JUDICIAL INDEPENDENCE IN JAPAN: A RE-INVESTIGATION FOR CHINA

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I. INTRODUCTION

In their discussions concerning judicial independence, many jurists have formulated far-reaching and complex versions of legal culture. From a comparative approach, in the political-legal tradition of many European countries, the notion of state judicial power involved in the settlement of criminal cases and even civilian disputes as a neutral party is quite acceptable. However, as will be discussed, in the history of Asian countries such as China and Japan, judicial power and administrative power have long been one integrated mass, and thus, it is difficult to establish an independent image of judicial power, which may be the situation in China today.[1]

The principle of judicial independence that originated in the West was put into effect with the establishment of the modern idea of "separation of powers."[2] Nonetheless, countries such as China and Japan face a long and winding process to establish judicial independence in their countries. If legal cultures are inevitably linked, phenomena in the abovementioned legal culture will indeed corroborate a regular pattern of development of legal culture.[3] However, this concept must surmount the

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1. For example, concepts such as "jurisdiction subject to the administration of the central government," and "jurisdiction and administration integrated in the local government" were consistently implemented for a long time in the history of ancient China. This kind of tradition has produced far-reaching influences in the process towards the independence of judicial power in modern China. For relevant discussions, *see* CHEN XIAOFENG RESEARCH IN CHINESE LEGAL CULTURE 482-499 (1993); ZHANG PEITIAN, CONFLICTS OF MODERN LEGAL CULTURES BETWEEN CHINA AND THE WEST 182-204 (1994).

2. In Europe, the idea of "judicial independence" emerged in the England in 17th century. But the French people first created this idea; *see* C. L. MONTESQUIEU, THE SPIRIT OF LAW (1748). For this reason, many Chinese scholars believe that the idea of "separation of powers" comes from western countries. For detailed information, *see* LI LONG, XIANFA JICHU LILUN [THE BASIC THEORY OF CONSTITUTION] 4-21 (1999).

3. Most Chinese jurists firmly believe in the concept of "the development law of legal culture." In an important work, Professor Wu Shucheng pointed out that, "legal practice, as the

notion of a kind of determinism. Since the early 19th century, with the impact of western legal culture, Asian countries such as Japan and China have gradually realized that judicial independence is not only a premise of "fair jurisdiction,"[4] but also a basic condition indispensable for the establishment and development of the rule of law. These countries have self-consciously started to absorb the concept and principles of judicial independence and made various attempts to establish relevant systems.[5] While China and Japan are both "eastern" countries, they have experienced quite different outcomes due to the differences in the two societies and their respective historical conditions. Japan has basically accomplished the historical task of setting up the foundations for judicial independence.[6] On the other hand, China still suffers various obstacles in the process of accomplishing this historical task, and faces various problems.[7]

This article will attempt to review Japan's process towards judicial independence, analyze the historical experience and lesson of Japan in this process, and then re-investigate the problems China faces in the process of realizing judicial independence.

II. THE CONCEPT OF JUDICIAL INDEPENDENCE AND ITS MEANING IN LEGAL CULTURE

As a legal term, the concept of judicial independence seems heavily colored by modern western law (including both civil law and common law traditions). However, it can hardly be found in the leading

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self-conscious activity of human beings to renovate both the physical and spiritual world, will always progress in a certain direction and way, which reflects a necessity of an internal link within a legal culture, thus forms the law of the development of legal culture." *See* WU SHUCHENG, et al. TRADITIONAL LEGAL CULTURE IN CHINA 694 (1994).

4. The term "fair jurisdiction" (*sifa gongzheng*) is a concept or slogan that is used often in China today. It refers to the concept that all judicial institutions, including courts, procuratorates and public security bureaux, shall enforce the law and regulations fairly, and not bend the law for personal gain.

5. *See supra* note 1.

6. Has Japan entirely accomplished the task of the independence of judicial power? For some Japanese jurists, maybe it is still a question in dispute. But the majority of Japanese jurists would not deny that Japan has already accomplished the task. For relevant discussion in Japan, *see* KENPŌ (4) TŌCHI KIKŌ [CONSTITUTION (4) GOVERNMENT ORGANIZATION] 124-134 (Teruya Abe & Masaaki Ikeda, eds., 1975).

