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Judicial Independence in China

Common Myths and Unfounded Assumptions

Randall Peerenboom

The Chinese judiciary is regularly criticized for the lack of (meaningful) independence.[1] The lack of "genuine progress" in establishing an independent judiciary is then cited as evidence that China's reform process is trapped in transition.[2] In response, international donor agencies and bilateral legal cooperation programs have encouraged China to adopt the institutions and practices found in advanced Western states known for the rule of law.

Surrounding these views is a set of common myths and unfounded assumptions. The first assumption is substantive: the concept of judicial independence is clear, and there is a single agreed upon model or generally accepted set of institutions and best practices articulated with sufficient specificity to guide reformers.[3] The second

[1] See, e.g., Kenneth Dam, *The Law-Growth Nexus* (Washington D.C., Brookings Institute: 2006), p. 250 (discussing puzzle of high growth rates despite "the lack of judicial independence"); see also Ethan Michelson, "Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism," *American Journal of Sociology*, vol. 113, no. 2, p. 353 (2007) ("the judiciary remains fused to the state, embedded in and subordinated to the rest of the government bureaucracy (i.e., there is no meaningful separation of powers or judicial autonomy))," and citing in support the works of seven scholars). Claims that China lacks meaningful independence entail that courts are independent to some degree or in some cases, and thus are at odds with blanket claims about the "lack of independence." Presumably, they are also not meant literally, that is, to suggest that judicial independence is not meaningful to parties in those cases that are decided independently on the merits. Thus, such claims would seem to mean that judicial independence is extremely limited in general or that there is no or extremely limited independence in particular types of cases, or that although judges do enjoy de facto independence in some cases, interference could occur if the authorities desired to intervene.

[2] Minxin Pei, "Is China's Transition Trapped?" in Randall Peerenboom ed., *Is China Trapped in Transition?* (Oxford: Oxford Foundation for Law, Justice and Society, 2007), http://www.fljs.org/section.aspx?id=1939.

[3] To this could be added three other assumptions. The first is political: foreign actors will be able to play a significant role in domestic reforms within the target country, and foreign states and international donor agencies have the political will and financial resources adequate to the task and are willing to spend them notwithstanding national security and other realpolitik concerns. The second is epistemological: international donor agencies and other foreign actors have sufficient local knowledge of existing

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assumption is methodological: there are clear standards for measuring judicial independence. The third assumption is normative: we know how independent courts should be (at each stage of development). The fourth assumption is the more independence the better. The fifth assumption is that the lack of judicial independence is a serious problem in all types of cases in China. The sixth is that China's courts lack independence because independence is impossible within a single-party state. The seventh, and a corollary, is that the party is the main source of interference with the courts. The eighth – and perhaps the granddaddy of them all – is that were China to suddenly democratize, judicial independence would no longer be a problem.

This chapter advances three main theses. First, each assumption is either wrong or needs to be qualified. Second, general statements about the lack of judicial independence or impossibility of achieving judicial independence in a single-party state fail to capture the complex reality of China or other authoritarian regimes. Third, legal reforms that assign a high priority to judicial independence will be unsuccessful or limited in their effectiveness until there is a deeper understanding of these issues as they apply to China and to developing countries. Moreover, to the extent they are successful in pushing toward greater independence and an expanded role for the courts in resolving certain types of controversial issues, they may in some circumstances do more harm than good.

Part I distinguishes between various aspects or subcomponents of judicial independence. Disaggregating judicial independence allows for a more nuanced discussion of judicial independence in China. Part II then takes each subcomponent of judicial independence in turn, reserving a discussion of the main external constraints on judicial independence for Part III. Parts II and III demonstrate that judicial independence has increased in China. Judges are allowed – indeed required – to decide most cases independently. Further, the party is not the main source of interference. Even when party organs do intervene, such "interference" may be justified. I do not mean to suggest that judicial independence is not an issue in some cases or that further improvements are not needed in some areas. But it is incorrect to conclude that parties cannot obtain a fair trial in all cases, especially commercial cases, because the judiciary lacks independence or because China is a single-party socialist state. Part IV discusses the implications of China's efforts to increase judicial independence

institutions, citizen demands, and the competing interests of various interest groups affected by reforms to intervene successfully in the legal reform process within the target country. The third is institutional: international donor agencies are clear about their purposes in promoting rule of law and judicial independence and have the incentive to acquire knowledge about the process and sequencing of legal reforms, to test the impact of such reforms, and to share the knowledge acquired and adapt their advice accordingly. For serious doubts about all of these assumptions, see the essays in Thomas Carothers ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington D.C., Carnegie Endowment for International Peace, 2006). See also Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development," in David Trubek and Alvaro Santos eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006).

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for the law and development movement, including observations about methodology and the relationship between regime type and judicial independence. Part V concludes with recommendations on how to address the related problems of judicial corruption and judicial independence.

JUDICIAL INDEPENDENCE

Judicial independence is a multifaceted concept.[4] The most basic form of judicial independence, decisional independence, refers to the ability of judges to decide cases independently in accordance with law and without (undue, inappropriate, or illegal) interference from other parties or entities. One prerequisite for decisional independence is that judges enjoy personal independence, which requires that their terms of office be reasonably secure; appointments and promotions should be relatively depoliticized; judges should be provided an adequate salary and should not be dismissed or have their salaries reduced as long as they are performing adequately; transfers and promotions should be fair and according to preestablished rules; and judges should be assigned cases in an impartial manner.

Internal independence refers to the ability of judges to decide cases without regard to administrative hierarchies within the court and in particular without interference from senior judges. External independence refers to judges being able to decide cases without interference from external sources such as the Chinese Communist Party (CCP), people's congresses, the government, administrative agencies, the procuracy, the military, or members of society. External independence, and ultimately decisional independence, requires the collective independence of the judiciary, which is the judiciary's ability as a whole and any individual court as a collective entity to function free from undue influence by other entities. Collective independence requires that the courts be adequately funded and that they have sufficient powers vis-à-vis other political organs for the legal system to function as a system of laws. Courts must not only be strong enough to resist pressure from outside forces in deciding cases; they must also have the authority and power to ensure that their judgments are enforced and that other political actors comply with their orders.

Contrary to common (mis)understanding, there is no single model of judicial independence or generally accepted set of institutions or best practices, at least none articulated with sufficient specificity to be useful for reformers.[5] To be sure,

[4] Shimon Shetreet and Jules Deschenes, *Judicial Independence: The Contemporary Debate* (Boston: Martinus Nijhoff Publishers, 1985).

[5] See Asian Development Bank, "Judicial Independence Overview and Country-level Summaries," (2003), p. 2, http://www.adb.org/Documents/Events/2003/RETA5987/Final_Overview_Report.pdf. (noting lack of a common or even consensus definition of judicial independence and that there is no single agreed model or set of institutional arrangements for judicial independence, and showing diversity of institutions within nine Asian countries).

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there are some well-established general principles and numerous statements of international best practices.[6] These guidelines generally cover similar grounds – appointments and promotions, removals and transfers, compensation, jurisdiction of the courts, judicial administration, budget, states of emergency, and warnings against misuse of military courts to try civilians. For such an immensely complicated topic, the list is surprisingly short. The U.N. Basic Principles contain just twenty-two articles, the Beijing Principles have forty-four articles, the International Bar Association standards are set out in forty-six provisions, some of which address judicial accountability and ethics, whereas IFES sums it all up in eighteen judicial integrity principles.

Most provisions are abstract and hortatory. Others are tautological. Some are both. Consider Article 4 of the U.N. Basic Principles: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision." Without a statement of what constitutes inappropriate or unwarranted interference, the first part simply restates the issue, whereas the second part, depending on how it is interpreted, is at odds with practices in many countries where legislatures may pass laws that overturn court decisions. Or take Article 3 of the Beijing Principles: "The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature." So far so good, but are decisions regarding states of emergency and declarations of war justiciable in nature? Are socioeconomic rights justiciable in nature? Such broad principles are consistent with a wide variety of institutions and practices.

