

JUDICIAL INDEPENDENCE IN EAST ASIA: LESSONS FOR CHINA**Tom Ginsburg ***

Like many countries around the world, China is increasingly interested in promoting the rule of law and judicial independence. A competent and professional judiciary is a central component of the “socialist rule of law” and China has made significant investments in institutional quality. Scholars disagree, however, about the efficacy of these reforms to date.¹ Just as we have few appropriate points of comparison for assessing China, China has few points of reference for designing reforms.

This chapter explores the experience of China’s East Asian neighbors with regard to judicial independence, with an eye toward drawing lessons for China’s own reforms. Japan, Korea and Taiwan collectively provide a useful vantage point to examine developments in China because their rapid growth from the 1950s through the 1990s represents that greatest sustained example of rapid growth in world history. The only comparable period of growth is that of contemporary China, now nearing the end of its third decade. The East Asian cases are also relevant to China because the countries in the region share certain cultural traditions, and because many of them developed their judicial systems during periods of authoritarian governance. Finally, the East Asian cases, like contemporary China, seem to challenge the conventional wisdom that a powerful legal system is necessary for sustained economic development.² My argument is that these cases provide nuanced lessons for the Chinese case about the definition of and conditions for judicial independence.

* Thanks to Jianlin Chen for research assistance.

¹ Compare Stanley Lubman, “Looking for Law in China” *Columbia Journal of Asian Law*, Vol. 20, no. 1, pp. 1-92 (2006) with Randall Peerenboom, *China’s Long March Toward Rule of Law* (New York: Cambridge University Press 2002).

² John Ohnesorge, “Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience”, University of Wisconsin Working Paper No. 1024 (2007), available at

The chapter begins by considering the problem of judicial independence in general, focusing on authoritarian settings. It tries to unpack the notion of independence. It then describes the experiences of Japan, Korea and Taiwan in some depth, and concludes with some thoughts on implications for the Chinese case. It argues that a realistic and achievable level of judicial independence can be achieved should China structure its judiciary roughly along Japanese lines, as has already been done in Korea and Taiwan.

The Concept of Independence

Judicial independence has become like freedom: everyone wants it but no one knows quite what it looks like, and it is easiest to observe in its absence. We know when judges are dependent on politicians or outside pressures, but have more difficulty saying definitively when judges are independent. Still, the normative consensus suggests that there is indeed something important about the concept.

And the normative consensus is clear. Virtually every developing country has some program of legal reform focused on the judiciary, and billions of dollars have been spent on promoting independence. The General Assembly of the UN supports it, as do governments both democratic and authoritarian. All this suggests that there is indeed a consensus that judicial independence is important, but also that the concept risks dilution into one so thin as to be meaningless.

More rigorous definition is in order.³ Nuno Garoupa and I have laid out a model in which a judiciary can shift along two dimensions: independence vs. accountability and strength vs. weakness.⁴ A judiciary that is weak and politically dependent might, through careful

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916781; Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest* (New York: Oxford University Press, 2007).

³ Stephen B. Burbank & Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, CA: Sage Publications, 2002).

⁴ See Nuno Garoupa and Tom Ginsburg, “Guarding the Guardians: Judicial Councils and Judicial Independence” *American Journal of Comparative Law* vol. 57, no. 1 (2009), pp. 201-32.

decision-making and institutional reforms, be able to build up a space for autonomy over time. As the courts become independent, however, they may expand their reach and intervene into matters of public policy. In some circumstances this can provoke reforms to enhance accountability of the judiciary, such as improved transparency and external involvement in the governance of the courts. This heightened access for outsiders, in turn, might reduce independence and strength of the courts.

The concept of independence can also vary across areas of the law, types of cases and courts within a single jurisdiction. Judiciaries differ in their levels of independence and also the scope of activity over which they are independent. Independence is thus a two-dimensional problem: one can imagine a judiciary that is very independent but only has a narrow scope of activity, or conversely, a judiciary that is highly responsive to manipulation and governs a wide range of activity.

Notwithstanding all these nuances, at its core, judicial independence involves the ability and willingness of courts to decide cases in light of the law without undue regard to the views of other government actors. Given all the other values that we might want out of a judiciary, such as consistency, accuracy, predictability, and speedy decision-making, it is not clear that this is the supreme quality we want to see. But it is, nevertheless, an important one in many definitions of judicial quality, and a judiciary that repeatedly decides cases in legally implausible ways under the influence of government actors is likely to suffer a decline in its reputation for independence and quality.⁵ Furthermore, independence can enhance the overall reputation of the regime. This explains why it is that a wide variety of regimes are willing to cede some autonomy to court systems.

