the translation of this work advocating for the separation of powers, Yan Fu had already expressed his strong dissatisfaction with China's classical legal system and attached great importance to the role a sound legal system can play in bringing about social change. He once recalled a conversation with Guo Songtao, the Qing's ambassador to England: "During my visit to Europe, I once attended court hearings and when I came back, I felt at a loss. On one occasion, I said to Mr. Guo Songtao that of the many reasons that make England and other European nations rich and strong, the most important one is the guarantee of justice. And my view was shared by Mr. Guo."²⁹ In addition, Yan Fu also held that the assertion that China was too populous to implement democracy was wrong.³⁰ In comparison with the specious viewpoint later aired by Sun Yat-sen that "the freedom enjoyed by the Chinese is not too little, but too much," Yan Fu clearly pointed out that although "forgiveness" was advocated in China, there was no freedom here in the Western sense of the word.³¹ He was of the firm conviction that a prosperous and strong China should rely on civic-minded citizens, the safeguard of civil rights, local autonomy, and national intelligence.³²

It merits noting that, while advocating such values as democracy and freedom, Yan Fu often mentioned the absence of specific governance techniques in China. "From the three dynasties of the Xia, Shang and Zhou onward, an untold number of people, from emperors and high-ranking officials to masters and scholars, who have set their minds on ordaining conscience for Heaven and Earth, securing life and fortune of the people, continuing lost teachings for past sages and establishing peace for all future generations, but as far as specific techniques for achieving these goals are concerned, in the span of more than 4,000 years of an endless cycle of conflict and peace, there has almost been no progress at all."³³ He advocated for the division of labor and believed that good governance lies in the technical competence of bureaucrats: "The matters of legislation and diplomacy are not things every man is capable of. With the advancement of civilization, the division of labor becomes more specialized. To govern a country well, like in a business, one must have the proper aptitude and receive proper education."³⁴ He held that the neglect of specific techniques in ancient China had much to do with the convergence and concentration of talents in the officialdom due to the Imperial Civil Service Examination system.

If the spirit of equality prevails in a country, then all professions only represent a division of labor and are equally indispensable, and there is

no differentiating between the respectable and the humble. And people may have varying attainments in what they do but are equal as individuals. Everyone does their best in their own trades and then all matters will be well attended. In China, however, due to its excessive emphasis on civil accomplishment, all talents across the country are concentrated in the officialdom, so that those who are intelligent and able disdain to engage in practical trades, and even if they find themselves in such trades due to circumstances, they find no delight in engaging in the business for a whole life.³⁵

In addition to translating *The Spirit of Laws*, Yan Fu also wrote articles especially discussing the separation of powers and expounding on the principles of judicial independence.

Due to the introduction of the principle of separation of powers to China and the criticisms of China's existing governmental structure, by the early twentieth century the idea of the separation of powers had moved from private discussion into official discourse. On the sixteenth day of the ninth month of the thirty-second year of the reign of Guangxu (November 2, 1906), the commissioner of reorganizing the governmental system presented a memorial to the emperor on reorganizing the ministries of the central government:

The government system of constitutional countries features primarily the separation of powers of the executive, legislative and judicial branches, where they are complementary to and are checked by each other, with an excellent design and exceptional effectiveness. This provides an ideal example of how old problems are rectified and accountability is established, as instructed by his majesty. In the case of China, methinks that there are three reasons for the difficulty of rectifying longstanding problems and establishing accountability, as follows:

The first is the indiscrimination of responsibilities and authorities. The officials in charge of both administration and legislation tend to make unfair laws out of the needs of administration without consulting public opinion. Those in charge of both administration and the judiciary tend to change laws out of their own prejudices. And those in charge of both legislation and judiciary tend to take advantage of it and make draconian laws, departing from laws' basic purpose of safeguarding the rights of the people. . . .

The second is the lack of clarity of officials' duties. For government to be effective, responsibilities should be clearly divided, and for decisions

to be effective, accountability should be established. But as it is today, one government department often has six heads, which means that six persons hold one position, and it can be sure that half of them are redundant. Likewise, one official often holds positions in different government departments, which means that one person holds multiple positions, and it can be sure that such a person must be wanting in real expertise. Multiple persons holding one position has the disadvantage of dawdling in work while one person holding multiple positions has the disadvantage of neglecting duties. As a result, the worthy are restrained from doing the right things, and the unworthy are contented with passing the buck. . . .

The third is official titles not matching their duties. The Ministry of Personnel is given the duty of appointing personnel, yet does not have the power of evaluate personnel, and the Ministry of Revenue is responsible for finance, yet does not have the power of statistics.³⁶

Although the separation of powers was discussed only from the perspective of reorganizing the governmental system, and the Qing court did not seem to really intend to push the mechanism, it was exactly at that time that China formally bid goodbye to the traditional government model and embarked on the path of Westernization. Indeed, both the five-power constitution model adopted by the Republic of China and the “one-government, two-branch” model (under the People’s Congress) adopted by the People’s Republic of China were nothing but variations of the separation of powers of the West and retained its basic framework.

