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Introduction

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This is the first book in English on judicial independence in China.[1] This may not seem surprising given China remains an effectively single-party socialist authoritarian state, the widely reported prosecutions of political dissidents and the conventional wisdom that China has never had independent courts. On the other hand, this may seem surprising given that China has become a possible model for other developing countries – a model that challenges key assumptions of the multibillion-dollar rule of law promotion industry, including the central importance of judicial independence for all we hold near and dear. Although China's success in achieving economic growth and reducing poverty is well known, less well known is that China outscores the average country in its income class, including many democracies, on many rule of law and good governance indicators, as well as most major indicators of human rights and well-being, with the notable exception of civil and political rights.[2] How has China managed all this without independent courts?

WHY STUDY JUDICIAL INDEPENDENCE IN CHINA?

There are few ideas more cherished, and less critically scrutinized, than judicial independence. Judicial independence is regularly portrayed as essential to rule of law, good governance, economic growth, democracy, human rights, and geopolitical stability. Notwithstanding nearly universal support for the notion of judicial

[1] Other works provide an overview of the legal system and legal reforms, including the overall development of the judiciary. Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), Stanley Lubman, *Bird in a Cage* (Palo Alto: Stanford University Press, 1999), Albert Chen, *Introduction to the PRC Legal System* (Hong Kong: Butterworths, 2nd ed., 2004), Chen Jianfu, *Chinese Law: Context and Transformation* (Leiden and Boston: Nijhoff, 2008); Stéphanie Balme and Michael Dowdle eds., *Building Constitutionalism in China* (New York: Palgrave McMillan, 2009).

[2] Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (London and New York: Oxford University Press, 2008).

independence, the concept remains disturbingly contested and unclear even in economically advanced liberal democracies known for the rule of law, as pointed out by two leading U.S. constitutional scholars:

> Consensus on broad values combined with discord over their application in particular cases is hardly uncommon, in law or anything else. But the range of disagreement when it comes to judicial independence seems unusually wide. We expect controversy over how to draw the line between proper and improper judicial behavior in particular cases, but there is as much uncertainty in locating the line between proper and improper external influences. Indeed, we do not have anything approaching consensus even with respect to the normative conditions necessary to have a properly independent bench. There is disagreement about whether or how to criticize judges and their decisions, and about whether or how to discipline judges. There is disagreement about how to explain or justify our institutional arrangements . . . And, of course, there is pervasive disagreement about whether our judges exhibit too much or too little independence.[3]

The problems are magnified when we move beyond economically advanced liberal democracies to developing countries and nonliberal authoritarian regimes. As Tom Ginsburg observes in this volume: "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."

One goal of this volume is to subject judicial independence and the claims made on its behalf to critical scrutiny. China is useful for testing general theories in that it represents a challenge to so much of the common wisdom about what judicial independence means, its importance, its relation to other social objectives, and how to achieve it. Most fundamentally, what *is* socialist rule of law? How does it differ from rule of law in a liberal democracy? And what are the implications for judicial independence?

China's rapid growth also challenges the prevailing wisdom. For many, China is an exception to the rule in that it has grown allegedly without "the rule of law" and an independent judiciary. But what role has the legal system played in economic growth in China? Have the courts been able to handle commercial cases independently? Are property rights protected in other ways? To the extent that there are external influences on judges in commercial cases, including party and government policy directives, do they promote or hinder economic development?