Judicial Independence in Authoritarian States

It is becoming increasingly clear that democracy is not a prerequisite for judicial independence. Many general theories of judicial independence focus on the link with political competition, and it is probably true that judges as a general matter have greater levels of independence in democracies than in dictatorships. However, it would be overstated to say that democracy is required for any judicial independence at all. Courts in authoritarian Korea and Taiwan as well as Meiji Japan, for example,

⁵ Nuno Garoupa and Tom Ginsburg, *Reputation and the Industrial Organization of the Judiciary*, Manuscript.

did show a willingness to rule against the government on occasion. The distinction between democracy and dictatorship has to do with the scope of judicial independence, and the range of transactions over which independence is at issue.

There are several reasons an authoritarian government may want to empower the judiciary in certain areas and grant it genuine autonomy. For many years, scholars have believed that an independent judiciary is useful for economic predictability. Entrepreneurs who know that they can go to independent courts are able to transact with a wider number of market players, and also will be less fearful of government arbitrariness. These things tend to encourage growth. A regime that wants to make a credible commitment to the market may set up courts with the power to rule against the regime in economic cases.

Another reason to empower courts is to provide a mechanism for monitoring the performance of lower-level bureaucrats. All governments face the problem of monitoring their own employees, who may abuse their office. If enough lower level bureaucrats abuse citizens, the regime as a whole will lose legitimacy. But it is difficult for politicians at the center to monitor all their employees. A limited regime of administrative complaints by the public can shine the light on bureaucratic malfeasance, informing the regime center and improving the quality of government.

A third reason regimes may want to empower courts is for legitimacy. Legitimacy comes in many forms, but having a court bless regime policies can help to convince citizens that those policies are just. Courts can also legitimate the regime in the eyes of foreigners, be they donors or other powers with whom the regime must interact. Furthermore, high-quality justice is a service that can be provided to citizens, and can help legitimate the regime.

We see several examples of non-democracies that demonstrate judicial independence over some scope of transactions. Singapore, for example, has a very high quality judiciary: indeed, by some survey measures it is the best judiciary in the world. Singapore's Chief Justice is perhaps the highest paid such official in the world, making more than U.S. \$1 million per year in total

compensation.⁶ The courts regularly rule against the government in routine matters, and the government always obeys. Sometimes, obedience is purely formal. In one prominent case, the courts found that the government had failed follows the rules for an arrest under the Internal Security Act. The government released the prisoner in question—but immediately rearrested them following proper procedures.⁷ The ruling was only possible because of a certain degree of judicial independence.

Notwithstanding this rosy picture, Singapore’s courts avoid ruling against the governing party, and indeed have been used to silence the opposition through libel actions. One can characterize the judiciary as having a good deal of independence over economic and administrative matters, but little in the realm of politics. This highlights that the scope of independence matters as much as its level.

The Singapore model may or may not be transferable to China. There are obviously vast differences in terms of scale and manageability. Furthermore, Singapore’s judiciary has the advantage of having come from the common law tradition, in which independence is a more longstanding ideological and institutional goal. Nevertheless, the case is important to consider because it provides a plausible model of a high quality judiciary that nevertheless has avoided “judicializing” politics. Independence can be maintained for the vast majority of cases, without threatening core regime goals directly.

One also sees relevant experience in the Northeast Asian cases. Most accounts of rapid growth in the region do not emphasize the role of law or the judiciary. Instead, analysts focus on wise bureaucrats, political stability, trade policy and the American security umbrella as the keys to rapid growth. But the Northeast Asian countries also featured a particular form of legal system that, by

⁶ Gordon Silverstein, “Singapore: The Exception that Proves Rules Matter”, in Tom Ginsburg & Tamir Moustafa eds., *Rule By Law: The Politics Of Courts In Authoritarian Regimes* (New York: Cambridge University Press, 2008).

⁷ Silverstein, “Singapore.”

conventional measures, was fairly independent. There may, therefore be lessons for China from understanding the East Asian cases.

Northeast Asian Experience

Japan

To understand the Northeast Asian pattern, we must start in the 19th century when Japan undertook its decision to modernize after two centuries of isolation. Pressured from abroad and confronted by unequal treaties that immunized foreigners from Japan's 'barbaric' courts, Japanese leaders in the Meiji period realized that national independence required a set of strong institutions. They built up a strong bureaucracy, an industrial base, and a legal system along Western lines.