Turning from broad standards to actual practice, the extent and nature of judicial independence and the institutional arrangements for realizing it vary widely from country to country, even among liberal democracies with well-functioning legal systems. In the United States, courts are an independent branch with broad powers to hear all types of cases and strike down congressional laws or executive branch regulations. In parliamentary supreme states such as England or Belgium, the courts answer to parliament and have limited powers to overturn laws or government regulations.[7] In common law systems, courts play an active role in policy making; in civil law countries courts have limited (albeit growing) powers to make or interpret law. The degree of separation between law and politics and the forms it takes vary

[6] See, e.g., the U.N. Basic Principles on the Independence of the Judiciary (1985); Universal Charter of the Judge (1998); Beijing Statement of Principles of the Independence of the Judiciary in the Law, Asia Region (1995); IBA Minimum Standard of Judicial Independence (1982); IFES/USAID, Guidance for Promoting Judicial Independence and Impartiality (2002); IFES, Regional Best Practices: A Model Framework for a State of the Judiciary Report for the Americas (2003).

[7] See Doris Marie Provine, "Courts, Justice, and Politics in France," in Herbert Jacob et al. eds., (*Courts, Law and Politics in Comparative Perspective*, New Haven: Yale University Press, 1996), p. 177: "In France, as in other countries that follow a civil law tradition, courts are not a coequal branch of government. . . . The courts were on the losing side of the French Revolution, and they suffered a tremendous loss of power and prestige in its aftermath. Two centuries later, the commitment to independence from the other branches is still in doubt. Courts in France are not known for standing up to government officials, and no one expects them to play an active role in government."

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from place to place.[8] There is, for example, surprisingly wide variation with respect to the crucial issue of appointment of judges.[9] In some systems, judges are career civil servants who must pass an exam to enter the judiciary. In other countries, academics or political figures without any prior practice as a lawyer or judge may be appointed to the bench, with the executive, legislature, judiciary, and/or the ministry of justice responsible for appointments or involved in the appointment process. Alternatively, judges may be elected. Some countries allow judges to be members of political parties and even to hold simultaneous posts in the executive branch or the legislature. Although political affiliation is important in appointments and elections in some countries, other systems strive to depoliticize the selection process.[10] Liberal democracies endorse freedom of thought and speech, yet many require judges to take an oath promising to uphold the constitution and to commit to regime norms such as rule of law and the promotion of human rights; and although some systems allow judges to speak out on political issues, others impose a duty of reserve.

With respect to the personal independence of judges, the United States grants judges life tenure, most others only provide for a fixed term.[11] As for collective independence, some courts are funded locally while others are funded centrally. In some countries, the judiciary prepares the budget, in others the executive and/or the legislature is involved in preparing or approving the budget.[12] Moreover, while

[8] Martin Shapiro has made a career pointing out that judges are political actors, even if they differ in significant ways from other political actors. See, e.g., Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002).

[9] See, generally, IFES/USAID, Promoting Judicial Independence, pp. 12–20. Article 2.14 of the Universal Declaration of the Independence of Justice acknowledges that: "There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives."

[10] Between 1963 and 1992, 58 to 73 percent of federal appellate judges and 49 to 61 percent of federal district judges had a record of political activism before appointment. Moreover, the majority of state judges are elected in the United States. Herbert Jacob, "Courts and Politics in the United States," in Herbert Jacob et al. eds., (*Courts, Law and Politics in Comparative Perspective*, New Haven: Yale University Press, 1996), p. 19. Query whether the practice in the United States of presidents nominating Supreme Court justices based on political affiliation constitutes an improper motive. Compare then these practices to China, where the party approves or vetoes candidates, the vast majority of whom are party members, but where party membership is often ideologically insignificant, as discussed below.

[11] Christopher L. Eisgruber, "Constitutional Self-Government and Judicial Review: A Reply to Five Critics," *University of San Francisco Law Review*, vol. 37, p. 156 (2002) ("the United States is virtually unique in allowing its constitutional court judges to serve indefinitely"). Of twenty-seven European countries, only six provide for life tenure whereas twenty-one provide for fixed terms. Lee Epstein et al. "Comparing Judicial Selection Systems," *William & Mary Bill of Rights Law Journal*, vol. 10, p. 1 (2001).

[12] IFES/USAID, Promoting Judicial Independence: "There are two basic models defining the relationship of the judiciary to the rest of the government: (1) a judiciary dependent on an executive department for its administrative and budgetary functions; and (2) a judiciary that is a separate branch and manages its own administration and budget. Although there are clear examples of independent judiciaries under the first model, the trend is to give judiciaries more administrative control, to protect against executive branch domination." But see Asian Development Bank, "Judicial Independence," noting that in the end legislatures must approve the judiciary's budget and thus it matters little whether the budget is drawn up by the executive branch (Ministry of Justice) or the Supreme Court; moreover, in most developing countries, including in Asia, the judiciary is low on the list of funding priorities.

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judges must enjoy a certain degree of independence, they must also be held accountable. Different systems employ various means to keep judges in line. Some rely on supervision by the legislature or the executive; some are self-regulating, with judges responsible for policing and disciplining themselves; others rely on media scrutiny and elections.

Legal systems also differ with respect to the degree of internal independence. Courts tend to be more hierarchical in civil law countries than in common law countries. Accordingly, the views of senior judges may carry more weight in practice if not according to law. Senior judges in civil systems may also exercise greater control over important administrative matters such as assignment of cases and personnel issues. Many countries have judicial councils; others do not. Of those that do, powers and functions vary widely.[13]

In light of such wide variation among liberal democracies considered exemplars of rule of law, significant divergence between countries with different conceptions of rule of law is to be expected. China explicitly endorses the principle of a socialist rule of law state, although there are competing conceptions within China.[14]

On the other hand, considerable convergence between countries with different conceptions of rule of law is to be expected. Notwithstanding significant variation with respect to judicial independence among similar and competing conceptions of rule of law, excessive dependence of the courts on political entities or interference by other actors in specific cases undermines the ability of the courts to impose meaningful restraints on political actors and runs afoul of both general rule of law principles such as the supremacy of the law and equality of all before the law and the need for impartial and fair outcomes based on law.

COLLECTIVE, PERSONAL, INTERNAL, AND DECISIONAL INDEPENDENCE IN CHINA

Collective Independence

The collective independence of the Chinese courts has been strengthened through increased budgets, more streamlined and efficient processes, and efforts to increase the authority of the courts.

The government has increased funding for the judiciary. However, costs have also risen. Many courts have relied on litigation fees to make up the difference. As a result, courts in developed areas such as Shanghai, Beijing, or Guangdong that handle a large number of cases have had many more resources at their disposal than courts in other areas. They have been able to invest in computers and other infrastructure and

[13] Violaine Autheman and Sandra Elena, "Global Best Practices: Judicial Councils – Lessons Learned from Europe and Latin America," *IFES Rule of Law White Paper Series*, 2004.

[14] See Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

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to pay higher salaries, thus attracting and retaining highly qualified judges. Facing greater financial hardship, courts in remote areas have at times sought to increase litigation fees by stretching or ignoring jurisdictional rules, discouraging parties from withdrawing lawsuits, and preventing parties from joining in class action suits so as to charge each plaintiff a separate filing fee. In response, the government experimented with a system whereby all litigation fees are sent to the provincial and central level and then redistributed through the finance bureau and high-level courts, and also increased central funding.[15] In December 2008, the State Council announced that funding of the courts would be centralized, although it remains to be seen whether funding will be adequate and reach lower-level courts.