A second goal is to contribute to, and draw on, the emerging literature on the development of legal systems in authoritarian regimes. Judicial independence is often assumed to be impossible in authoritarian regimes, where law plays a limited

[3] John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraints," *New York University Law Review*, vol. 77 (2002).

role in governance and takes a back seat to government policies and ruling party diktats, legal institutions are unable to restrain political power, and judges are faithful servants of the ruling regime. Yet even a cursory glance at authoritarian regimes – whether historical or contemporary, whether in Europe or in East Asia, Latin America, Africa, or the Middle East – reveals that law plays a much larger role in authoritarian states than commonly believed.[4] Nor is that particularly surprising. Authoritarian regimes turn to courts for many reasons, including to facilitate economic growth, maintain social order, supervise and discipline local officials, define and enforce relationships between central and local governments, monitor boundaries between competing state organs, distance the ruling regime from unpopular decisions, and enhance regime legitimacy at home and abroad.[5]

Conversely, it is commonly assumed that democratic regimes favor judicial independence. Yet even the most cursory glance at democratic regimes – whether historical or contemporary, whether in Europe or in East Asia, Latin America, Africa, or the Middle East – demonstrates that democracy does not guarantee judicial independence.[6] Many legal systems in developing democracies are plagued by judicial corruption, incompetence, and inefficiency. The judiciary is often controlled by the executive, beholden to the political and economic elite, threatened by organized crime, and subject to social pressure from the public and media. Clearly, much depends on the particular regime, whether authoritarian or democratic. There is therefore a need to move beyond simplistic black and white portrayals based on regime type.

This is not to say that political structures are irrelevant. Courts in authoritarian states may enjoy considerable independence, although usually over a limited scope of issues. They often enjoy more autonomy in commercial law than with respect to protecting civil and political rights. One question is whether there will be spillover to other areas. More generally, what are the limits of law and judicial independence in authoritarian regimes? What mechanisms do authoritarian regimes use to limit judicial independence? Has China employed similar mechanisms? Has it developed alternative ways of controlling the judiciary?

A third related goal is to sort out sense from nonsense about judicial independence and the legal system in China. As with other authoritarian regimes, blanket

4 See Tamir Moustafa and Tom Ginsburg, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008); Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship* (Cambridge: Cambridge University Press, 2007); see also Chapters 12 and 13 in this volume and the cites therein.

5 See Moustafa and Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics," in Moustafa and Ginsburg, *Rule by Law*.

6 For problems in judicial independence, corruption, and incompetence in Bangladesh, Cambodia, Nepal, Indonesia, Pakistan, the Philippines, and Thailand, 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. See also Chapter 5 in this volume and the cites therein.

denunciations of the lack of meaningful independence in China fail to capture the more complex reality. The courts handle more than 8 million cases a year. Judicial independence is not an issue in many cases, nor is the source, likelihood, or impact of interference the same across cases.

There is therefore a pressing need to get beyond outdated stereotypes and broad generalizations, to examine a wider range of cases than just high-profile conflicts involving political dissidents so prominently featured in the reports of human rights groups and the Western media, and to overcome the knee-jerk reaction to blame all judicial shortcomings on the party and lack of U.S.-style separation of powers. In short, there is a need for more nuanced studies, new analytic frameworks, and thicker descriptions of the actual issues judges face in their daily lives, the reasons for existing policies, and the responses of the judiciary to such policies. The development of the legal system in China must also be situated within a broader comparative framework of other developing countries, many of which are experiencing similar issues.

Even assuming the conventional wisdom is correct and judicial independence is necessary or useful for many of the goals mentioned previously, there is still the all-important question of how to achieve it. Thus a fourth goal is to scrutinize the dominant approach of the rule of law industry to prescribing "international best practices." It is now clear in light of the historical development of legal systems in Euro-America, Asia, and some countries in Eastern Europe, Latin America, and the Middle East that there is no single path toward the rule of law and that rule of law principles are consistent with a wide variety of institutional arrangements, although implications for policy makers are far from clear. Moreover, the less than spectacular results of rule of law promotion efforts call into question the role and influence of foreign actors, as well as the assumption that the best way for developing states to achieve rule of law is to mimic or transplant Euro-American institutions, values, and practices.