The Tortuous Path of Judicial Independence in Modern China

Judicial independence is an inherent requirement of the principle of separation of powers. It is true, as clearly shown in the analysis of China’s old tradition of government, that the absence of a tradition of separation of powers is an important reason for the lack of judicial independence in ancient China. But seen from a sociological perspective, there is another reason for it: that is, an independent legal profession and the resulting legal scholarship and knowledge tradition had never emerged here. More broadly speaking, in the absence of a social environment and social resources safeguarding judicial independence, the concept of judicial independence is bound to be nothing but a hollow-sounding theory advocated by the minority. Even if it is enshrined in the official discourse, it is still no more than lip service without substance.

FORCED SEPARATION OF POWERS

In modern China, the principle of judicial independence was, from the very beginning, something forced upon it by the outside world. As discussed earlier, with the increase in contact and legal conflicts between China and the West, foreigners were increasingly dissatisfied with China's laws and legal system. Therefore, in the Treaty of Nanjing and the Treaty of the Bogue signed after the Opium Wars, provisions were made not only for the cession of Hong Kong, the opening of ports, and tariff agreements, but also for the exclusive application of British laws and courts to British citizens in China, that is, consular jurisdiction. This last provision was not perceived by the Chinese at the time to be of any significance at all. "In the eyes of people during the reign of the Daoguang emperor, it was only natural that foreigners should be governed by their own laws. They saw it as the most convenient and straightforward way of handling things."³⁷ However, concurrent with the conflicts between Western powers and China was the dissemination of Western concepts of the national state and sovereignty, and under the influence of these concepts, consular jurisdiction began to be seen as a disgrace to the state and nation. After the Boxer Rebellion, there was a rising demand within China for changes in the existing laws and legal system in imitation of the Western model, and consular jurisdiction, while safeguarding the interests of Westerners in China, intensified the conflict between China and the West.³⁸ With this backdrop, in the Renewed Treaty of Commerce and Navigation between Britain and China signed in the twenty-seventh year of the reign of the Guangxu emperor (1901), there was a special provision that read: "China shall commit itself to aligning its legal system to other countries, an endeavor for which Britain agrees to give all necessary assistance, and Britain agrees to abandon its consular jurisdiction in China when China's laws and adjudication practices are soundly established."³⁹ It was only then that China began to reform its legal system officially.

This reform, largely initiated under external pressure, had its intrinsic flaws. For example, whether the government, the primary actor behind the reform, was sincere about the cause was open to debate.⁴⁰ There were other factors seriously affecting the reform process, such as disagreement among officials with different views, difficulty in coordinating among different government departments, and increasingly intense conflicts between the ethnic minority Manchu and the ethnic majority Han Chinese. Above all, because this reform had a strong utilitarian orientation, decisionmakers seldom considered the reform's far-reaching effects and the basic elements required for

the formation and administration of the new legal system, contenting themselves with a perfunctory reproduction of the Western system.

In the ninth month of the thirty-second year of the reign of Guangxu, the Qing court ordered that “the Ministry of Punishment be changed to the Ministry of Justice in charge of the judiciary and the Court of Judicial Review to the Supreme Court in charge of trials.”⁴¹ This order immediately triggered much talk about a series of issues, such as how the power was to be divided between the Ministry of Justice and the Supreme Court, how to determine the qualifications of judicial officials, how to coordinate between the old system and the new system, and what model all levels of local governments were to follow to ensure judicial independence. Among the memorials submitted to the emperor on the those issues, one memorial entitled “Proposal on Strict Separation of Government Administration and the Judiciary,” submitted by Imperial Censor Wu Fang, showed remarkable insight and deserves some space for discussion here.⁴²

Unlike most officials, who primarily concerned themselves with the establishment of the cabinet system of government and the legislative body, Wu Fang held that given the circumstances at the time, the separation of the legislature and the executive could not be achieved any time soon, but overall, judicial independence was practical and feasible.⁴³ Besides, according to Wu Fang, judicial independence was completely feasible not only at the level of the central government but also at the level of local government, refuting the view that China should not hurry to introduce judicial independence:

It is generally agreed among men of broad vision at home and abroad that an independent judiciary is the kernel of our present endeavor toward a constitutional government, and they are all looking forward with great anticipation to the establishment of the judicial system. Efforts in this direction, however, have been obstructed by some buttoned-down officials accustomed to the old ways and resisting new things with misleading half truths. Their arguments, in summary, consist of no more than three points: 1), the nationals are not well educated enough for the system; 2), the talents in legal affairs are inadequate; and 3), the power of executive officials will be eroded. The view that the Chinese people are not suitable to be judged by an independent court is simply nonsensical because even within the foreign concessions, consular jurisdiction applies to all people including Chinese, and no objection has ever been raised against the application to Chinese on the grounds of their legal illiteracy.