The spending increase has been matched by an attempt to reduce costs by increasing judicial efficiency. The total number of cases handled by the courts grew dramatically throughout the 1980s and much of the 1990s before leveling off at around 8 million cases a year. In response to heavier caseloads and increasing backlogs, the Supreme People's Court (SPC) has encouraged greater use of simplified and summary procedures in both civil and criminal trials. Almost 40 percent of criminal cases and 70 percent of civil cases are heard using these procedures.[16] There has also been a push to establish small-claims courts.[17]

Many other reforms have aimed at increasing judicial efficiency. In the past, the same judge frequently was in charge of accepting a case, carrying out pretrial investigations, and then trying it. To increase efficiency and curtail corruption, the functions of accepting, hearing, supervising, and enforcing cases have been separated. Some courts are now experimenting with pretrial judges who hold pretrial conferences, facilitate discovery and exchange of evidence, and carry out mediation. In any event, partiality in case assignment does not appear to be a significant problem.

The authority of courts has also increased over last twenty-five years. This is evident in the high rate of administrative litigation cases where courts quash administrative agency decisions or a case is withdrawn after the agency changes its decision. Plaintiffs are much more successful in China than in the United States, France, and Taiwan.[18] The greater authority of the court is also evident in the low number of cases supervised by the procuracy or people's congress that result in a changed verdict – less than 0.3 percent.[19] The enhanced stature of the court is also evident in high acquittal rates for lawyers in cases where police and procuracy prosecute lawyers on

[15] China has experimented with different ways of funding the courts. See Zhu Jingwen ed., *Zhongguo falü fazhan baogao (1979–2004)* [China Legal Development Report (1979–2004)], (Beijing: People's University Press: 2007).

[16] Information Office of the State Council, China's Efforts and Achievements in Promoting Rule of Law, February 2008.

[17] The SPC's Second Five-Year Agenda (2004–2008), available at http://www.law-lib.com/law/law_view.asp?id=120832.

[18] See Chapter 6.

[19] Peerenboom, "Judicial Accountability and Judicial Independence: An Empirical Study of Individual Case Supervision in the People's Republic of China," *The China Journal*, vol. 55, p. 67, 2006.

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trumped up charges of falsifying evidence.[20] Clearly the courts are increasingly able to stand up to the people's congress, procuracy, and police.

The growing independence and authority of the court is also evident in the public's increased reliance on the courts for dispute settlement. There has been a clear and marked trend toward greater reliance on courts with declining interest in mediation and arbitration.[21] In the past plaintiffs in labor suits often lost, with the court upholding the decision of the labor arbitration committee. Today, the majority wins in court – with plaintiffs enjoying a higher success rate in courts than in arbitration.[22] The enhanced authority and stature of the courts, which are responsible for enforcing judgments in China, is also evident in higher enforcement rates. Faced with a rise in parties refusing to comply with court judgments in the late 1990s, the courts acted aggressively, adopting a number of measures to increase their powers. The number of people detained in conjunction with compulsory enforcement actions rose to more than 50,000 in 1999, after which both the rate of noncompliance and the rate of people detained in enforcement cases dropped dramatically.[23] In keeping with general patterns of development, enforcement is much better in urban than in rural areas.[24]

At the same time, courts are exerting their authority and protecting their turf and reputation by resisting attempts to channel controversial socioeconomic disputes into the court.[25] These cases are difficult to resolve because they are fundamentally economic in nature and the state lacks the resources and institutions (such as a well-developed welfare system) to provide an effective remedy.

Personal Independence

The personal independence of judges has also increased. The Judges Law sought to strengthen the independence of the judiciary by providing that judges have the right to be free from external interference.[26] In fact, few judges are prosecuted or subject to administrative sanctions. According to the Supreme People's Court 2002 Work Report, 995 judges and judicial personnel violated laws and rules in 2001. It bears emphasizing that this number is only a tiny fraction of the total number of judicial personnel, includes both judges and all other court personnel, and includes major as well as minor infractions. Of the 995 cases, the infractions were sufficiently serious to result in criminal prosecutions in only 85 cases. In 2002, only forty-five judges

[20] Fu Hualing, "When Lawyers are Prosecuted: The Struggle of a Profession in Transition," 2006, http://ssrn.com/abstract=956500.
[21] Zhu, *China Legal Development*.
[22] See Ronald Brown, "China Labor Dispute Resolution," in *Dispute Resolution in China*.
[23] Zhu, *China Legal Development*, pp. 243–249.
[24] He Xin, "Enforcing Commercial Judgments in the Pearl River Delta of China," *Journal of Empirical Legal Studies* (forthcoming). On the general relationship between improvements in the legal system and development, see Zhu, *China Legal Development*.
[25] See Chapters 6 and 9 in this volume.
[26] PRC Judges Law, art. 8.

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were subject to criminal sanctions. Moreover, according to the Supreme People's Court 2003 Work Report, the number of judges who violated the laws or rules decreased from an already low 0.067 percent in 1998 to an even lower 0.02 percent in 2002.

National regulations have also sought to strengthen the personal independence of judges by limiting the practice of penalizing judges for reversals on appeal. As in other countries, judges are sanctioned for intentional misbehavior or negligence in carrying out their duties. Some local courts have created an extensive incentive structure for judges. Although most requirements are uncontroversial, some are at odds with national norms established by the SPC and might impinge unduly on the autonomy of judges or create perverse incentives, depending on how the standards are interpreted and applied.[27] There does not appear to be any systematic evidence that the standards are leading to excessive sanctioning of judges for making honest mistakes in the handling of cases. In any event, judicial independence is not a goal in itself but rather a means to a just and efficient judiciary. Judges may be independent but incompetent, lazy, inefficient, or corrupt. Accordingly, even if an incentive system for judges impinged to some extent on judicial independence, the question would remain whether doing so was worth it in terms of fostering a more efficient, professional, honest, and just judiciary.

Appointments and promotions are now also more merit-based, with a greater role for higher-level courts in the decision-making process. New graduates must start in lower courts and work their way up. Supreme- and high-court judges are now selected from lower-level judges with at least five years experience and from academics and elite lawyers. In basic-level courts, presidents who in the past were often appointed based on their political background rather than their legal skills are now supposed to meet the qualification requirements for judges and to be selected from the best judges on the court.

Nevertheless, as in many countries the criteria for becoming a judge and for being promoted are not publicly available, nor is the selection and promotion process transparent or subject to public monitoring.

Internal Independence

Internal independence refers to judges' ability to decide cases without regard to administrative hierarchies within the court and without interference from senior judges. A contentious issue has been the independence and authority of the judges hearing the case to issue a final decision without approval from the adjudicative committee or senior judges on the court. The advantages and disadvantages of the adjudicative committee review system have been debated for more than a decade.

[27] See generally Carl Minzner, "Judicial Disciplinary Systems for Incorrectly Decided Cases," in Mary Gallagher et al. eds., *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge: Harvard University Press, forthcoming).

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Supporters argue that review by more senior judges is necessary in light of the low level of competence of some judges. They also suggest that the system reduces corruption. Some claim that the system enhances the independence of the judiciary because the adjudicative committee, which includes the president and other high-ranking party members within the court, may be better able to resist outside influences than more junior judges.

On the other hand, critics complain that under the current system the judges who decide the case are not the ones who hear it. Accordingly, the judges who do hear the case feel they have little power. Further, critics claim judges hearing the cases become timid and are quick to hand over tough cases to the adjudicative committee rather than working through the issues themselves, even though doing so may result in delays.

One significant reform has been implementation of a system where presiding judges are selected based on merit through a competitive process and given more authority within the court. The second SPC agenda introduced further reforms. One change was to have the adjudicative committee hear directly major or difficult cases or those with general applicability. Another was to have the court president or head of the division join the collegial panel. Still another change was to create separate committees for civil and criminal cases to avoid the problem of criminal law judges hearing civil cases and vice versa.