A leading legal history of the Meiji period divides legal reform into three phases.⁸ The first phase was from the Restoration in 1868 to the promulgation of the Imperial Edict of 1881, which announced the formation of a national Diet and drafting of a constitution; the second phase was from 1881 through 1898, during which time the constitution and great codes were promulgated; and the third phase lasted from 1898 through the death of the Meiji emperor in 1912, a period of implementation and consolidation rather than dramatic legislative change.

It should be emphasized that the legal system was not demanded from within, but rather was adopted as a response to the unequal treaties. Only when the Western powers viewed Japan as having a "civilized" legal system would the treaties be revised. The early Meiji reformers thus placed great emphasis on the adoption of substantive law and, crucially, the creation of a high quality judiciary.

The appointment of Shinpei Eto as Minister of Justice in June 1872 was to lead to a series of radical institutional changes. Eto, leader of the militant faction in the government that sought to mimic western imperialism with an invasion of Korea (and later leader of a revolt against the new government), clearly saw formal legalism as crucial to maintaining national strength.⁹ Eto was also a

⁸ Ryosuke Ishii, ed. *Japanese Legislation in the Meiji Era* 13 (tr. William Chambliss, Tokyo: Pan-Pacific Press, 1958).

⁹ Hiyoshi Sonoda, *Eto Shimpei Den* (Tokyo: Taikōdō, 1968)

centralizer, trying to take away jurisdiction from the local governments and centralize it in the Ministry of Justice responsible for the courts.¹⁰ In keeping with the notion of legal institutions as embodying “universally recognized principles,” the judiciary was established as a separate branch of government under the supervision of the Ministry of Justice.¹¹ Professionals in the Ministry would issue advice to judges of the courts when faced with questions of interpretation or application of law. The Minister of Justice was the presiding judge of the highest court, so separation of powers was incomplete in this early phase. Only in 1875 was the Great Court of Judicature established as the highest judicial authority.¹² In 1877 qualifications for judges and prosecutors were issued and executive officials barred from serving concurrently as judges.¹³ Thus we see in this early period the first steps, if still tentative, towards establishment of autonomous legal institutions.

In 1881, the Emperor issued a rescript calling for the creation of a national assembly and the drafting of a constitution.¹⁴ This occurred in reaction to growing calls for more rapid reform and in the wake of internal challenges to central authority including the Satsuma rebellion of 1877. From then on, legal reforms become more coherent, less piecemeal and centered around the nascent

¹⁰ Even this formal shift did not change the fact that actual establishment of prefectural courts under national administration was slow, leaving the prefectural authorities in control even after the abolishment of the *han*.

¹¹ The Shiho Shokumu Teisei (Justice Staff Regulations) issued in September 1872.

¹² Much of the modern judicial structure can be traced back to the Choshu leader Kido Takayoshi, who secured the establishment of a supreme court at the same time the Genro-in was established in 1875. An initial proposal that the Genro have formal power to review legislation was rejected at Kido's insistence.

¹³ Takkaki Hattori, "The Legal Profession in Japan: Its Historical Development and Present State," in *Law in Japan: The Legal Order in a Changing Society*, ed. Arthur T. von Mehren (Cambridge: Harvard University Press, 1963).

¹⁴ Reprinted in Ishii, *Japanese Legislation*, p. 720.

institutions that had emerged in the early Meiji years. The 1884 rules on appointment of judges and the 1886 Court Organization Act established an examination requirement for judges and prosecutors. Reappointment of existing judges and prosecutors was not required, so the movement toward a professional judiciary was not fully articulated, but by the mid-1880s the direction seemed clear. The judicial system was reformed by organic law in 1890, just after the adoption of the Meiji Constitution.

By the 1890s, the judiciary in Japan had emerged as a discrete branch of government, with a strong reputation for consistency and an insistence on resisting overt political pressure. An important test of the new reforms came in a famous incident in 1891 when a policeman attempted to kill the Russian crown prince at Otsu. Ordinarily, attempted murder was punishable only by life in prison, but the government sought the death penalty, by analogy to offenses against the Japanese imperial household. Resisting this pressure, the courts declined to issue a death sentence, establishing the principle of judicial independence in the Japanese context. This ruling became a wellspring for the traditions of institutional autonomy and freedom from pressures which remain the hallmark of the Japanese judiciary.