It pains my heart to think that while the Chinese are entitled to fair trials and due process in foreign concessions, they are denied the right by their own government. As for the argument pointing at our inadequacy of talents in adjudication, it is seemingly right but actually wrong, because, although government officials were only responsible for administration of civil examinations, labor and taxation and were not necessarily acquainted with adjudication, when they took the office of an executive position, they were at ease in handling adjudication matters. Now if the executive and the judiciary are separated, so that officials are enabled to devote themselves completely to one duty and do it well rather than being distracted by two different duties at the same time and resulting in poor performance as was the case in the past, and the poor performance was not due to lack of intelligence but to the fact that the officials were overburdened. This should not be taken as an argument for China's lack of talents. At last, the view that the separation of powers will lead to the erosion of authorities enjoyed by officials in the past is particularly one-sided, because officials' authorities are given by the state and they are respected and revered even if they do not adjudicate on cases in person. If behind the view is the fear that with the establishment of the new system they would not be able to resort to intimidation and brutal force for private gains as they could in the past, such officials would not be tolerated in this sagacious dynasty. Your humble servant observes that there was no separation between the executive and the judiciary in the West in the ancient times and it came about only when their legal system developed to a certain stage.

With the separation between the two governmental bodies, the executive officials can devote themselves completely to the administration of the government without any occurrence of abuse of power, and the judges can devote themselves completely to safeguarding the lawful rights of the citizens through fair trials. If an independent judiciary interfered with the performance of duties of executive officials, Western countries would not have abandoned their old practices and embraced the separation of powers. If the combination of executive and judicial powers does not threaten the long-term stability and prosperity of our country, it is well to keep it for a while for gradual change, but the fact is that, given the development of world affairs and the grievances and hardships suffered by the ordinary people, we have come to a point where our country's stability and prosperity will be put in jeopardy if

the judicial independence is not institutionalized immediately without delay. Your humble servant prays Her Majesty the Empress Dowager and His Majesty the Emperor to consider this.⁴⁴

Wu Fang not only forcefully demonstrated the importance of judicial independence for the elimination of consular jurisdiction but also explicitly analyzed its great significance in internal affairs:

It is my observation that civil disorders in history have mostly had two causes, the first being heavy exploitation and taxation and the second being unfairness in adjudication. . . . The independent judiciary in Western countries was established as a countermeasure against the arbitrariness of executive officials, and over some one hundred years since then, has contributed to the civil harmony, prosperity and national strength of these countries. In the case of China, however, adjudication has always been in the charge of prefectural and county heads and executed by their secretaries, leading to all kinds of malpractice and dishonest dealings and bringing great suffering to ordinary people as well as giving rise to various factors threatening national stability, so that a mechanism meant to have justice done ends up estranging the people from the government. The primary reason for this is that prefectural and county heads are full of various duties where they need to attend to both government administration and civil and criminal trials and as a result, the worthy of them are exhausted and the unworthy of them become unscrupulous. What's more, competent adjudication requires great familiarity with laws and with the details and particulars of each case, something it is impossible for executive official to accomplish given their already crowded agendas. However, if an independent judiciary is established so that the executive officials concern themselves exclusively with government administration and judges with adjudication, then all ills will be removed.⁴⁵

This argument for judicial independence is so cogent and powerful that it still speaks to today's readers. Regrettably, arguments like this were uttered too late, and no more than five years later, the Qing dynasty collapsed. The time allowed to the decisionmakers was too little to implement a reform of such magnitude in such a vast country. Besides, there was little accumulation of knowledge concerning institutional development at that time. Just as Wu Fang said, "adjudication requires great familiarity with laws," but when it came to specific questions, such as in what aspects the responsibilities of the

judiciary differ from those of the executive and what institutional arrangements should be made, very little thought had been devoted to them. The impact of court ministers' memorials and the emperor's decrees on society was also open to question.

Regarding private discourse, I mentioned earlier the famous translator Yan Fu's exposition on the separation of powers. In fact, he also expressed a number of insightful opinions on judicial independence. For example, in the preface to his translation of Adam Smith's *The Wealth of Nations* (published during 1901–02), he made special mention of the unique features of the Western judicial system:

The biggest difference between China and the West in the institutional framework of government, without doubt, lies in law. The legal system of the West has its origin in Greek and Roman antiquity and has evolved and undergone great changes over a long period of time before reaching its present state. In summary, it has eight unique features. The first is the study of law as a specialized discipline. The second is the legal profession. The third is the jury system. The fourth is the legislature controlling the enactment and revocation of laws. The fifth is that the salary of public servants is being provided by citizens. The sixth is public justice being classified into the two kinds: civil and criminal. The seventh is that judges determine the conviction of the accused. And the eighth is that judges are all very well paid. These are only the major differences. With these features, Western countries safeguard the integrity of their legal system and ensure justice.⁴⁶

In a note appended to his translation of *The Spirit of Laws* by Montesquieu, Yan Fu further explained the principle of judicial independence to his countrymen:

In China, adjudicators are servants of the emperor. The justice and judiciary bodies are established only as agents of the emperor. That's why verdicts issued by the Ministry of Justice are subject to the approval of the emperor who is also responsible for rehearing provincial cases of capital punishment. All of these policies are diametrically different from the practices in Europe. Laws are regarded as supreme in Anglo countries and do not yield to any other power. Each law is formulated in accordance with the Constitution, and upon enactment, does not allow any change to it, not even a single word of it.⁴⁷

The above observation was indeed brilliant, but the reform undertaken by the Qing court in this direction was too late to save itself from ultimate collapse.

After the Qing dynasty was replaced by the Republic of China, the mission of judicial reform was left to the builders of the new republic.