Local courts have implemented additional reforms. For instance, Yuexiu court in Guangdong has recorded detailed rules for approval of cases to be heard by the adjudicative committee. The court also uses these cases as a pedagogical tool for lower courts by periodically publishing guiding opinions based on the results.[28]

EXTERNAL INDEPENDENCE IN CHINA

Discussions of judicial independence often begin and end with a litany of complaints about external interference, particularly by the party, or focus on isolated problematic cases that are politically sensitive or involve contentious social issues. As such, they fail to do justice to, if not completely ignore, significant improvements on other subcomponents of judicial impendence. Even in the area of external independence, however, there have been considerable improvements.

The Party's Influence on the Judiciary

The party's role in the legal system and its impact on judicial independence is generally overstated and assumed – without a close examination of the party's actual role and its consequences – to be pernicious. In a single-party, socialist state, the

[28] See Yueshou Court Adopts Several Measures to Actively Promote Reform of the Adjudicative Work, http://www.gzcourt.org.cn/court_info/court_info_detail.jsp?type=1&code=1625.

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party will exercise some degree of influence over the courts. However, that does not mean that courts are simply party organs or that the party controls every action of the courts or determines the outcome of all or even most cases.

In practice, the party influences the courts in various ways and through various channels. The party exerts influence in ideology, policy, and personnel matters, although it sometimes is involved in deciding the outcome of particular cases.[29]

Examples of party-led or -inspired policies include the various strike hard campaigns to reduce crime, the SPC's "Opinions on Playing Fully the Role of Adjudication to Provide Judicial Protection and Legal Services for Economic Development, the Guidance Notice regarding Lawyers' Handling of Multi-party Cases," issued by the All China Lawyers Association, prohibitions on accepting Falun Gong cases, efforts to reduce judicial corruption and improve enforcement, and renewed emphasis on mediation.

Some of these policies enhance the independence and authority of the court vis-à-vis other actors. Some of them may impede judicial independence to achieve other important social goals. Generally, such policy statements do not ask lower courts to violate or set aside the law when deciding cases. Rather, lower courts are exhorted to ensure the cases are handled in accordance with law. To be sure, if party organs get carried away in their zeal to crack down on crime or root out corruption and pressure the courts to meet certain quotas, judges will feel they are being asked to deny the accused their rights or at least that their professional judgment is being sacrificed to satisfy political objectives.

Some of these policies aim to limit access to courts and steer disputes to other channels. In some cases, this is problematic and reflects the limited independence of the courts when it comes to politically sensitive cases, as in the rules prohibiting suits by Falun Gong disciples. But in other cases, limiting access to the courts may be justified and may actually enhance the authority of the judiciary. For instance, a number of measures have sought to steer socioeconomic disputes away from the courts toward other mechanisms such as administrative reconsideration, mediation, arbitration, public hearings, and the political process more generally, when it became apparent that the courts lacked the resources, competence, and stature to provide effective relief in such cases. Forcing the courts to handle such cases had undermined the authority of the judiciary and contributed to a sharp rise in petitions and mass protests.

When it comes to judicial appointments and promotions elsewhere, the general trend has been toward increased emphasis on professional skills and a greater role for judges in the same level and higher courts in decision-making. In any event, to conclude that the party's ability to vet judges determines the outcomes is much too simple. Because many party members joined the party for personal advancement rather than out of ideological commitment to socialism or the party, being a party

[29] For a more detailed discussion, see Peerenboom, *China's Long March*.

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member tells us little about a judge's political or legal views; one could be a reformer or conservative. It is possible that party members are more likely to follow the party line more readily than nonparty members to avoid jeopardizing their career. But most cases turn on legal issues for which there is no party line or no clear party line. Of course, even in liberal democracies judges may be appointed and promoted based on their political views – the appointment of U.S. Supreme Court judges is one of many examples.

Most worrisome is direct interference by the party or political organs in the courts' handling of specific cases. Although party organs are not legally allowed to interfere in specific cases, in practice party organs or individual party members do on occasion become involved in pending cases. Usually, the party intervenes through the Political–legal Committee (PLC). However, party influence may also be brought to bear through the party committee, individual party members, the adjudicative committee, or the president of the court.

The PLC might become involved in politically sensitive cases or cases involving conflicts between the courts and the procuracy or government. Even when the PLC becomes involved, it does not necessarily dictate the outcome. Rather, it recommends action to the court. It also may express an opinion on certain aspects of the case, such as the guilt of the accused, but leave it to the court to determine punishment.

The extent of direct party intervention should not be overstated.[30] According to a survey of 280 judges published in 1993, party organs or individual party members were the source in only 8 percent of the cases. In contrast, government organs were the source of interference in 26 percent of the cases and social contacts in 29 percent. In a survey of administrative law judges in Jiangsu, only 14 percent cited interference from the party as a factor. Still another survey of eighty-nine arbitral award enforcement cases in China found that party interference was rare and usually only occurred when there was a personal connection between an individual party member and the respondent against which enforcement was sought. The nature of the interference and its impact on the final decision also matter: Were judges told to act in accordance with law, to bear in mind the impact on social stability or the consistency of the decision with economic policies, or to decide in favor of one party notwithstanding the law?

The party's main interest in the outcome of most cases, whether commercial, criminal, or administrative, is that the result be perceived as fair by the parties and the people. Accordingly, the CCP only rarely intervenes in the handling of specific cases. In any event, party involvement in specific cases does not necessarily mean that justice is sacrificed. Party intervention may ensure that the case is handled in accordance with law. In the aforementioned arbitration survey, most lawyers felt

[30] These surveys, discussed in Peerenboom, *China's Long March*, are from the 1990s and thus in need of updating in light of reforms during the last fifteen years.

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that the CCP on balance played a positive role. The explanation why this is so is straightforward: the ruling regime has invested considerable resources in attracting foreign investment and does not want China's reputation sullied by negative publicity.

Of course, the CCP has a significant stake in cases that threaten sociopolitical stability and more specifically its right to rule. The courts' ability to decide such cases independently is severely restricted at best, as discussed in the next chapter.

People's Congresses and the Judiciary

As in other countries where the parliament is supreme, China rejects U.S. style separation of powers. In China, the National People's Congress (NPC) is the highest organ of state power. Thus, although the judiciary enjoys a functional independence, the NPC has the right to supervise the judiciary. The NPC influences the judiciary through its role in the appointment and approval process. It also exercises various forms of supervision. Every year, the SPC must submit a work report to the NPC for review.

People's congresses may also address inquiries to the courts regarding general issues, although they seldom do. Much more common and controversial has been their role in supervising individual cases – a practice which has now fallen into disfavor with the passage of the Supervision Law. Individual case supervision (ICS) inevitably diminishes the independence of the court to some extent. At minimum, the courts must devote resources to reviewing applications for responding to inquiries of the people's congress and retrying cases protested by the procuracy. The possibility of retrial also encourages outside parties to attempt to persuade the courts to readjudicate.

Although ICS inevitably diminishes the independence of the court, the extent will vary depending on how often cases are supervised and how supervision is conducted., ICS was always rare.[31] The method of ICS could also be more or less intrusive. People's congresses often responded to a petition by asking the court to handle the matter in accordance with law. They asked the court to report back or investigate on their own in only a small percentage of cases. In 2001, Gansu People's Congress Letters and Visits Office made 459 telephone calls and sent 306 letters to expedite cases, asking for a report in 102 cases. In the rare case where the people's congress conducted its own investigation and then issues a formal supervisory opinion, the nature of the opinion varied from general advice pointing out issues that require attention to specific advice on how the court should decide the case. In some cases, the committee investigating the case offered its own interpretation of the law, facts, or opinion on contested issues like the amount of damages or the proper sentence of criminals.

[31] For statistics, see Peerenboom, "Judicial Independence and Judicial Accountability."