China is an interesting test case in that it has pursued its own approach to reforms. China did not adopt the big bang approach to economic reforms or follow the neoliberal aspects of the Washington Consensus, including rapid privatization, deregulation, and opening of the domestic economy to international competition. Like other successful East Asian states, it has postponed democratization until it attains a higher level of economic and institutional development. Also, like other successful East Asian states, it has adopted a two-track approach to legal development that emphasizes commercial law while imposing limits on the exercise of civil and political rights. But what are the costs of this gradualist approach? Will China be able to maintain and deepen the reform agenda, or will the reform process stall, leaving China another example of a dysfunctional middle-income state that once showed great promise?

In addressing these issues, the authors in this volume adopt a variety of perspectives and approaches reflecting the interdisciplinary, holistic, and comparative nature of the development process. There are contributions from legal scholars, political scientists, and sociologists. Some authors take an institutional approach, whereas

others opt for a historical–cultural approach. Several chapters address the debate over globalization and the need to adapt universal norms and practices to local contexts. Some chapters are comparative, with authors drawing on the experiences of countries in Europe, the Middle East, and East Asia. The authors also consider different levels of wealth and the diverse challenges faced by low-, middle-, and high-income countries, as well as differences in the nature of the political regime.

Theoretically, several chapters challenge conventional assumptions about judicial independence. Others develop new analytical frameworks that differentiate among types of cases, sources of interference, and levels of courts. Whereas some chapters focus on urban courts, others focus on rural courts. There are discussions of civil, criminal, and administrative cases. Several chapters present data from recent empirical studies, complementing and enriching new and existing theoretical perspectives.

CHAPTER SYNOPSES

The volume begins by situating the debate over judicial independence in China within the larger debate over the rule of law industry approach of promoting international best practices. In Chapter 2, Keith Henderson draws on his extensive experience in the industry to summarize international best practices, captured in 18 JIP (Judicial Integrity Principles). The JIP are modeled largely on the current institutions, values, and practices in economically advanced Western liberal democracies and reflect the experience of USAID, International Foundation for Electoral Systems (IFES), and others in promoting rule of law in developing countries. Henderson also summarizes the main principles of a pragmatic, context-specific methodology for judicial reforms developed more fully elsewhere.

Henderson draws on his personal experience in advising on judicial reforms in China to shed light on the applicability of international best practices to China. As he and others in this volume note, there is widespread support for more independent courts from the central government, from judges and other legal complex actors, from investors and business people, and from the broad public. However, notwithstanding general support for the JIP, he also found that some of the JIP were opposed by one group or another for a variety of political, institutional, historical, practical, and interest-based reasons. Many participants questioned the feasibility of some of the reforms, particularly those beyond the authority of the judiciary to implement on its own. As in other countries, including other successful East Asian countries during their phase of rapid growth under authoritarian regimes, the main emphasis was on politically safer reforms aimed at promoting judicial efficiency, legal predictability, and legal consistency in the economic sector.

In Chapter 3, although not disputing the normative desirability of the JIP, Antoine Garapon, a former judge and current director of the Institut des Hautes Etudes sur la Justice, raises serious doubts about the dominant approach of prescribing international best practices. Drawing on his own extensive comparative experiences,

Garapon argues that this approach ignores culture and politics and is inconsistent with the way legal systems actually develop. Legal reforms do not occur within a political vacuum. Powerful interests are at stake. For reforms to be successful, they must take into account opposing interests and existing conditions. In some cases, compromises are necessary, as in the "unholy alliance" between the Judges Club and Islamists in Egypt.

Garapon recommends more attention be paid to the process of reform and, in particular, to the historical process by which judicial independence has been achieved in developed countries, as well as the political battles being fought in countries now trying to establish independent judiciaries. Rather than beginning with a predetermined set of abstract principles for judicial independence, he suggests that we begin with a detailed study of the forms of interference and their impact in particular contexts. In that sense, the differences between Garapon and Henderson may not be as great as it first appears because Henderson advocates a similar methodology for judicial reforms in his chapter.