JUDICIAL INDEPENDENCE DURING THE BEIYANG GOVERNMENT PERIOD

This was an age of radical change. With the overthrow of the feudal monarchy and the establishment of a republic, people were stirred by elation and hope, eager to build a brand-new modern nation after the previous chaos and revolutions. The Provisional Constitution of the Republic of China, promulgated in the first year of the Republic of China, offered a portrait of the new country. It would be a country where citizens are entitled to a series of political and legal rights, with a parliament representing public opinion and exercising the power of legislation, and a president elected, empowered by, and responsible to the parliament. Concerning the judiciary, the constitution had the following provisions: "The judiciary shall be composed of those judges appointed by the Provisional President and the Chief of the Department of Justice"; "Judges shall be independent and shall not be subject to the interference of higher officials"; and "Judges during their continuance in office shall not have their emoluments decreased and shall not be transferred to other offices, nor shall they be removed from office except when they are convicted of crimes, or of offenses punishable according to law by removal from office."⁴⁸ These provisions, with their high degree of explicitness and rigor, were the most thorough among all provisions concerning judicial independence adopted in China in the twentieth century.

Unfortunately, the Beiyang era in which the well-ordered constitution was formulated was an age beset by political chaos. On the one hand, the political stage was a complete mess with warlords manipulating the government, elections and appointments dominated by blatant fractional struggles, and money and private relationships playing an important role; on the other hand, the constitution was approached with an idealistic attitude intolerant of any concession and compromise. "Chinese expectations for the probity of politicians in a constitutional order were probably unrealistically high. Normal political compromises were seen as betrayals, tactical shifts as evidence of lack of principle."⁴⁹ Ultimately, "the Constitution failed to check conflicts and lead to solidarity as the broad mass of the Chinese people expected . . . the constitutional system exhausted its own vitality through its members' absorption in factional struggles."⁵⁰

When it comes to the judicial system in this period, however, there was a somewhat different state of things. Shen Jiaben and Wu Tingfang, both important officials in charge of judicial reform in the late Qing dynasty,

retained important roles in the establishment of a new legal system after the Revolution of 1911 (Xinhai Revolution).⁵¹ Shen Jiaben was reputed to be a “matchmaker between Chinese and Western laws,” while Wu Tingfang was the first Chinese to receive a complete legal education in the West and the first ethnically Chinese barrister in history.⁵² Since 1902 they had been given the important task of reforming the country’s legal system. From their positions in the new government, they introduced many changes to the traditional legal system by abolishing various cruel punishments, prohibiting the use of torture in interrogations, drafting a civil procedure law, translating foreign legal works, and establishing legal schools for developing specialized talents, which laid a good foundation for legal development in the Republic of China period.⁵³ After the Revolution of 1911, Wu Tingfang served briefly as the chief of the Department of Justice for the Nanjing Provisional Government, but due to the short duration of the provisional government, he did not make a far-reaching contribution to the development of the legal system in this position. Even so, he published a work entitled “Preliminary Suggestions on the Governance of the Republic of China” (*Zhonghua minguo tuzhi chuyi*) in 1915, and in two chapters arguing for the importance of the judicial system, he cogently and poignantly aired his views on the subject:

As the Western saying goes, to determine whether a country is civilized, one should check whether its judiciary is independent and whether its law enforcement is strict and impartial. The idea underlying this saying is that the judiciary is the central pillar on which the whole country’s governance rests rather than something superficial. China’s legal system, in contrast, has always been foreign to the concept of judicial independence, and for more than two thousand years, the three powers of legislation, administration and judiciary had been controlled by a single person from the central government down to local governments. . . . This diametrical difference between Chinese and Western laws used to give rise to a lot of conflicts between China and the West, especially in international affairs. And China’s legal system was slighted due to its administrative officials’ interference with the judiciary.⁵⁴

Wu emphasized, in particular, that the key to judicial independence is “the judge being given exclusive and unchallengeable rights to adjudication . . . the judge is the representative of the law and the judicial power shall not be interfered by the monarch or president. A verdict, once issued, cannot be set aside unless referred to a competent judicial organ at a higher level and reheard by duly authorized judges.”⁵⁵

As a matter of fact, the judiciary enjoyed a higher degree of independence during the Beiyang government period than in the Nanjing Nationalist government period. Take the relationship between the judiciary and political parties, for example. There was an act governing the organization of courts that banned any judge from joining any political party or organization or from being elected to any national or local congress. In December 1912, the Department of Justice issued an order requiring all judges who had joined any political party to declare their withdrawal from their party.⁵⁶ In March of the following year, the Department of Justice in a reply to a report from Guangxi Province ordered the Higher Court of Guangxi Province to ensure the removal of all judges from their political affiliation.⁵⁷ In the meantime, it announced a list of judges serving on the Supreme Court, the Higher Court in the capital, and local courts, showing that they either had no political affiliation or had withdrawn from their parties.⁵⁸ By 1915 the ban on political affiliation was extended to county magistrates in charge of judicial affairs.⁵⁹

Judicial independence during the Beiyang government period was also reflected in the application of the challenge system. In 1915 the Department of Justice issued an order banning all judges, prosecutors, and lawyers who served as clerks at courts and procuratorates from engaging in the legal profession within three years after their departure from their offices. This ban was not revoked until 1927.⁶⁰