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Regardless of whether the supervision is by the procuracy or the people's congress, the court in theory has always retained the right to decide the case. Local regulations often stressed that people's congresses were not supposed to substitute their judgment for that of the courts, and people's congresses usually abided by this principle. However, in some cases there is sharp disagreement on specific legal or factual issues, and the people's congress or the procuracy might believe that the court is wrong or even suspect corruption. In such cases, the supervising entity may not be able to avoid addressing specific issues. Even if it did not reach a conclusion on a particular issue, its position may be apparent from the fact that it challenges the court, especially when there are only two possibilities.

Whether the people's congress should be able to set out in its opinion specific findings on legal or factual issues is debatable. However, it should not be able to compel the court to adopt its findings or continually challenge the court if the court upholds its original decision.[32] Ultimately, the people's congress and procuracy must defer to the SPC's judgment to avoid undermining the independence of the court.

In practice, the response of the courts to ICS by the people's congress varied widely. Some courts regularly ignored the people's congress's request for a report whereas others reported more often than not.[33] While in some cases judges appeared to cave in even when they did not agree with the advice of the people's congress, there were many more cases where judges resisted even specific advice from the people's congress. In fact, prosecutors and members of the people's congress regularly complained that courts did not take their advice seriously. As a result, some recommend greater powers for the procuracy and people's congress, including allowing the procuracy to attend adjudicative supervision committee deliberations.

In all legal systems, there is a tension between judicial independence and judicial accountability, and the two goals must be balanced. Given the current circumstances in China, particularly in some lower courts, the need for supervision is greater than in some other countries. However, advocates of greater judicial independence were able to argue successfully that were other most suitable mechanisms for ensuring accountability than ICS by people's congresses.

Local Governments and the Judiciary

Local protectionism may take many forms, some more serious than others. Local government officials may pressure a court to decide a case in favor of the local party, deny an outsider's application for enforcement, or just drag out the enforcement

[32] SPC Notice on the Correct Application of the "Regulations on Issues Relating to People's Courts Remanding for Retrial and Ordering Retrial of Civil Cases," November 12, 2003.

[33] Cai Dingjian reports that rates vary from less than 10 percent to 75 percent. Cai Dingjian, "Renmin daibiao dahui gean jiandu de xianzhuang ji qi gaige" [The Current State of Individual Case Supervision by the National People's Congress and its Reform], in Cai Dingjian (ed.), *Jiandu yu sifa gongzheng*, [Judicial Fairness and Supervision] (Beijing: Falü Chubanshe, 2005).

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process, usually by requesting additional documents or by leaving a case pending. Local protectionism is therefore a matter of degree: it may impede or be an absolute bar to recovery. To be sure, local governments are not free to engage in protectionism as they wish. Similarly, local courts cannot simply take their orders from the government, even if they are so inclined; they must also answer to higher courts, the media, and the court of public opinion. In fact, the SPC has adopted numerous measures to address local protectionism and interference by government officials.[34]

Although various factors contribute to local protectionism, the main causes are the way courts have been funded and judges appointed. It follows logically – and is widely accepted in practice – that local protectionism is a problem in basic-level courts. The main proposals for dealing with local protectionism are to change the way courts are funded and judges are appointed, or to create federal or regional courts. The SPC Second Five-Year Agenda opted for both approaches, calling for changes in the way cases that cross jurisdictions are to be handled and recommending that the central and provincial level be responsible for funding the courts. As noted, the State Council centralized funding in 2008. As in other areas, there is a clear relationship between local protectionism and economic development, with protectionism more severe in poorer rural areas than in richer urban areas.[35]

The Procuracy, Public Security, and Police

Historically, public security was the strongest institution, especially during the Cultural Revolution when the procuracy was shut down and the judiciary weakened. Even now, the head of the PLC is often the chief of public security. Moreover, under China's constitution, the procuracy has the right to supervise the courts. On the other hand, reforms have given the courts an increasingly important role, particularly with respect to commercial matters. Judges tend to be better educated than procuratorates and police and enjoy a higher social status.[36] Moreover, procuratorates appear before the court as a party to a dispute, observe the rules of the court, and obey the court's orders.

As in other countries, there are also institution-based differences in the worldviews of judges, prosecutors, and police. The rank and file of the procuracy, public security, and police tend to be more sympathetic to the need for law and order than judges. Not surprisingly, the increase in the authority and importance of the courts during the last decade has led to tensions between the courts and the public security and police. The struggle for power has led to the judiciary and procuracy issuing

[34] Peerenboom, *China's Long March*; He, "Enforcing Commercial Judgments"; Zhu, *China's Legal Development*.

[35] Mei Ying Gechlik, "Judicial Reform in China: Lessons from Shanghai," *Columbia Journal of Asian Law*, vol. 19, p. 100 (2006); He, "Enforcing Commercial Judgments."

[36] Zhu, *China Legal Development*, p. 34.

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inconsistent interpretations of key legislation and the procuracy objecting during the drafting of the Law on Legislation to the SPC's practice of interpreting laws. The police and prosecutors have also been accused of failing to cooperate with judges in trials by not appearing when they are supposed to or by not turning over evidence or documents as requested. There are also numerous reports of police harassing and physically abusing lawyers who try to meet with their clients, as well as reports of lawyers arrested on trumped up charges of harboring criminals or conspiring in crimes. As the prevailing dominant authority, the party is often forced to intervene in such disputes between the various institutions.

Procuracy supervision of individual cases remains controversial. There has been a change in the pattern of procuracy protests (kangsu) over the years. The number of criminal cases retried through adjudicative supervision has decreased, while the number of civil and economic cases has grown. Civil and economic cases now constitute more than 80 percent of all cases retried through adjudicative supervision, while criminal cases account for less than 10 percent, with administrative cases making up the remainder. In criminal cases, the procuracy often seeks heavier sentences. Regardless of the type of case, the procuracy loses the vast majority of the time, challenging the common if outdated and superficial view of the courts as subservient to the police and procuracy.

The Relation between Higher- and Lower-Level Courts

Normally one does not think of higher-level courts as a threat to judicial independence. However, judicial independence may be undermined when higher courts exert undue influence on lower courts outside the normal channels of appeal.

In China, higher courts often engage in a longstanding practice of responding to inquiries from lower courts for advice regarding legal issues in particular cases currently before the lower court. Lower-court judges may request advice formally in writing or less formally by phone. The lower courts are not bound by the higher court's answer, although in most cases the higher court's advice will be followed or at least given great weight. Scholars have criticized the practice for depriving the litigant the right to appeal because the higher court has already decided key issues, albeit in the absence of a complete record and without the parties having the opportunity to present their case. In practice, lower-level courts reportedly seek instruction from higher courts less and less, with the frequency varying from court to court and judge to judge. In part, this reflects the increased confidence of judges but it is also in part the result of increased caseloads and stricter time limits for concluding cases so that busy judges simply do not have time to seek instructions from higher-level courts.

The Second Five-Year Agenda recommended that lower courts submit cases involving generally applicable legal issues to the higher court directly for hearing rather than seeking advice. This would eliminate the problem of the higher court

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deciding issues in cases that it does not hear and would also preserve the integrity of the appeal process.

Social Pressures

Social pressure from relatives, friends, and acquaintances is a major source of outside interference. In a society that places a premium on guanxi (personal networks) and renqing (human feelings or empathy), judges often find themselves besieged by intermediaries seeking to intervene on behalf of a criminal suspect or one of the parties in a commercial dispute (see Chapter 11).

To be sure, personal connections come into play to some extent in every country, as do human feelings. Judges, however, must resist social pressures to render a fair verdict in accordance with law. Chinese citizens must appreciate, as have citizens in Taiwan, Hong Kong, and other Asian countries, that there are limits to empathy and personal connections.