The story of the development of judicial autonomy in Japan is really a remarkable one in comparative terms. Before Eto's reforms of 1872, the notion of a distinct branch of government for judicial affairs seemed, to use the most appropriate term, foreign. Within two and a half decades, a profession had been created and judges had developed enough sense of professional autonomy to resist executive pressure from an authoritarian government. Although the initial motivation for creating a judiciary may have largely been symbolic, designed to satisfy foreigners that Japanese justice was not barbaric, it led to genuine institutional autonomy rather quickly. It is instructive that judicial independence was maintained to a greater extent in wartime Japan than in Nazi Germany.

The tradition continued in the postwar democratic era.¹⁵ The Japanese judicial system was organized hierarchically, with effective control at the top, and developed an internalized institutional

¹⁵ See generally John Haley, *Authority without Power: Law and the Japanese Paradox* (New York: Oxford University Press, 1990).

emphasis on providing like solutions to like cases, helping to render their decision-making predictable and thereby contributing to a reasonably sound business environment. Courts had a moderate capacity to handle civil and commercial disputes, but the number of judges was kept quite low in comparative terms. This in turn helped to keep litigation rates low in Japan relative to other advanced industrial democracies.

Some scholars have focused on the ability of the Secretariat of the Supreme Court to manipulate judicial career incentives through making assignments to different parts of the country.¹⁶ There does seem to be some evidence that judges who decided against the ruling party in a series of cases in the early 1970s suffered some career penalties. However, the judiciary as a whole is structurally independent, and no one has asserted any overt interference with the Secretariat of the Supreme Court. Whatever else their faults, the Japanese judges are generally seen as being free from corruption so prevalent elsewhere in the region. No judge has ever been found to be corrupt, quite different from the bureaucrats or politicians in Japan.¹⁷ Judges have a strong sense of corporate identity, and have internalized an ideology of following the law. The Japanese situation can be characterized as one in which collective independence is secure, even if individual judges are subject to pressures to conform.

¹⁶ J. Mark Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago: University of Chicago Press, 2003); Setsuo Miyazawa, "Administrative Control of Japanese Judges," *Kobe University Law Review*, vol. 25 (1991).

¹⁷ See John Haley, "The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust." Lectures and Occasional Papers, Whitney R. Harris Institute for Global Legal Studies, no.3. Washington University School of Law.<http://law.wustl.edu/igls/lecturespapers/2003-3HaleyJapaneseJudiciary.html>; see discussion in Frank K. Upham, "Political Lackeys or Faithful Public Servants: Two Views of the Japanese Judiciary," *Law and Social Inquiry* vol. 30, pp 421-55 (2005).

It is worth restating how remarkable the Japanese story is from a comparative perspective. Billions of dollars have been spent in judicial reform and institutional development programs, yet we have virtually no evidence of any judiciary shifting from being generally characterized as dependent to one that is independent. The Meiji Japan story, like that of contemporary China, really involves institutional *creation* rather than institutional transformation. Thus the issue was not one of replacing an institutional culture but creating one from scratch, which is perhaps surprisingly an easier task. The case suggests that genuine judicial independence is at least one possible outcome of the current reform programs in China.

Taiwan and Korea

Taiwan and Korea were colonized by Japan in 1895 and 1910 respectively, and the basic institutional structures of government were transferred, including the legal system. Within two decades a Japanese-style colonial government structure was in place, including cabinet government, courts, police and legislation.¹⁸ From early on, though, law was adopted not as an instrument to maintain independence in the face of Western colonialism, as it had been in Japan, but as a tool to deprive Korea and Taiwan of independence in the interests of Japanese colonialism. Judges were primarily Japanese, though Koreans and to a lesser extent Taiwanese could become judges. As the colonial period went on, more qualified local candidates appeared because of the creation of the imperial universities that became Seoul National University and National Taiwan University. These trained local talent who increasingly joined the various legal professions, including the judiciary.

After independence, the basic structure of the Japanese judiciary as a discrete bureaucracy survived in Korea. Judges were trained with lawyers and prosecutors in a special program at Seoul National University and later at a training school run by the Supreme Court. This ensured that the courts themselves played the central role in socializing the legal profession and allowed judges to internalize the positivist ideology that characterizes Japanese courts today. Judges saw themselves as servants of the law, charged with deciding cases consistently.