It should be admitted that the banning of judges from political affiliation during the Yuan Shikai administration had the obvious political motive of constraining the political and legal influence of the Kuomintang and the Republican Party.⁶¹ In spite of its expedient nature, this regulation, if adhered to perennially, would still likely become a fixed, effective system. Indeed, such cases abound historically both in China and foreign countries. Besides, political calculation is only one among many possible reasons for the creation of the regulation, including people's enthusiasm for the newly introduced judicial system and the reasonable guidance of institutional development from the chiefs of the Department of Justice, who almost all had received excellent legal education.⁶² Extra efforts were made to accelerate the abolition of consular jurisdiction in China and ensure the high professional caliber of senior judges.⁶³ When commenting on national affairs in 1923, Liang Qichao, who once served as the chief of the Department of Justice, observed that the measures and policies put forth by the government since the founding of the republic had generally been unsatisfactory.⁶⁴ Relatively speaking, however, the development of the judicial system was among the few successful endeavors.⁶⁵

PARTISAN CONTROL OF THE JUDICIARY

In spite of institutional progress in judicial development, the political scene in the Beiyang government period went from bad to worse, beset by political division and wars fought among powerful warlords, so that the country was a republic only in name and a despotic state in essence. This ultimately led to the Northern Expedition in 1926 and the establishment of the Nationalist government in Nanjing in the following year, ushering in nearly a decade of relative national unity.⁶⁶ During this period, the development of the judicial system underwent a drastic shift from judicial independence and political neutrality to the subordination of the judiciary to the ruling party, that is, partial political control of the judiciary.

Xu Qian, who served as chief of the Department of Justice and chairman of the Judicial Committee of the Nationalist government in Guangzhou from August to December 1926, was the earliest advocate of partisan control of the judiciary. He graduated from the Law School of the Imperial University of Peking and, according to Zhang Guofu, had the experience of

assisting Shen Jiaben in judicial reform in the late Qing, promoting cooperation between Kuomintang and the communist party in 1924, and participating in the May Thirtieth Movement led by Li Dazhao in 1925. He also accompanied Feng Yuxiang on a visit to the Soviet Union in 1926. With this background, particularly with the influence of Li Dazhao and his Soviet visit, he came to the conclusion that the judicial system of the warlord-dominated Beiyang Government was reactionary and he therefore made the determination to reform that system.⁶⁷

With this introduction, the following remark from Xu Qian will come as no surprise: “The law under the traitorous [Beiyang] government is by its nature non-revolutionary and indeed counterrevolutionary and meant to serve the interest of the privileged bourgeoisie by suppressing ordinary people and the proletariat. . . . Since we are determined to carry out revolution, it behoves us to overthrow the counterrevolutionary law. Our revolution should be a thorough one and against not only the traitorous government but also its judiciary.”⁶⁸ Xu expressly called for demolition of the principle of judicial independence:

The old judicial concepts such as “judicial independence” and “judges without political party affiliation” are often taken for granted, but they are today among the principal obstructions to the advancement of our

party's doctrines and revolutionary spirit. The judiciary, if given independence, may go counter to our political guidelines and give rise to conflicts if revolution is advocated politically and yet prohibited judicially. Therefore, the judiciary must be subjected to politics. This new system, indeed, has materialized in the Soviet Union where not only the executive and the legislature are integrated but the judiciary is also not independent.⁶⁹

If what Xu Qian advocated represented the views of the leftist wing of the Kuomintang government, then the elaboration on partisan control of the judiciary by Ju Zheng, a founding member of the Kuomintang and the head of the Supreme Court, represented the mainstream views of the party. In an article published in 1934, he made a clarification on partisan control of the judiciary, where the concept was divided into the two aspects of "political identification of judges with the party" and "application of party doctrines to adjudication." "Political identification of judges with the party" does not mean that all judges shall be Kuomintang members; it means that "judges shall be selected from candidates with a good understanding and strict adherence to the party's doctrine. They don't have to be Kuomintang members but must identify themselves with Three Principles of the People. In a nutshell, partisan control of the judiciary is not the judiciary being staffed by party members but its being guided by the party's doctrines."⁷⁰

Departing from political expediency-based arguments, Ju Zheng attempted to rationalize partisan control of the judiciary from the perspectives of the philosophy of law and jurisprudence. He held that there is no legal principle that holds true anytime and anywhere, and those who hold such ideas are "poisoned by the eighteenth-century theories of the natural law."⁷¹ The following argument illustrates his application of Marxist concepts:

The law is a superstructure, rather than a castle in the air, which has the social structure as its base; in other words, it must fit in with the economic system. The specific modes of production and their corresponding economic systems in all eras of all societies reflect the diverse needs of people living in those eras and result in various social ideologies and world outlooks. Therefore, every society, every ethnicity and every era have their distinctive world outlooks: the world outlook is something with particular temporal and spatial coordinates. . . . The law is the embodiment of the part of the whole world outlook that concerns with the understanding of "justice."⁷²

Ju Zheng also used Hans Kelsen's pure theory of law and legal realism, which he called "two great epoch-making achievements in modern legal theory," to demonstrate the absurdity of the "old theory of separation of powers," the inseparability of legislature and judiciary, and the need to apply party doctrines to adjudication, that is, "party doctrine-based adjudication," which requires that the judge shall:

- 1) refer to party doctrines where the law does not provide for; 2) turn to party doctrines for solutions to specific problems for which the relevant provisions of the law are too abstract to be operable, and ensure that the law's provisions do not go beyond the bounds explicitly set by party doctrines; 3) invigorate the law where it is too rigid and impractical; and 4) declare the invalidity of legal provisions if they obviously contradict the actual social life and there is no other applicable legal provisions by citing specific party doctrines.⁷³

Partisan control of the judiciary was greatly advanced in the decade after 1926 when the Committee for Judicial Reform established by the Nationalist government in Guangzhou passed a resolution that not only explicitly revoked the ban on judges joining political parties but also required that all judicial officials must be Kuomintang members and have a good reputation and at least three years of experience in legal affairs.⁷⁴ The requirement of at least three years of professional experience shows that the decisionmakers did not replace professional competence completely with political loyalty. However, as seen from how this was put into practice later, political loyalty always had priority over professional competence.⁷⁵ Indeed, the government introduced a series of measures to strengthen the party's control of the judiciary. In the newly established judge training school, for example, a total of 200 candidacies were especially reserved for Kuomintang members with appropriate educational backgrounds (graduation from a legal education program of three years or more).⁷⁶ In addition, candidates recommended by the party headquarters of the Kuomintang for judicial posts enjoyed priority over other candidates.⁷⁷ And cases involving members of the Communist Party (counterrevolutionary cases) were heard by juries composed of Kuomintang members selected by local party committees of the Kuomintang.⁷⁸ These measures, among others, made the judicial system so politicized that the judiciary was almost turned into the internal affairs department of the Kuomintang.

In retrospect, partisan control of the judiciary was a deviation, or, indeed, a regression, for the past century of judicial development in China. However, it should be pointed out that partisan control of the judiciary was not only

part of the Kuomintang's endeavors toward comprehensive control of the country's social affairs but also an extension of the guideline of "using the political party to run the state" (*yi dang zhi guo*) advocated by Sun Yat-sen.⁷⁹ Given the historical conditions then, this practice was inevitable.⁸⁰

Some Comments

A review and study of history does not easily reveal specific laws to be followed by later generations in order to avoid the past's detours, because history is not a drama in which every actor from kings and heroes to ordinary people has well-defined roles and lines. In the case of the history of China in the last century, with the country torn by revolutions, wars, and changes in political regimes in the first fifty years and divided between two governments in the second fifty years, there were too many drastic changes to find in them any meaningful set patterns. It was one hundred years full of major events, during which there were a great many missed opportunities, man-made disasters, unexpected changes, tragically pursued and impossible endeavors, and conflicts of and alternations between reason and sentiment. It was a grand history jointly created by people half consciously and half unconsciously.

However, I am still of the conviction that the survey and study of history is capable of enlightening later generations. According to Benedetto Croce, "The deed of which the history is told must vibrate in the soul of the historian . . . the past fact does not answer to a past interest but to a present interest, in so far as it is unified with an interest of the present life. . . . Every true history is contemporary history."⁸¹ Besides, different narrations of the same history are also a competition of different views and a contest of wisdom. They present diversified perspectives on the same things that happened in the past and enable us to better understand where we are now and where we are going.

A survey of the legal history of modern China shows that over the last century, China has always endeavored to build itself into a modern country, but due to internal trouble and outside aggression, the establishment of a reliable legal and judicial system has proven difficult. There is a Western saying, "In times of war, the law falls silent" (*inter arma silent leges*), that provides profound insight into the nature of law.⁸² Law, per se, is a mechanism of using peaceful coercion to restrain violence among parties, but in a society constantly ravaged by wars or other intense conflicts, it is impossible for the law to effectively restrain such violence. In the meantime, the establishment and development of the legal order can also be a source of problems. Admittedly,

there is no place for legal order where there is no conflict, but for legal order to be maintained, the conflict must be kept within a reasonable limit, where parties or classes in conflict may, through mutual compromise, come up with a system of rules with which they all shall comply. In the course of time, this system may, in some aspects, become out of step with the needs of life, but even so, the attempts to update this system should not evolve into wars but be brought into fruition in the form of a new system through a new round of compromise among conflicting parties. It goes without saying that between the new and old systems there is often a relationship of aggregation and inheritance rather than abrupt rupture. This continuity of history cannot persist without the factor of time, without a reasonably long period of social stability.⁸³ To use an old Chinese maxim, "Social order and general prosperity do not come by without one hundred years of sustained efforts."

In this respect, however, how much time—that is, peaceful time without the presence of wars or intense social conflicts like the Great Cultural Revolution—have the Chinese really had to wholeheartedly develop the country's institutional system? A calculation finds that it is no more than some thirty years. Furthermore, the two periods constituting these thirty-some years were separated by a war and were characterized by different ideologies and prevailing legal theories, so that the former period could hardly serve as the foundation for the latter period's development. This is an important social reason why China's legal system has not embarked on the right path to this day.