7. *See* CHEN XIAOFENG, RESEARCH IN CHINA LEGAL CULTURE 482-499(1993); Tan Shigui, *On Independence of Jurisdiction*, ZHONGGUO RENMIN DAXUE XUEBAO [THE JOURNAL OF PEOPLE'S UNIVERSITY] No.2, 1997 at 18.

law dictionaries of western countries.[8] In China, the term is usually expressed as "jurisdictional independence" (*si fa du li*); while legal works and law dictionaries in Japan commonly adopt the expression of "judicial independence" (*si fa quan de du li*).[9]

Then what does "judicial independence" mean? In Japan, the term is usually considered from the perspective of the separation of powers to refer to a state whereby "judicial power has been separated from legislative and administrative powers and granted to an independent state organ."[10] In ordinary circumstances, the term is taken to mean that "judges who officiate judicial power should be entirely independent, and should not be bounded by any orders or directives from anyone in the process of trial for actual cases," or in other words, judges will "not only be exempted from the command and supervision of other state organs in law, but will also be exempted from any other restrictions."[11] The above explanation is reflected in the spirit of the present Japanese Constitution, where Article 76 Paragraph 3 stipulates that, "All judges should be independent in the exercise of their conscience and shall be bound only by this Constitution and its laws."

The concept of "judicial independence" as explained above clearly includes two aspects of meaning in conformity with the views of Japanese jurists. First, it includes the independence of the courts' adjudicative power as a "legal organ," that the court is independent from other state "political" organs (including the legislative and administrative organs). This so-called "independence of the court" is a premise of the second meaning embodied in the concept of "judicial independence," the independence of the judges' authority; that judges should independently exercise the adjudicative power according to their own beliefs and according to an objective meaning of law, and they should not be bound by any orders or directives from anyone. Independence of judges is the core of the meaning embodied in the concept of the "judicial independence."[12]

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8. For example, the term can not be found in BLACK'S LAW DICTIONARY (7th ed. 1999) or THE OXFORD COMPANION TO LAW.

9. For example, one of the most authoritative law dictionaries, SHIN HŌRITSU JITEN [NEW DICTIONARY OF LAW] has collected this term, and most constitutional law textbooks in Japan have a special chapter or section on the topic of judicial independence. SHIN HŌRITSU JITEN 640 (3d ed. 1988).

10. *Id.*

11. *Id.*

12. As for authoritative and representative comments about the two aspects of the concept of judicial independence, *see* KŌJI SATŌ, KEMPŌ [CONSTITUTION] 229 (1981); *see also* Abe & Ikeda eds., *supra* note 6, at 130-131. In an important work on the research of the independence of

In the following section, I will discuss the two aspects of meaning of the concept of judicial independence, both of which reflect the historical process and concrete steps towards judicial independence in modern Japan, and also explain the reason why Japanese jurists commonly adopt the concept of judicial independence.

There has been bold speculation that the concept of "jurisdictional independence" as presently adopted by Chinese jurists may be an academic term imported from Japan.[13] Then why does China not use the term "judicial independence," but instead "jurisdictional independence"? A flat-footed explanation may be that orthodox ideology in present day China is not compatible with the theory of separation of powers, which is the theoretical basis of judicial independence. Nevertheless, against such an ideological background, is there no formation of legal culture? At the end of the Qing Dynasty from 1902 to 1911, there was a movement of reform and legislation.[14] During that period, governors used to promote the separation of the legislative, administrative and judicial powers. The Charter of Judicial Authority (1907) promulgated at that time flaunted the independence of judgments on the one hand. However, on the other hand, it also stipulated that the Ministry of Justice (the supreme judicial administrative organ) had the power to overrule this judicial independence. It also had regulations

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judicial power in Japan, Professor Masayasu Hasegawa has pointed out that the concept of the "judicial independence" in Japan should include three aspects of meaning: (1) judicial power should be independent from legislative and administrative powers; (2) each individual court should be independent; and (3) each individual judge should be independent. This is undoubtedly a very important point of view, but it seems that the first and second aspects of meaning could be subsumed into one. Professor Hasegawa's theory of "three aspects of meaning" can be viewed as a minority theory. *See* MASAYASU HASEGAWA, SHIHŌKEN NO DOKURITSU [THE INDEPENDENCE OF JUDICIAL POWER] 66-68 (1971).