Media coverage of legal cases has also been controversial, as it is elsewhere. IFES has noted: "Investigative journalism projects have not always been successful. Even when journalists are well-trained and media is independent from government control, the owners, with their own biases and connections, often control content."[37] In China, judges complain that the media, often paid off by one side to the dispute, presents a skewed picture of the facts and legal issues.[38]

Off-the-shelf guidelines for international best practices are so general as to be useless. Consider for example the IBA's advice: "It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case."[39]

An Asian Development Bank report provides a more useful rule of thumb: criticizing judges for unpopular decisions impedes judicial independence and is bad; exposing judicial corruption, judicial incompetence, or other judicial misbehavior is good, even if it also impedes judicial independence. Of course, in many cases it will not be clear at the time of reporting whether judges were in fact guilty of corruption

[37] IFES/USAID, Promoting Judicial Independence, p. 36.

[38] See Benjamin Liebman, "Watchdog or Demagogue? The Media in the Chinese Legal System," *Columbia Law Review*, vol. 105, p. 1 (2005); see also Liebman, "A Populist Threat to Chinese Courts," in *Chinese Justice*, suggesting that public opinion may affect court decisions in some cases, particularly high-profile criminal cases. However, the influence of the public is in most cases limited given the difficulty of mobilizing the public, differences of opinion among the public, and the fact that public opinion is frequently ill-informed about the legal issues. Controls on the press and civil society also limit public pressure. In addition, the government has attempted to relieve pressure on the courts by channeling controversial socioeconomic disputes away from the court.

[39] IBA Minimum Standards, arts. 33 and 34.

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or misbehavior. Nor will it be clear in many legal cases whether a controversial and unpopular judicial decision was nonetheless correct as a matter of law. In any event, after reviewing several instances where the media exerted a negative influence on the judiciary, the report concludes on a more ambiguous note:[40]

> The country-level findings demonstrate that there is no single preferred model of the relationship between judicial independence and the media, organized interest groups, and civic organizations, or with other sources and mechanisms of external influence and control. Instead, they may present challenges and threats to, no less than support structures for, judicial independence.

SUMMARY CONCLUSIONS

Decisional independence – the ability of judges to decide cases independently in accordance with law and without (undue, inappropriate, or illegal) interference from other parties or entities – is in effect the sum of all other subcomponents. Notwithstanding problems in politically sensitive and socioeconomic cases or institutional weaknesses particularly in lower-level courts, there has been a significant increase in decisional independence of the courts overall as measured by various indicators. It is incorrect to conclude (or to assume) that the Chinese judiciary is unable to decide any case independently, especially commercial cases and many other routine civil, administrative, or criminal cases.

As economic and legal reforms have progressed, the role of the courts has changed. Economic reforms have produced a more divided and pluralistic society, growing social cleavages, and a rapidly expanding middle class with significant economic interests to protect. As a consequence, citizens are increasingly looking to the courts to resolve disputes and to provide a neutral forum for reducing social tensions. The judiciary therefore is being asked to play a larger and more crucial role than in the past. Moreover, in today's modern market economy, companies can no longer tolerate long delays in concluding commercial cases or judges who lack the competence to decide complex legal issues. As Hu Jintao and the Politburo have forthrightly acknowledged, there is no choice but to continue with and deepen the process of reform.

Thus, although wary of the implications of deeper institutional reforms, the government has enacted a wide range of measures to create a more independent, competent, and authoritative judiciary. As we have seen, the last decade has witnessed a flurry of reforms, many of them initiated by those in the judiciary in response to the suggestions of judges working on the front lines as well as to the suggestions and criticisms of academics and citizens, but which could not have been carried out without the express or tacit consent of government leaders.

[40] Asian Development Bank, "Judicial Independence," p. 9.

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As a result of these many incremental reforms, the judiciary has become more competent, authoritative, and independent. However, as with economic reforms, China has taken a pragmatic approach and avoided the temptation to accept the one-size-fits-all solutions that have produced such spectacular failures elsewhere.[41] Instead, it has tailored reforms to China's particular circumstances and adopted a number of more measured responses to increase judicial independence that addresses specific issues.

There are many reasons for such an approach. Like other developing countries, China lacks the institutional capacity and resources to implement one-size-fits-all solutions based on the institutions and practices in wealthy countries. Institutional conflicts between the procuracy, police, people's congress, and the courts, and between central and local governments, have also influenced the pace and direction of reform. More fundamentally, there is something of a chicken-and-egg aspect to judicial reforms: a competent and clean judiciary infused with a sense of professional pride requires a high degree of independence and authority; and yet an independent and authoritative judiciary assumes a competent and clean corps of judges. To be sure, there has been significant progress in raising the professional qualifications of judges. Would-be judges must now meet higher educational standards, pass a unified national exam, and undergo three months of training before they assume their post. In 2004, 97.7 percent of the 20,000 candidates who passed the unified judicial exam had a bachelor's degree or higher.[42] The improvements in judicial competence and accountability have allowed for increases in independence and authority.

We can expect further positive changes in the future, including deeper institutional changes that will inevitably alter the balance of power between the judiciary and the party as well as the legislature and executive branch, including local governments, the procuracy, public security, and the police.

China's experiences shed light on several more general law-and-development issues. First, disaggregating judicial independence provides a more accurate picture of the complex reality in China than simple generalizations about the lack of independent courts. However, many reforms undertaken to increase judicial competence, authority, and independence are highly technical. It is not likely most business people, foreign observers, or even many Chinese citizens will understand

[41] On the poor results, see Transparency International, *Global Corruption Report 2007: What can be done about corruption in the judicial sector?* http://www.eldis.org/go/what-s-new&id=33536&type=Document; Javier Couso, "Judicial Independence in Latin America: The Lessons of History in Search for an Always Elusive Ideal," in Tom Ginsburg and Robert Kagan eds., *Institutions and Public Law* (New York: Peter Lang, 2005); IFES/USAID, Promoting Judicial Independence; Carlos Santiso, "The Elusive Quest for the Rule of Law: Promoting Judicial Reform in Latin America," *Revista de Economia Politica/Brazilian Journal of Political Economy*, vol. 23, no. 3, pp. 112–134 (2003).

[42] 2004 nian sifa kaoshi canjia renshu ji tongguo lü [Number of Participants and Pass Rate in the 2004 Judicial Examination], http://education.163.com/edu2004/editor_2004/training/041223/041223_170987.html.

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such reforms or even be aware of them.[43] Studies relying on subjective perceptions of judicial independence are likely to be biased therefore by the technical nature of reforms as well as media reports of nonrepresentative cases of judicial corruption or influence.[44]

Second, although there is no shortage of off-the-shelf guidelines for promoting judicial independence, there is a danger of description passing as prescription – that is, of taking institutions in the United States or Europe as necessary and sufficient for other countries. Conversely, any deviations from this standard model are condemned. Thus, China's regulatory innovations – including individual case supervision, adjudicative committees, an extensive incentive structure for judges, and, most of all, the role of party organs in the court system – have all been widely criticized. Yet the wide variation in legal systems calls into question what is needed, as do the poor results when developing countries try to mimic institutions and practices that have evolved over centuries in certain developed countries.

China's path toward greater judicial independence once again demonstrates that establishment of rule of law is a long-term process involving incremental reforms and considerable political struggle among competing interest groups. As such, it is largely a domestic process. Foreign actors lack the local knowledge and the influence to significantly shape the outcome.

Third, studies that use judicial independence as a dependent variable or as an independent variable to test the effect on economic growth or human rights necessarily assume there is a reasonably accurate way to measure judicial independence.[45] Yet the wide variation in legal systems and the many different aspects of judicial independence raise a number of thorny methodological issues for social scientists. What aspects are most important? How do you weigh the various factors and combine

[43] IFES/USAID, Promoting Judicial Independence, p. 38, makes a similar point.