The debate between Henderson and Garapon reflects the different emphases of an institutional versus a cultural–historical approach,[7] which in turn reflects long-standing debates over the possibility and desirability of legal transplants.[8] In general, advocates of a cultural–historical approach place more emphasis on path dependencies and the often unpredictable nature of legal reforms. As such, they see legal development as nonlinear and the process as less teleological and more open-ended than one that focuses on achieving prescribed substantive standards or best practices.

In Chapter 4, Zhu Suli, Dean of Peking Law School and one of China's leading legal theorists, employs the cultural–historical approach in challenging the notion that judicial independence is the appropriate lens through which to view judicial reforms in China. Zhu provides a broad historical overview of the Kuomintang and Chinese Communist Party (CCP) regimes to situate the judiciary within the political context of an effectively single-party state. Echoing Garapon, he argues that "rather than searching for, or aspiring to, some decontextualized abstraction or ideal type of judicial independence, we should pay more attention to the actual role of the Party and its influence on the judiciary, the legal system, and China's efforts at modernization more generally." Although disagreeing with some party decisions, he concludes that, on balance, the CCP has played a positive role. Moreover, while some judicial problems may be attributable to party policies, he suggests

7 For the historical–cultural approach, see generally Paul Kahn, *The Cultural Study of Law* (Chicago: University of Chicago Press, 1999). In addition to the chapters by Garapon and Zhu in this volume, see also Jonathan Ocko and David Gilmartin, "State, Sovereignty, and the People: A Comparison of the 'Rule of Law' in China and India," *The Journal of Asian Studies*, vol. 68(1).

8 R.L. Abel, "Law as a Lag: Inertia as a Social Theory of Law," *Michigan L. Rev* vol. 80, pp. 775–809 (1982); Alan Watson, *Legal Transplants* (Athens: University of Georgia Press, 1983); William Twining, "Generalizing about Law: The Case of Legal Transplants" (2002), http://www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_4.pdf.

that the more fundamental cause of shortcomings in the judiciary is the recent unprecedented social transformation of Chinese society.

In Chapter 5, Peerenboom also challenges many assumptions underlying common views about judicial independence in China, including that there is a single agreed upon model or generally accepted set of institutions and best practices articulated with sufficient specificity to guide reformers; that the main source of external interference is the party; and that if China were to suddenly democratize, judicial independence would no longer be a problem. He then breaks the concept of judicial independence down into different subcomponents and analyzes China's progress on each. Although progress has undoubtedly been made on each dimension, it has been uneven. He ends with policy recommendations for enhancing judicial independence and limiting judicial corruption.

Whereas Chapter 5 adopts an institutional approach, Fu Yulin and Peerenboom develop a new case-based analytical framework in Chapter 6. They distinguish between pure political cases, politically sensitive cases, and ordinary cases and highlight three types of politically sensitive cases: socio-economic, new crimes, and class actions. They then discuss the sources, nature, and impact of interference for each type of case and provide recommendations tailored to particular problems that arise. They emphasize, as do others, that judicial independence is not an end in itself but a means to other goals, and that there is substantive disagreement in China about how independent the courts should be and whether the courts are the appropriate forum for resolving certain types of disputes, notwithstanding the global trend toward judicialization. They also show that reforms to enhance judicial independence entail a wide range of changes that affect not just the judiciary as an institution but substantive and procedural law, the balance of power among state organs, party–state relations, and social attitudes and practices. An approach focused primarily on the judiciary, or even on state institutions, is therefore not sufficient.

In Chapter 7, Nicholas Howson illustrates the benefits of a case-based approach in his detailed study of more than 1000 corporate law cases in Shanghai courts. He notes that amendments to the Company Law in 2006 represent a radical shift from self-enforcement to a litigation-centered model for resolving corporate disputes. He finds that Shanghai courts are now more competent, autonomous, and independent, and have ruled against government entities, state-owned enterprises, and other politically and economically powerful, well-connected commercial actors and investors. The courts have also indirectly showed signs of autonomy in acting as guardians of the commercial order, seeking to protect a sphere for privately ordered economic activity from intrusion by mandatory business regulations.