13. In October 1905, after Mr. Sheng Jiaben's visit to examine Japan's court and jail systems, he adopted the term "jurisdictional independence" in his work VISITS TO COURTS: "The jurisdiction in western countries is independent. No one can intervene in trial or judgement. Even with the imperial order or the President's authority, only amnesty can be granted, but judgement can not be changed." ZHANG, *supra* note 1 at 182. Whether this is the origin of the term "jurisdictional independence" in China is still an unresolved question. However, it is widely acknowledged that Chinese law and legal theories were deeply influenced by modern Japan and many legal terms were imported from Japan. This field is still awaiting further research by Chinese and Japanese jurists. Interestingly, at that time, China treated Japan as one of the western countries and believed that Japan had successfully learned the legal system from western countries.

14. During that time, many western "big powers" (including Japan) had influenced in China. England, Japan, the United States and other countries promised to give up their consular jurisdiction power if China would abolish its cruel punishments. In order to maintain political control, the Qing Government started a reform of its legal system by taking into consideration legal systems from Europe, the United States, Japan and other countries.

stipulating that all cases decided by the central judicial office (the supreme judicial organ) and checked by the Ministry of Justice had to be sent to the Emperor for final judgment.[15] Just as one Chinese scholar pointed out, jurisdictional independence and the independence of judgment flaunted during the legislative reforms of the Qing Dynasty were scarcely unimpaired. This reflected the intransigence of the traditional trial system, indicating the difficulties of Chinese legal culture development in modern civilization.[16] In other words, it was relatively difficult for China to establish a system of judicial independence due to the influence of Chinese legal culture. Therefore, regardless of whether one refers to "judicial independence" in Japan or "jurisdictional independence" in China, these concepts are deeply branded with their own legal and cultural characteristics.

III. THE COURSE TOWARDS JUDICIAL INDEPENDENCE IN JAPAN

Japan's course towards judicial independence was a gradual process that can be roughly divided into two historical phases: the prewar phase and the postwar phase.

In 1871, the Japanese government established the Ministry of Justice, an administrative organ with jurisdiction over criminal, civil and administrative cases. In 1875, Japan established the Grand Court (*Daishin'in*) as the supreme judicial organ. The establishment of the Grand Court marked the establishment of a modern judicial system in Japan. However, at that time, there was still no judicial independence at all.[17] According to the system at that time, the Minister of Justice of the central government could exercise his supervisory power over the adjudicational power of the judiciary. At around the time the first Constitution (*Dai Nihon Teikoku Kenpō* or *Meiji Kenpō*)[18] was enacted in Japan in 1889, the Official System of the Ministry of Justice (*Saibansho Kansei*) (1886), the Official System of the Courts (*Saibansho Kōseihō*) (1886), and the Law of Formation of the Courts (1890) were promulgated one after the other in order to reform the traditional judicial system and establish a modern judicial system.[19] Meanwhile, the Meiji Constitution

15. ZHANG, supra note 1, at 201-204.
16. *Id.* at 204.
17. Abe & Ikeda eds., *supra* note 6, at 128.
18. MEIJI KENPŌ [MEIJI CONSTITUTION] (1889).
19. Abe & Ikeda eds., *supra* note 6, at 128-129.

also apparently established a doctrine of "separation of powers." Article 57 of the Meiji Constitution stipulated that "judicial power is officiated by the court according to the law under the name of the Emperor." This indicates that on the one hand, the courts can exercise the adjudicational power independent of the legislative and the administrative branches, but on the other hand, they must obey the authority of the Emperor and be responsible to the Emperor.