¹⁸ James Palais, *POLITICS AND POLICY IN TRADITIONAL KOREA* (Cambridge: Harvard University Press, 1976).

In the early 1960s, Korea experienced a brief period of democracy, and the courts became increasingly willing to decide cases against the government. But the scope of independence was limited, and eventually constrained under the military regime of Park Chung Hee. When the Supreme Court decided cases against the perceived interest of Park, he reappointed members of the Court, excluding those who had voted against him. He also passed a new constitution, the so-called *Yushin* Constitution of 1972, without the power of judicial review. During the 1970s, judges were relatively quiescent in deciding cases against the government. Still, ideals of independence were present.

The story in Taiwan is somewhat different. The island had a longer and more positive experience of Japanese colonialism, and those Taiwanese that had become lawyers and judges were quite familiar with the Japanese tradition of judicial independence, such as it was. Taiwan was integrated into the Republic of China with the Japanese defeat, and soon became the last bastion of Chiang Kai-shek's regime. Like other aspects of the government structure, the judiciary was then dominated by "mainlanders" who had retreated with Chiang during the loss of the mainland. Some of these judges were of high quality, but were unable to exercise independence in cases of importance to the regime. In the 1950s, the KMT had passed a law making it harder for the Taiwanese constitutional court to exercise judicial review, but they never had to take the power away from the courts. As time went on, however, Taiwanese judges began to rise in the judicial hierarchy, and they tended to have internalized the Japanese rather than the Republican Chinese tradition. The seeds of judicial independence were cultivated by these judges.

One can think of the East Asian configuration as having independent courts with a fairly small scope of activity. In both Korea and Taiwan, in the economic sphere, the judiciary retained autonomy. It had a distinct professional ideology and norms of neutrality in most cases. Both regimes had at least a nominal commitment to the rule of law and legality, which prevented them

from, say, jailing judges wholesale.¹⁹ Independence, however, did not extend to control of politically sensitive matters. Both the Kuomintang (KMT) and the Korean strongmen developed means of monitoring and disciplining judges, particularly in politically sensitive disputes. These mechanisms of discipline were easier for a Leninist party like the KMT to implement than, say, Park Chung Hee in Korea, whose interference with judicial independence was clumsier.

The scope of judicial activity increased dramatically in Korea and Taiwan beginning with democratization in the late 1980s.²⁰ The courts helped resolve several crucial cases on democratization process in the early 1990s. In particular, newly emboldened constitutional courts became more active, striking legislation of the old regime, and seeking to provide a more solid legal basis for governance. Many of the decisions had to do with administrative law and criminal procedure, two areas where the courts could play a constructive role in ensuring responsiveness of low-level government actors to new elites. As political competition increased, the courts began to play an even more important role. When divided government emerged in Taiwan in 2000, for example, the constitutional court became the locus of a major dispute around the country's fourth nuclear plant. The court played an important role in encouraging the parties to come to a political compromise. In Korea, the constitutional court was called on to decide whether the elected president should be removed in an impeachment. It allowed him to remain in office, but also reaffirmed that the court would be the decision-maker in this and other highly sensitive matters in the future. In both countries, the courts enjoy a good reputation for quality and independence. The story of Korea and Taiwan after democratization is one of expanding both the scope and the level of independence at the same time.

¹⁹ Weitseng Chen, "Cross the Bridge When There? China-Taiwan Comparison of Rule-of-Law-Without-Democracy Strategy for Transition," *Yale Law School Student Scholarship Series* #55 (2007), available at <http://lsr.nellco.org/yale/student/papers/55>.

²⁰ See generally Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003).

In Japan, which has remained a democracy continuously since 1946, the courts have also been given expanded authority in the last decade, as part of an overall reform of the legal system. These reforms have not focused on independence *per se*; indeed, some of the reforms such as introducing a jury system and the involvement of the public in judicial appointment processes seem designed to enhance transparency and accountability rather than independence. But the scope of judicial activity seems to be increasing with nascent signs of more judicialization.²¹ The focus on independence has been less clear than those in Korea or Taiwan, however, in part because the judges had such a high baseline of autonomy.