The incompatibility, like that of putting a square peg in a round hole, is reflected not only in the different institutional systems and concepts over the past one hundred years but also, and more important, in the fact that the Chinese cannot identify a possible conjunction between today's efforts toward judicial reform and the country's older traditions. Regarding the judicial system, as shown by the earlier brief analysis of China's old judicial tradition, it is true that the old tradition contradicts some of the basic value orientations today, but this does not mean that it has no strong points worth being integrated into today's system. Take the imperial examination system, for example. In spite of its overemphasis on general erudition at the expense of specialized knowledge, the form it takes and the value assigned to knowledge-based adjustment of social relationships still show considerable rationality. The rationality of this system, however, has never been done justice, and the whole imperial examination system was abandoned in favor of the so-called masses orientation, which has led to the arbitrary selection of judges and ultimately undermined both people's trust of the judicial organs and the judicial organs'

credibility in society. To this day we are still mired in the vicious cycle of judges being denied independence in judgment on the grounds of their general incompetence in legal affairs, which in turn is attributed to their being denied independence in judgment. Consequentially, judicial independence remains unachieved, and the competence of judges remains unimproved. In China's efforts to establish a strict examination system and a more sophisticated, legal expertise-based judicial appointment system, it is advisable to draw on Japan's experience in applying the spirit of the imperial examination system to the establishment and shaping of the legal profession in modern times.⁸⁴

The departure of China's old government system from the separation of powers, as discussed earlier, still has influence in various aspects of government and society today. For instance, although China has put in place a government system divided into the people's government, the court, and the procuratorate, people inside and outside this system have difficulty getting accustomed to it. The relevant officials only pay lip service to this system while in reality they attend to matters in their own way. A county head does not truly believe that he must comply with the decisions made by an ordinary judge in legal matters, and even the judges themselves do not have the courage to go through the procedures in strict accordance with the law when handling cases concerning local government departments or individuals without giving consideration to the opinions of high officials.⁸⁵ Ordinary people are simply at a loss about how to deal with this government system. On the one hand, the government's power has penetrated deeply into grass-roots life, but on the other hand, the government, with its dizzying number of departments, has become so bureaucratic that the people do not know where to turn for solutions to their problems. Additionally, this superficial separation of powers not only fails to ensure the real independence of various branches of government but also significantly sacrifices the administrative efficiency of the old system, making ordinary people victims of bureaucratic buck-passing.

This is exactly the source of the challenges facing judicial independence. The court, as a later offshoot of the government, needs the support of social resources. However, as the logic of the internal operation of government organs does not support judicial independence, the court faces "survival" pressure, despite the independence and supreme prestige granted to it in the formal codes. The obvious result is that the court has to accept the authority of powers not recognized in law and its role therefore as a tool, and yet it must try to expand the scope of its powers at every opportunity. The expansion of

power obtained this way, however, only ends up pushing it further from independence.

The malfunction of the separation of powers system and the difficulty of achieving judicial independence in China are associated with both a lack of in-depth discussion among China's intelligentsia about the kind of judicial system to be established in the country, and with the limited dissemination of major judicial concepts among the public. From the survey of judicial independence in China over the past century, it can be readily seen that judicial knowledge was not well developed during that period; even today, some prevalent judicial concepts are ambiguous or misleading. Most prominently, there is little serious discussion in legal circles of the reasons why it is necessary for judicial powers to be separated and independent from executive powers. The boundary between these two powers should also be reflected in the criteria for appointment of personnel, the ways in which powers are exercised, institutions' internal administration models, the relationship between organs and the public, and other aspects. It is exactly due to the ignorance of the differences between the two powers in such respects that an administrative, or rather nonjudicial, model has been adopted by the courts for a long period of time.

The hierarchical system of judges is a good case in point. In this system, adopted in imitation of administrative or even military systems, judges' positions follow a hierarchy like that of administrative officials, and inside the court, judges of higher ranks enjoy institutionalized powers, such as the ability to interfere in cases heard by judges of lower rank. Although this system of domination by top-down rankings has always been taken for granted and greatly facilitates the control of court activities, the nature of this control is completely administrative and against the intrinsic requirements of the judicial profession and decisionmaking. Unlike administrative organs or the military, the activities of judges are highly case specific. The judge exercises his powers of office in the court where he makes decisions, not just in the final judgment but also in decisions concerning specific matters in the course of adjudication and in interaction with all parties concerned in the case. With the constant need to make decisions, if the judge cannot decide on relevant matters independently, the efficiency of adjudication will be directly affected. Besides, judicial decisions rely heavily on the evaluation of statements of the parties concerned and witnesses and require the judge's close observation.⁸⁶ Indeed, this intrinsic requirement of adjudication is what determines the principles of direct trial and oral evidence in modern legal proceedings. But the hierarchical system prevents the judge from making independent judgments

because of the influence from judges at higher levels of office, that is, their “superiors.” It is taken for granted that judges should rely on and comply with their superiors for decisions. This model undoubtedly increases the uncertainty of adjudication and provides a channel by which illegitimate powers interfere with judicial activities.