[44] Selective use of data is common. For example, reports often provide absolute numbers of cases involving sanctions of judges but do not note that this is a small percentage overall given the size of China's judiciary, that it involves members of the judiciary who are not judges or who do not hear cases, and that the statistics include, and do not distinguish between, corruption and other misbehavior such as poor performance.

[45] See, e.g., Rafael La Porta, "Judicial Checks and Balances," *Journal of Political Economy*, vol. 112, no. 2 (2004) (using tenure of high-court judges and the role of precedent to measure judicial independence). Compare Linda Camp Keith, "Judicial Independence and Human Rights Protection Around the World," *Judicature*, vol. 85, p. 195 (2002). Keith found that provisions for guaranteed terms for judges, separation of powers, bans on military courts and other exceptional courts, and fiscal autonomy were associated with better protection of civil rights, although a provision for exclusive authority of the courts to determine their own competence, a provision enabling courts to issue final decisions not subject to review other than by appeal in accordance with law, and a provision enumerating qualifications to be a judge were not significant. The various factors were coded on a scale of 0–2. However, many of the variables are vague or subject to wide variation in different systems. Consider the wide range of differences with respect to the key issue of separation of powers. Similarly, guaranteed terms of office encompass systems that provide life tenure and systems where judges are employed for a period of years, with the number of years varying from country to country. Nor is it clear how these various components are to be weighted and aggregated.

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them into a single score? How do you design an index that will also capture significant differences in the types and level of courts, types of cases, and sources of interference? How do you move beyond formal measures of de jure independence to measures of actual de facto independence?

The limited attempts to do so thus far have produced surprising results: one study found that not a single country in the top ten of the de jure judicial independence index was in the top ten of the de facto judicial independence index; not one OECD country was in the top ten of the de jure index, whereas the United States was thirtieth; and Armenia, Kuwait, and Turkey were in the top ten of the de facto index. There was also a negative correlation between de jure judicial independence and a weak positive correlation between de facto judicial independence and other indexes that ostensibly measure similar things, such as rule of law, transparency, accountability of the legal system, and protection of civil and property rights. The authors concluded that the "irritatingly low correlations" suggest that the relationship between judicial independence and these other things may not be as straightforward as sometimes assumed.[46]

Fourth, measuring judicial independence, whether de facto or de jure, assumes there is substantive agreement on how independent the courts should be. There are, however, many controversial issues that undermine the assumption of an accepted normative standard of judicial independence and the assumption that the more independent the better.[47] What is the proper balance between judicial independence and accountability? How should that balance be obtained? Should courts be allowed to decide controversial social issues involving distribution of resources, or should such decisions be left to other political branches? Should the government be able to issue policy statements to guide judicial decision making? Given China's limited resources, how should the courts be funded? What would constitute an adequate budget?[48] How much of the budget should go for new buildings, computers, and

[46] They also note that they did not attempt to weight the various factors and point out various difficulties with trying to do so. See Lars Feld and Stefan Voigt. "Making Judges Independent – Some Proposals Regarding the Judiciary," in R. Congleton ed., *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge: MIT Press, 2006); Feld and Voigt, "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators," *European Journal of Political Economy*, vol. 19, no. 3, 2003.

[47] IFES/USAID, Promoting Judicial Independence: "No judiciary is completely free to act according to its own lights; nor should it be. Ultimately, the judiciary, like any other institution of democratic governance, has to be accountable to the public for both its decisions and its operations."

[48] IFES/USAID, Promoting Judicial Independence, pp. 25–26: "Once again, there is no easy recipe for making this determination [as to what constitutes an adequate budget]. What is adequate varies from country to country and is based, among other things, on the resources available to the government, the stage of development of the legal system, the size of the population, the number of judges per capita and of organizational units included within the judiciary's budget (i.e., judges, judicial council, prosecutors, police, public defenders, military courts, labor courts, and electoral courts), and the extent to which courts are being used, or would likely be used if they were perceived to be fair and effective. Because of all these variables, comparisons among countries are virtually impossible. . . . If a judiciary's budget is inadequate to meet its needs, funds generated by the judiciary can provide an alternative

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infrastructure and how much to higher salaries? Reasonable people in China and elsewhere can and do disagree about these fundamental issues.

Fifth, and related, judicial independence is a means to an end (or ends) rather than an end itself. The goal is not simply to maximize judicial independence. Some limits on judicial independence may be justified in terms of other social values or may not have an impact on the performance of the legal system. As an Asian Development Bank report has noted:[49]

> [There is a need to focus] attention on the actual performance of the judicial system, irrespective of whether the judiciary enjoys a high level of independence or not. This line of inquiry highlights the importance of understanding the specific ways in which judges are not independent and whether such specific constraints impede the system's ability to deliver justice. If the lack of independence does impede performance in specific ways, then it is necessary to ascertain how and to what extent it is impeded. Just as some are tempted wrongly to judge judicial systems as either "independent" or "not independent," so too many assume that any given structural constraint on independence will necessarily affect the performance of the judiciary across-the-board. This assumption is challenged [in the present study of legal systems in Asia].

Halliday et al. describe a threefold threat to judicial independence from the state, from markets (e.g., corruption), and from the public. In each case, too much independence is also a problem:[50]

> In relation to the executive arms of the state, too few benefits to state administration or reputation render them dispensable; too great an affinity with state politics renders them impotent. In relation to political parties, too distant a position from the policy ideals of parties renders courts irrelevant; too deep an immersion of judges in party politics converts courts into yet another arena of politics and subverts justice from within. In relation to the bar, too attenuated a relationship leaves courts vulnerable; too integral a relationship with lawyers diminishes courts' authority [and contributes to corruption]. In relation to the public [and media], too little public support denies judiciaries a primary source of legitimation; too much sensitivity to public opinion makes courts manipulable.

These issues demonstrate the need to think more deeply about the proper role of the courts in China at this stage of development. A closer examination of the specific role of party organs, which provide a pragmatic assessment of the advantages

to augment those resources. The United States provides an example of this practice. Trial courts in the United States were at one time insufficiently funded through state and local governments. Facing popular resistance to increasing direct support to the judiciary, the courts, with legislative approval, instead instituted user fees." Recognizing resource constraints in developing countries, the IBA does not attempt to specify a particular allocation of resources to the courts other than vaguely noting that the needs of the judiciary be given a "high priority." IBA Principles, art. 44.

[49] Asian Development Bank, "Judicial Independence," p. 3.

[50] Terrence Halliday et al., "Struggles for Political Liberalism: Reaching for a Theory of the Legal Complex and Political Mobilisation," in Halliday et al. eds., *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change* (Oxford: Hart Press, 2007).

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and disadvantages of various forms of party involvement, is also needed. As Zhu Suli points out in his chapter, rejecting any role for party organs is neither feasible nor desirable. Efforts to promote judicial independence and rule of law have failed in many countries because of turf battles between the executive, legislative, and judicial branches.[51] In China, the CCP is the only entity with the authority to overcome such conflicts.

China's reforms have been successful due in large part to the government's pragmatic approach and willingness to resist, selectively adopt, and adapt as needed the ideologically driven prescriptions offered by Western states and international donor agencies. China has sought to develop its own variant of socialist rule of law compatible with the current form of government and contingent circumstances, including existing cultural norms and level of institutional development. Yet they have also realized that institutional reforms were needed, including a more authoritative and independent judiciary.

There are of course risks to this approach, including that political reforms will be too limited and too slow. For instance, although a high degree of judicial independence is possible within a single-party system, it requires a highly disciplined party to resist the temptation to interfere in cases that threaten its own survival. Until the handover to China in 1997, the Hong Kong legal system was widely considered to be an exemplar of rule of law, notwithstanding the lack of democracy and a restricted scope of individual rights under British rule. Even after the handover, the legal system continues to score high on the World Bank's Rule of Law Index, and the judiciary continues to enjoy a reputation for independence.