Lessons for Judicial Independence in China

What lessons can be drawn for China from these cases? An initial point is that more attention should be placed on the best historical antecedent for China's reform program, the experience of Meiji Japan. Like China's leaders today, the Meiji reformers sought to enhance national power and independence through legal reform. Their focus was largely instrumental: judicial independence was part of a package of modernizations that included industrial and military modernization as well. Similarly, the system was an oligarchy of sorts, though of course China's Communist Party is far more institutionalized than the personalized Meiji system.²²

It is also worth recalling China's early 20th century attempts to develop the legal system were directly influenced by Meiji developments, since Japan was the sole example of a non-Western power that had voluntarily integrated Western law. Japanese served as legal advisors, drafting

²¹ C. Neal Tate and Thorsten Vallinder, *The Global Expansion of Judicial Power* (New York: NYU Press, 1995).

²² Peter R. Moody, Jr., "Genro Rule in China and Japan : A Comparative Perspective" *Journal of Chinese Political Science* vol. 12, no. 1 (April, 2007), pp. 29-48.

statutes and sharing experiences.²³ In addition, Japan had adopted the Western colonial rhetoric about law that had itself prompted Japan's own reform. Thus Korea's legal system was deemed uncivilized and unable to protect the rights of Japanese nationals there. China's own republican reformers sought security from Japan through modernization, including modernization of law.²⁴ The first attempts to reform the punishment system, set up the judiciary as a distinct branch of government, and establish independence in adjudication, all were developed both in reaction to, and informed by, the Japanese experience. These attempts were ultimately unsuccessful, but not because of the actions of judges, who at times exhibited great courage in defending independence.²⁵ Rather, the politicization of the judiciary under the Kuomintang and the escalating civil war doomed the first attempts at developing judicial independence.²⁶

One of the most important lessons to be drawn from the East Asian countries is the collective nature of judicial independence in civil law systems. The judiciaries in all three countries functioned as unified national bureaucracies. In contrast with China (and the United States) where most courts

²³ Xiaoqun Xu, *Trial of Modernity: Judicial Reform in Early Twentieth Century China 1901-37* (Stanford: Stanford University Press, 2008), p. 52 reports on leading scholar Ogawa Shigejiro advising on the Prison Law of the Great Qing.

²⁴ Xu, *Trial of Modernity*, p. 1. Xu quotes Shi Lianfang, writing in the *Falu pinglun*: "The so-called modern state is defined not only by whether it is independent and unified, capable of protecting its own people and fulfilling international obligations, but also, as one of the main conditions, by whether it is a state of "the rule of law." If we destroy the rule of law ourselves, that would be no less than to provide evidence for Japan's international propaganda!"

²⁵ Xu gives the example of Lu Xingyuan, Chief Justice of Jiangsu Provincial Court, removed because he refused to hand over communist suspect arrested in the International Settlement to Chinese authorities.

²⁶ Arguably, one can see earlier antecedent notions of judicial independence in some of the Chinese imperial institutions. Xu, *Trial of Modernity*, p. 17.

are responsive to local governments that select and (until recently) funded them, the East Asian cases saw the judiciary as another branch of national government. In Japan, judges spend their careers rotating in two to four year stints in various regions around the country, helping to reinforce a sense of corporate identity in the judiciary and preventing judges from becoming too embedded in local matters. In Korea and Taiwan, judges can also rotate to different positions and undergo collective training and socialization.

The East Asian countries also instituted very severe tests to ensure that only the best and brightest could enter the judiciary. In Japan and Korea, the test is a generalized bar exam that prospective judges, prosecutors and lawyers must all pass, and the pass rates fluctuated between 2 and 4 percent for most of the postwar period. Taiwan's judicial exam did not include practicing lawyers, and had a slightly higher though still miniscule passage rate. This ensured that judicial service was relatively high status, what Dezalay and Garth characterize as an "ornamental Confucianism."²⁷ No doubt it also helped to dampen judicial corruption that has plagued so many other countries.

Both of these conditions are somewhat lacking in contemporary China. Although China has done a good job of improving the qualifications of judges, so that a majority now have higher education, that process must continue. The key issue is not just education, but status, and that is something that is far harder to engineer. If status is entirely identified with money, it will be difficult to draw the most talented jurists into the judiciary. South Korea is confronting this problem today because of patterns of retirement by judges into the legal profession, once they reach a certain age. This practice has caused some concerns about the erosion of judicial independence, because it is feared that judges are capitalizing on their connections in arguing cases before the courts they used to serve.