On the other hand, the limits of judicial independence were evident in the courts' deference to national economic and social policies in contravention of the Company Law and in the courts' reluctance to hear cases involving companies limited by shares. In each case, the courts are animated by both explicit instruction from superior bureaucratic organs and voluntary self-restraint.

There are a number of reasons for these externally and internally imposed limitations. Some reflect the limited experience of the courts with new types of claims; others reflect plaintiff and judicial deference to the China Securities Regulatory Commission and public prosecutor; still others reflect concerns for market and social stability. Scholars and commentators may disagree about the wisdom of moving slowly or refusing to hear certain cases for these reasons, at least for the moment. More worrisome from the standpoint of judicial independence and justice is the refusal to hear cases because of the superior political power of one of the parties. This concern should not be overstated. As Howson points out, Shanghai courts decided against politically powerful parties in all of the more than 200 opinions reviewed in full where there was a discernable political interest.

Whatever the reasons for the court's reluctance to hear certain types of corporate cases, Howson argues that the failure to apply the new provisions to public companies is "tragic" because the Company Law was amended in part to address corporate governance in such firms. He concludes by suggesting that the current approach of Shanghai courts may not be sustainable in the long run given the rapid rise of group plaintiff cases and popular anger against politically and economically privileged insiders.

In Chapter 8, Stéphanie Balme provides the kind of thick description of the lived reality of judges in rural courts advocated by others in this volume as the proper basis for a successful reform agenda. Various studies cited in this volume have demonstrated significant differences between rural and urban courts in terms of the level of professionalism of judges, judicial salaries and benefits, judicial corruption, the nature of cases, enforcement of court judgments, and citizens' willingness to litigate and satisfaction levels when they do. On the whole, the quality of judges and justice is much higher in urban courts than in rural courts. Drawing on years of fieldwork in basic level courts in remote Shaanxi and Gansu provinces, two of the poorest provinces in China, Balme finds that local judges are better trained and more professional than in the past, although technical competence remains an issue, with only half of the judges in lower courts in these two provinces having obtained college degrees in law. She also finds that despite assurances of de jure independence, judges lack de facto independence. Until recently, local courts have been funded by the local government, although the State Council announced in 2008 that funding was to be centralized. Although centralized funding may lead to significantly less local protectionism and more independence vis-à-vis local governments, it remains to be seen whether the funding will be adequate and make its way to basic courts. Moreover, local people's congresses and party organs still play a role in the appointment and promotion of judges.

Lack of adequate funding is not the only issue, however. Judges in basic level courts, particularly in rural areas, lack prestige and social status. They are often treated like other civil servants and assigned nonjudicial or quasi-judicial tasks such as political mobilization and legal education for the public. Under Hu Jintao's

leadership, the judiciary has been given the new roles of contributing to "social harmony" and, in light of the global economic crisis, of maintaining economic growth and social stability.

As Carlo Guarnieri points out in his chapter, judges are heavily influenced by their reference group. Yet rural judges in local courts are often isolated from professional networks and in some cases slighted by better trained and higher-paid judges in higher courts and urban areas. Thus, they may look to similarly situated judges or to local government and business elites. As Balme notes, like party and government officials, judges are somewhat more educated and better informed than the average villager. On the other hand, many judges are also similar in social background and economic status to the parties that appear before them in court. This close social proximity between judges and citizens may lead judges to be more sympathetic to the plight of weaker parties and thus to turn to alternative dispute resolution methods such as mediation, where judges enjoy greater discretion and exert greater control. Either way, the close relation to local elites or average citizens that characterizes the dense social network of local village life facilitates ex parte meetings and increases the likelihood of corruption. Nevertheless, Balme sees hope for the judiciary's future in the combination of top-down and bottom-up reform efforts aimed at enhancing the professionalism, financial security, and authority of judges in basic level courts, although fundamental changes that rely on forces beyond the judiciary's control will be necessary if China is to meet international standards for judicial independence.