In 1891, a low-ranking police officer named Tsuda tried to assassinate the visiting Russian Prince at Ōtsu.[20] The Matsukata government at that time was afraid that the case would lead to diplomatic disputes between Japan and Russia, so the government asked the court to sentence Tsuda to death. Mr. Kojima, the President of the Grand Court, used the Meiji Constitution to argue against the government. Finally, the court sentenced Tsuda to life imprisonment for his murder attempt. This historical event which is also known as the "Ōtsu Event" had far-reaching influence in the legal history of Japan, and has been credited for "leaving indelible footmarks in the judicial history of Japan."[21] Professor Toshiyoshi Miyazawa, the authority among post-war Japanese constitution jurists, firmly believed that "the tradition of judicial independence in Japan was established after the Ōtsu Event.[22]

Most jurists hold the view that Japan's achievements in establishing judicial independence in the prewar phase were quite limited and weak. According to the positivist research of the history professor Saburō Ienaga, prewar Japan adopted a "syncretic framework of judgment and prosecution." The offices of the courts and the prosecutor's offices were not separated. Other than the common courts, there also existed the administrative courts that governed administrative cases. The Minister of Justice exercised the power of judicial administration and the internal control system of the courts was so strict that there was little judicial independence.[23] Especially during the Second World War, judges hardly had any freedom under the wartime control system.[24]

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20. The attempted murder only injured the Russian Prince.

21. *See* NAOKI KOBAYASHI, (SHINBAN) KENPŌ KŌGI (GE) [(NEW EDITION) LECTURES ON THE CONSTITUTION (2D VOL.)] 296 (1981).

22. *See* SABURŌ IENAGA, SHIHŌKEN DOKURITSU NO REKISHITEKI KŌSATSU [THE HISTORICAL REVIEW ON THE INDEPENDENCE OF JUDICIAL POWER] 5 (1967).

23. As for the Ōtsu Event, in order to resist pressure from the government, the President of the Grand Court, Kojima, went to the local court to encourage the trial judge. *See* HASEGAWA, *supra* note 12, at 22-23.

24. *See* IENAGA, supra note 22, at 8-80. Further for the summary of the independence of judicial power in pre-war Japan, *see also* Abe & Ikeda eds, *supra* note 6, at 128-130.

After the war, the American Occupation Authorities instructed the Japanese government to amend the Meiji Constitution and promote judicial reform. Henceforth, Japan entered a second historical phase, the postwar phase, of its course towards judicial independence. After reform of the judicial system, judicial independence had basically been established both in system and in practice, which can be seen from the following points.

First, the pre-war system of a "syncretic framework of judgment and prosecution" was abolished. Offices of the courts and the prosecutors were entirely separated, and the prosecutor's office was subjected to the control of the Ministry of Justice. Moreover, the postwar Constitution (*Nihonkoku Kenpō*)[25] clearly stipulated that "no extraordinary tribunal should be established, nor shall any organ or agency of the Executive be given final judicial power."[26] In accordance with this article, all pre-war administrative courts were abolished.

Second, during the postwar period, courts have been more independent from other political organs in the state system. The new constitution stipulates that "the whole judicial power is vested in the Supreme Court and in such subordinate courts as are established by law."[27] In order to realize fully judicial independence, the patronage of judges, the financial management of courts, the supervision of the judicial staff and the other powers of judicial administration are all vested in courts under the control of the Ministry of Justice. In fact, according to the Law of the Courts (*Saibanshohō*), the judicial and administrative affairs of each court are governed by an autonomous conference of judges.[28] Furthermore, the Financial Law (*Zaiseihō*) also stipulates that the court system has an independent budget and that the President of the Supreme Court will submit the budgetary estimate report to the Cabinet, which will incorporate the report into the state budget. Therefore, the courts are assured of financial independence.[29] An independent financial system is an effective guarantee of judicial independence.