²⁷ Yves Dezalay and Bryant Garth, "International Strategies and Local Transformations: Preliminary Observations of the Position of Law in the Field of State Power in Asia: South Korea" in William Alford and Setsuo Miyazawa, eds., *Raising the Bar: The Emerging Legal Profession in East Asia* (Cambridge: Harvard University Press, 2007), at pp. 92-94

By far the greatest threat to judicial independence in China comes from the fact that judges are dependent on local governments for appointment, promotion and, until recently, have been dependent on local government for funding and material security. This has been widely remarked upon and even identified as a priority for the national government to some degree.²⁸ There is seen to be a severe risk of local favoritism, the antithesis of independence. The issue also goes to status: when funded and managed by local governments, judges are likely to be viewed as simply one more government agency, rather than being independent actors who can hold government accountable.

Greater centralization—and professionalization—is now a priority for the Supreme People’s Court, which has improved its own status at the national level and has contributed to the resolution of a number of high profile policy matters. Supervision and management of local courts by superior courts will, of course, burden those at higher levels. Yet it seems essential for the collective independence of the judiciary as a whole.

Another point is that independence limited to routine cases, a la Singapore, is hardly the ultimate ideal. Judicial independence is most tested in high profile national cases, and has been demonstrated clearly by constitutional courts in Korea and Taiwan in recent years. While a system of judicial review of legislative action has been called for in China, it is likely some years away. Such a power, however, is the hallmark of judicial independence and the rule of law, for government will then be responsive to the law.

It is worth noting that the features I have emphasized in the Northeast Asian cases, namely a meritocratically selected national bureaucracy, with a rotation system, parallel features of governance in imperial China. Certainly there was no judicial independence in the structural sense in imperial China: magistrates were all-purpose officials that combined executive and judicial functions. Nevertheless, the overarching concern with the risk of corruption informed all aspects of institutional design. The ancient ‘rule of avoidance’ involved sending magistrates far from their

²⁸ Opinion of the Central Political-Legal Commission on Several Issues in the Deepening of Reform in the Judicial System and the Work Mechanism, covered in <http://news.sina.com.cn/c/2008-12-05/015716785000.shtml>

home regions, and was employed to ensure that magistrates did not become overly involved in local politics, enhancing impartial adjudication and independence.²⁹ Judges in China today enjoy no such institutional insulation from the governments that pay them.

Conclusion

The East Asian countries provide a viable and convenient model of developing judicial independence that holds important lessons for China. The cases illustrate that unpacking judicial independence, and viewing it not as a unitary quality but one that varies across time, space and area of law, has payoffs. Two points in particular stand out: the possibility of independence in an authoritarian setting, and the importance of collective independence.

First, it is certainly possible to speak of independence even in an authoritarian political system like contemporary China. Like democracies, authoritarian governments have some incentive to empower judiciaries and grant them genuine independence, as do democratic governments. The difference is that the scope of judicial independence in authoritarian regimes is less wide than in democracies, even if courts enjoy high levels of independence in particular areas. Typically authoritarians will seek to empower courts to help provide predictability in the economic sphere without hindering core regime policies or interfering in the political sphere. Sometimes authoritarians also use courts to discipline lower level bureaucrats, and to provide legitimacy. For all of these reasons, we can be optimistic of the continued trajectory of judicial independence in China, at least for the vast majority of cases that do not have major political overtones.

Second, one can distinguish independence of the judiciary from independence of judges. The countries under consideration have tended to utilize mechanisms that emphasize collective independence of the judiciary as a whole rather than the independence of individual judges. The Japanese model features a hierarchically organized judiciary, with strong internal controls, and a

²⁹ Ironically, this rendered the magistrate more dependent on sometimes corrupt local county functionaries, undermining official discourse. Similarly, the extensive system of appeal was designed to ensure some modicum of independence in adjudication as errors would be corrected by higher level officials.

strong sense of corporate identity among the judges. The judiciary as a whole, because it can act with relative uniformity, is able to compete for resources in the competition with other government agencies. It also involves a very difficult examination, ensuring both high quality and high status for judges. Judges serving in a bureaucratic hierarchy, under central national control, can develop a consciousness of their role and internalize norms of professional behavior. In turn this makes them more effective judges, more likely to be trusted with important issues by the state and by private parties. They are not, however, independent of other judges in making decisions.

Becoming more like Japan in terms of judicial independence actually involves a return to China's not so distant past. The reforms suggested are in fact consistent with aspects of China's ancient legal tradition, even if they are best exemplified today by China's neighbors. A unified, hierarchically organized judiciary is the best route to achieving China's goals for legal reform, whatever they may be.