Much more likely is a high degree of judicial independence in some areas, combined with at times excessive restrictions in politically sensitive cases, as true for South Korea and Taiwan prior to democratization, and still true for Singapore. Singapore – a democracy, albeit dominated by the People's Action Party (PAP) – is generally ranked as one of the best legal systems in the world by investors, yet there are still highly problematic defamation suits against opposition figures and other limitations of civil and political rights.

Whatever the pace and limits of political reform under the current political system, democratization alone would clearly not ensure an independent and authoritative judiciary. In Indonesia, corporatist ties between judges and the political, military, and business elite have undermined the authority and independence of the judiciary.[52] In the Philippines, the courts continue to be so heavily influenced by the politics of populist, people-power movements that basic rule of law principles

[51] Daniels and Trebilcock argue that political-economy obstacles, including opposition by key interest groups, have been the biggest barriers in Latin America and Central and Eastern Europe. Ronald J. Daniels and Michael J. Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries," (2004), available at http://www.wdi.bus.umich.edu/global_conf/papers/revised/Trebilcock_Michael.pdf.

[52] Howard Dick, "Why Law Reforms Fail: Indonesia's Anti-corruption Reforms," in Tim Lindsey ed., *Law Reform in Developing and Transitional States* (London: Routledge, 2007).

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are threatened.[53] Across Latin American democracies, efforts to increase judicial independence have fallen short time and again. In India and many other developing countries, judges are independent but corrupt and inefficient.

Nor is an independent court in a democratic state necessarily a force for political liberalism and protection of individual rights. In Japan, judges are independent but have played a minimal role in restraining political actors or protecting human rights. In Hong Kong, independent judges have often sided with the corporate sector and socially conservative forces. In the United States, courts have deferred to the executive branch in the war on terror, much to the dismay of civil libertarians. In Eastern Europe and Latin America, rising crime rates have led to a curtailment of protections afforded criminal defendants.

POLICY RECOMMENDATIONS

To challenge common assumptions and myths is not to deny the need for reforms to increase the independence and authority of the courts in China. Nor is it to deny that there are serious threats to judicial independence from various public and private sources or that judicial independence is severely constrained in some types of cases. But it does suggest the need for a more nuanced approach.

Efforts to increase judicial independence should be based on four general principles. First, reforms should be designed and proceed in light of a careful consideration of China's actual circumstances rather than ideology and the blind transplantation of universal best practices. Second, given the inherent tension between judicial corruption and judicial independence, both problems must be addressed simultaneously. Third, increased judicial independence and authority should be tied to levels of competence and integrity, beginning with judges in higher-level courts in urban areas. Fourth, different types of cases produce different sources of interference, and therefore efforts to increase judicial independence require solutions targeted to the specific type of threat, as discussed in the next chapter.

Judicial corruption can be decreased by (i) ensuring that the recruitment and promotion of judges is based on merit and that judges are provided continuous on-the-job training; (ii) ensuring that the courts are adequately funded and that judges are paid a reasonable salary; (iii) reducing the discretion of judges and court staff by reducing barriers to the acceptance of cases, by adopting a case management system that assigns cases within a division randomly, and by reducing the complexity of pretrial and trial procedures; (iv) strengthening the mechanisms for accountability, including more prosecutions and heavier punishment of corrupt judges while at the same time ensuring that judges enjoy due process rights and will not be removed

[53] Raul Pangalangan, "The Philippine 'People Power' Constitution, Rule of Law, and the Limits of Liberal Constitutionalism," in Randall Peerenboom ed., *Asian Discourses of Rule of Law* (London: Routledge, 2004).

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from their jobs or denied promotion for whistle-blowing on other corrupt judges; (v) making full use of the rules for withdrawal in cases of real or perceived conflicts of interest; (vi) enhancing scrutiny of judges by civil society, including the establishment of consultative committees that include citizen representatives to investigate allegations of corruption and conflicts of interest while educating the media and the public about the value of judicial independence and the need to avoid trying cases in public; (vii) increasing transparency: publication of more judgments; wider and easier access to court documents by the public and media; more information about the process for nominating, appointing, and promoting judges, including selection criteria and reasons for appointing or rejecting candidates; and (viii) fully enforcing a requirement that judges report their and their immediate family members' income, with the information available to the public and media.

Judicial independence could be strengthened in various ways. Some of these overlap with recommendations for dealing with judicial corruption: (i) ensuring that the recruitment and promotion of judges is based on merit and that judges are provided continuous on-the-job training; (ii) allowing a greater role for higher-level courts, the bar association, and other legal professionals in the nomination and appointment process; (iii) ensuring that the courts are adequately funded and that judges are paid an adequate salary; and (iv) publishing more judgments with reasoned opinions. Other ways include (v) changing the incentive structure for judges so that they are not penalized in terms of bonuses or promotions for reversals on appeal provided that their decisions were based on a plausible interpretation of law rather than due to ignorance of the law, negligence, or corruption; (vi) ensuring that judges are not fired or removed for deciding cases in ways that are politically controversial but in compliance with the law; (vii) eliminating the adjudicative committee in higher-level courts and greatly restricting its role in lower courts; (viii) defining more specifically, and making more transparent, the role of party organs with respect to ideological guidance for the court, appointments, and involvement in particular cases, and ensuring that party policies are transformed into laws and regulations; (ix) eliminating or restricting supervision of the courts by the procuracy and people's congresses, again, beginning with higher-level courts; and (x) increasing supervision by the media and civil society and restricting defamation cases against the media for criticism of government officials and judges while at the same time raising the professional standards of the media and eliminating the practice of reporters accepting fees from an interested party to a dispute; encouraging the emerging practice of having spokespeople from the courts hold press conferences to explain controversial cases to the media and the public; and more generally providing more information about the activities of the courts, including overall caseloads, the types of cases handled, and the results.

In addition, the SPC could further enhance the authority of the court by expanding the scope of judicial review to include abstract acts and by allowing the courts to annul lower-level legislation inconsistent with superior legislation. As in other

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countries, efforts to increase the authority of the court at the expense of other institutions will be resisted. A newly empowered court could force a constitutional crisis were if it were to challenge directly an NPC law (falü), State Council administrative regulation (xingzheng fagui), or even a ministry-level rule (guizhang). Thus one possibility would be to limit the ability of the courts to invalidate abstract acts to all normative documents (guifanxing wenjian).[54] Over time, as the courts gained in confidence and experience, their scope of review could be expanded, first to rules then to local people's congress regulations and State Council administrative regulations. Most of the problems are with regulations below the level of the State Council anyway. Moreover, the courts could expect support from the central authorities because conflicts between lower-level regulations and laws or State Council administrative regulations do not benefit the nation.

Many of these recommendations are consistent with the general trend of judicial reforms over the last decade or are already being implemented. It is a matter of scaling up the reforms and carrying them out more thoroughly, a challenge made difficult by the size and diversity of China and the uneven development in rural and urban areas and between the eastern region and the rest of the country. Other recommendations are more contested, including increasing the amount spent on the judiciary, altering the balance of power between the courts and other state organs, decreasing the power of senior judges within courts, and defining the proper role of the party vis-à-vis the courts.

If all or most of the above changes were implemented or more fully implemented, judicial independence would increase over time. As in other East Asian states, judicial independence would deepen and the range of cases in which judges could decide cases independently would increase. Nevertheless, it is unlikely that the courts would gain the authority to handle politically sensitive cases independently. It is also unlikely that the courts would have the ability to provide an effective remedy in many socioeconomic cases. These cases are best handled in other ways, including through the establishment of an adequate social welfare system, by mediation, and through other political and administrative channels.

[54] This is essentially the approach taken in the PRC Administrative Reconsideration Law.