This hierarchical system of judges blinds those living under it to the possibility that there could exist a diametrically different system where every judge is independent and there is no subordination among judges, and where the judge’s sole responsibility is to understand the law and administer justice. Regardless of titles and positions, every judge is one among equals.⁸⁷ This equality is not just among judges in the same court or courts of the same level but also among judges of courts at different levels. It is true that a higher-level trial court can change the judgment issued by a lower court (strictly pursuant to applicable laws), but this should be understood in terms of the division of labor rather than of rank; nor does this fact indicate any significant change in the criteria of appointment and emolument for judges in different courts.⁸⁸

Another characteristic that is associated with, or indeed is an adaptation to, the hierarchical system of judges is the administrative structure of courts. The appeals process in the modern court system, by which a preliminary trial may be followed by a second appeal trial, is designed to provide a channel for the correction of possible mistakes in judgment. In the two-tier court system, for example, a concerned party not satisfied with the preliminary judgment may take his or her case to the appeals court, which will then review the preliminary judgment, usually with an emphasis on whether the preliminary court followed due process and whether there were any mistakes in the interpretation and application of the laws. The appeals court then decides either to return the case to the original court for retrial or to uphold the preliminary judgment; in the latter case, the original decision becomes final and legally binding on the parties concerned. The fact that appellate courts have the power to change preliminary court judgments does not imply that they are administratively superior to lower courts; the former does not have leadership or supervisory power over the latter. If the two become administratively affiliated, then there should be consistency in their will and behaviors, and the higher courts should be responsible for the decisions the lower courts make. In this case, the lower courts must turn to the higher courts for directions before making any decisions and strictly follow the higher courts’ instructions. Under such a scenario, the appeals system would no longer make sense. Therefore, in some countries that adhere to the rule of law, the

higher courts and the supreme court attach due importance to safeguarding the independence of lower courts.

China's judicial framework, it is true, adopts the concept that the relationship between higher and lower courts is different in nature from that existing between different levels of administrative or procuratorial organs. For instance, the relationships between higher and lower courts and between higher and lower procuratorates are differently provided for by law. According to article 132 of the Constitution of the People's Republic of China, "The Supreme People's Procuratorate directs the work of the people's procuratorates at various local levels and of the special people's procuratorates. People's procuratorates at higher levels direct the work of those at lower levels." Article 127 of the same constitution stipulates that "the Supreme People's Court supervises the administration of justice by the people's courts at various local levels and by the special people's courts. People's courts at higher levels supervise the administration of justice by those at lower levels."⁸⁹ However, the framework is one thing while the actual operation of the legal system is quite another. In spite of the different phrasing concerning the relationship of courts and of procuratorates in the constitution, the meaning of the word "supervise" as it is used concerning the relationship between higher and lower courts is not that straightforward. In some instances, the boundary between "supervise" and "direct" is very thin. A good example is the rising number of cases in which lower courts turn to the higher courts for direction concerning specific legal matters. This case referral system, under which the lower courts, rather than make judgments independently, refer cases to higher courts for directions on what judgments to make, is deemed by the mainstream an important element of "nonprocedural supervision on trial work." In addition to case referrals initiated by the lower courts, the higher courts may, on their own initiative, give instructions to lower courts about cases deemed as "having major impact." In such respects, there is simply no difference between courts and procuratorates in organizational structure.

This situation has various causes, including long-term instability in society and academic research, the traditional overemphasis on general principles and neglect of specific systems, a mainstream perspective that exaggerates social character and underestimates the role of sound systems, and class ideology that prevailed for a long period of time in China's institutional development. In addition to these noticeable factors, I think there is another important cause, namely, the failure to realize that institutional development, in essence, is a process of knowledge accumulation, and that the difference in the degree of soundness of different institutional systems reflects the difference

in the command of knowledge of the people operating the systems. With regard to the judicial system, although China has introduced a modern framework, people inside and outside the framework still approach and operate it with traditional concepts, thus engendering incompatibility in many matters. The new system was introduced with the intention of avoiding the defects of the traditional system, but if the new system cannot run smoothly while the order of the old system has been undermined, it is inevitable that defects of both the old and new systems will emerge, with the paradoxical result that with more new rules there is less order.

In today's China, the knowledge dimension of the institutional system is especially significant and merits emphasis. In the past, the advocates of a new system often only concerned themselves with "grand discourse" on values and oversimplified the complicated process of institutionalization into a number of provocative slogans, which to a certain extent intensified ideological conflict and hampered success. For example, as a slogan, "judicial independence" is something so good and desirable that some would risk their life to achieve it while others would regard it as horrible and consider anyone advocating for it a rightist who should be suppressed by imprisonment. However, a rational survey of the theories and practices of judicial independence shows that the judiciary should be independent because independent courts are better able to accomplish their mission of settling disputes. In the meantime, an independent judiciary has the double effect of restraining the government from abusing power and safeguarding the rights and interests of citizens—as well as channeling public dissatisfaction into the courts and allaying it through the legal process, thus preventing citizens from resorting to violence for solutions to their suppressed grievances.⁹⁰ Like anything in the world, judicial independence is not perfect, and its realization has a price. Independent jurists have their private interests, specialization has its blind spots, and the pursuit of judicial independence is likely to distance the court system from the external world. As the saying goes, "One cannot have one's cake and eat it too." Humankind can only strike the best balance possible, otherwise those pursuing judicial independence with an idealistic vision will get disillusioned after achieving it, while those attempting to suppress judicial independence will end up seeing the disappearance of social order with the departure of judicial independence.