Third, in the postwar phase, Japan established the principle of the independence of the judge's authority. Article 76 Paragraph 3 of the Constitution stipulates that "No extraordinary tribunal should be established, nor shall any organ or agency of the Executive be given final

25. KENPŌ [CONSTITUTION].
26. KENPŌ, art. 76, para. 2 (1946).
27. *Id.* art. 76, para. 1.
28. SAIBANSHOHŌ, arts. 12, 20, 29.
29. ZAISEIHŌ, arts. 17, 19.

judicial power." This article is viewed as the core of judicial independence.[30]

The notion of "judge's conscience" is a disputed concept in doctrinal interpretation. According to one important view, this notion refers to the "benchmark of guaranteeing the interpersonal independence of the judge officiating the independent authority."[31] The independence of judges' individual authority requires that trial judges must not be restricted by any organizations, groups and individuals, and that other judges inside the judicial system will not intervene in their work. This is the ultimate summary of judicial independence. To ensure the independence of judges' authority, the Law of the Courts states that while superior courts hold the supervision powers of judicial administration over their staff, the inferior courts and their staff, such supervision power "should not influence or restrict the judges' adjudicative power."[32]

Furthermore, in order to ensure the independence of the judges' authority, the appointment and removal system of judges, and the system safeguarding judges' status, has been renovated during the postwar judicial reform. According to the present Constitution of Japan, the President of the Supreme Court is nominated by the Cabinet and appointed by the Emperor.[33] The Cabinet appoints the other 14 judges of the Supreme Court.[34] The Cabinet will also appoint judges of the inferior courts according to the nominations of the Supreme Court. The term of duty is ten years and judges can be re-appointed until they reach legal retiring age.[35] A judge should not be removed during the term of duty except when it is decided that he or she is not competent in performing official duties for physical or mental reasons, or when the National Diet impeaches him or her.[36] Moreover, according to the Law of the courts (Saibanshohō), it is not allowed to dismiss, re-assign, re-deploy a judge, or reduce his salary in situations where the judge's personal will is violated.[37]

30. Abe & Ikeda eds., *supra* note 6, at 131.
31. *Id.* at 132,133.
32. SAIBANSHOHŌ, arts. 80, 81.
33. KENPŌ art. 6, para. 2. However, the Emperor merely holds symbolic power under the Constitution, and the actual power of appointment belongs to the Cabinet.
34. KENPŌ art. 79, para. 1.
35. KENPŌ, art. 80, para. 1. In practice, there have been several exceptional cases where judges were declined re-appointments. For details, see the following section.
36. KENPŌ, art. 78.
37. SAIBANSHOHŌ, art. 48

The post-war reform discussed above has exerted great influence on the practice of judicial independence. Let me give an example. In 1948, a defendant, Urawa, garroted her three children, and unsuccessfully attempted suicide. The defendant was sentenced to three years imprisonment with a probation period of three years. After investigation, the Judicial Committee of the House of Councilors considered that the trial court had improperly determined the facts of the case and sentenced too leniently. The Judicial Committee submitted a report to the National Diet to reprimand the court. The Supreme Court then protested against the Judicial Committee's report, arguing that the behavior of the Judicial Committee was beyond the investigation power of the Judicial Committee over state affairs, and thus impaired judicial independence. The Judicial Committee released its counter-statement in debate with the Supreme Court. However, the Senate itself kept a restrained silence in the debate between the Judicial Committee and the Supreme Court. At that time, both public opinion and the academic writings of jurists basically supported the Supreme Court. Thereafter, such events have hardly occurred.[38]

Another case concerning judicial independence is the so-called "event of Hiraga's letter" which happened in 1969. At that time, Hiraga, the president of the local court in Sapporo, wrote a letter to its presiding judge, Fukushima, during the trial of the "Naganuma SAM [Surface to Air Missile] Base" case, instructing Fukushima to dismiss the application. Fukushima considered Hiraga's behavior to constitute inappropriate interference, impairing the independence of a judge's individual authority. So he publicized Hiraga's letter though the media. Hiraga soon received an admonition from the Supreme Court and was removed to a position of lower authority away from the Sapporo local court.[39] Fukushima was also criticized for his behavior. Other cases, involving the re-appointments of several progressive young judges, were also rejected by the Supreme Court. Judicial developments at that time were referred to as a "judicial crisis" and were widely criticized by the public and the academic writings of jurists.[40]

It should be emphasized that the situation described in the "event of Hiraga's letter" wherein there was attempted intervention into a trial

38. *See* 900 JURISTO 40, 41 (1988).