In Chapter 9, Xin He focuses on a particular type of administrative case in rural areas involving "married out women" (MOW) – that is, women who leave their home village after they are married and are then denied economic benefits from their home village. He shows that lower courts in Guangdong province have effectively resisted pressure from party and government organs to solve these disputes, raising questions about the extent to which they are controlled by superior political powers. Citing legal barriers and enforcement difficulties, the courts resisted the global trend to judicialize these disputes, pushing them back to political and administrative channels. However, the courts then demonstrated their strategic sophistication by claiming the right to review the government's decisions in administrative litigation. In so doing, the courts retain an advantageous position in the power relationship with the governments. Moreover, as these cases inevitably leave some groups dissatisfied, the court can avoid public displeasure by forcing the government to make the decision. He concludes that Chinese courts are capable of deliberating about and transforming their situation by strategically interpreting the law and negotiating with superior powers. Consistent with findings in other chapters, he suggests that judicial independence in China is far more complicated than is often recognized and that judicial behavior cannot be adequately explained without thick descriptions of legal arguments, resource constraints, and strategic interpretations open to the courts in a particular context.

As Henderson points out, and empirical studies confirm, most judiciaries in developing countries, whether democratic or authoritarian, suffer from judicial corruption. Judicial corruption undermines judicial independence directly in particular cases and indirectly in support for long-term reforms that grant judges more independence. Simply put, giving more independence and authority to corrupt or incompetent judges will not lead to more just outcomes.[9] Thus, another lesson learned is the need to sequence reforms in a way that balances judicial independence and judicial accountability.

In Chapter 10, Ling Li draws on an extensive data set of confirmed cases of judges sanctioned for corruption over a ten-year period to develop a new analytical framework for judicial corruption. She distinguishes between corruption at different stages (case acceptance, adjudication phase, and enforcement); forms of corruption (physical abuse, theft and embezzlement, bribery or influence-peddling); levels of, and divisions within, courts; and rank of judges. Among her key findings are that corruption is most likely in civil (especially commercial) cases, followed by criminal cases, and rare in administrative cases. Corruption is most common during the adjudication phase, followed by enforcement, and relatively rare during the case acceptance phase. By far the most common type of corruption is bribery and influence-peddling. Physical abuse of parties is rare and largely confined to lower level courts. Although higher court judges did engage in corruption, there were few cases where the corruption resulted in a gross miscarriage of justice reflected in a judgment clearly at odds with the law. Rather, corrupt court presidents were most likely to be guilty of taking kickbacks on construction projects to build new courthouses or of accepting bribes from subordinates seeking promotions.

The next chapter, by Minxin Pei, Guoyan Zhang, Fei Pei, and Lixin Chen, fills in the picture presented by Ling Li by providing a detailed survey of commercial and property cases in Shanghai courts involving both private and corporate parties. The survey sheds light on when parties choose to litigate, the pretrial and trial processes, the extent and sources of outside influence on the courts, and people's attitudes and satisfaction levels, including their perceptions of corruption and the role of lawyers in resolving disputes. The study demonstrates that the judiciary has become more professional, at least in major urban areas, and that parties generally view the litigation process favorably. This confirms results found in several other surveys.[10]

Nevertheless, the courts are subject to considerable outside influence in civil cases, most notably from the parties themselves. Corporate parties are more likely than private parties to seek to influence judges, usually through gift-giving and dinners. This is not because private parties are loath to engage in such behavior, but because they do not know how to go about it. Corporate parties are more likely to hire lawyers

[9] Transparency International, "Global Corruption Report: Corruption and Judicial System," (2007) http://www.transparency.org/publications/gcr/download_gcr#download.
[10] See Chapter 6 and the cites therein.