39. *Id.* at 174, 175.

40. For relevant discussions about the "judicial crisis," *see.*, NIHONSHAKAI TO HŌ [JAPANESE SOCIETY AND LAW] 207-209 (Yozhō Watanabe et al. eds.,1994); HASEGAWA, *supra* note 12, at 33-45; *Shihō no Kiki* [*Judicial Crisis*], HŌGAKU SEMINĀ RINJI ZŌKAN (1971).

judge's authority is quite rare in today's Japan. That is why the event received wide attention and criticism. It shows that the historical task of judicial independence has basically been accomplished, and full importance is attached to its practice.[41]

IV. THE EXPERIENCE AND LESSON OF THE "JAPANESE MODEL"

The process towards judicial independence in Japan can be summarized as follows. In the pre-war historical phase, it was emphasized that judicial power was independent from other state organs, especially administrative organs. The "Ōtsu Event" bears important symbolic meaning and historical significance in this respect. In the post-war historical phase, Japan consolidated the achievements of the prewar phase, and further promoted judicial independence relative to legislative and administrative powers. Then Japan shifted the emphasis to the independence of judges' individual authority. In the post-war phase, the independence of judges' individual authority was considered the core principle of independent judicial power. As such, the historical progression toward judicial independence has been almost fully realized. Such a two-step process is not only the inevitable result of historical development, but also typically reflects the concrete connotations of judicial independence faced by non-western countries, especially Asian countries that bear the legal tradition of integrating judicial power and administrative power. Japanese jurists' theories concerning the two aspects of the concept of the judicial power form a corresponding relationship with the two historical phases of the development of judicial independence in Japan. We can call this particular historical experience the "Japanese model," achieving judicial independence from the perspective of historical development.

In the "Japanese model" above, Japan's postwar phase is greatly important. In the opinion of Japanese jurists, the independence of judges' individual authority is precisely the core of judicial independence. The task of judicial independence must be carried out to reflect the independence of the individual authority of judges in the final analysis. However, the achievements of the prewar historical phase should not be

41. Japanese legal scholar Professor Nobuyoshi Toshitani has pointed out that through the judicial reform after the World War II, "judicial independence has been established." Also, independence of the judges had been protected. *See* Nobuyoshi Toshitani, *People's Judicial Involvement*, *in* TODAY'S JAPANESE LAW 172-173, (Kenji Wurada ed., 1995).

neglected. How did Japan achieve judicial independence during the prewar phase?

During the Tokugawa Period, the Japanese government signed many unequal treaties with western countries. In order to abolish the unequal treaties and exterritoriality rights, the Meiji government committed itself to modernize the domestic legal system under pressure from western countries. The codification and reform of the legal system naturally became an urgent task of the government. Against such a historical background, the task of judicial independence was put on the government's agenda.[42]

During the pre-war phase, the efforts of the Japanese judicial elite, such as a former president of the Supreme Court, Kojima, cannot be underestimated. At that time, most of the judges in Japan came from the inferior samurai class of the shogunate, and mostly from small feudalities. But in the political framework of the Meiji government, elite from the Satsuma and Chōshū feudalities controlled virtually all of the government's power. Thus, judicial independence in Meiji times was actually the result of the achievements of governors who skillfully utilized the struggle amongst the local feudalities.[43] Of course, it is undeniable that the authority of the Emperor at that time also had some effect. As mentioned above, Article 57 of the Meiji Constitution stipulates that "judicial power is officiated by the court according to the law under the name of the Emperor."[44] For example, during the "Ōtsu Event," Kojima took advantage of this structure and utilized the "name of the Emperor" to oppose great pressure from the government.[45]

Obviously, it is important that Japan started to establish a modern westernized legal system and judicial system during the prewar historical phase. In such circumstances, the concrete guarantee system of judicial

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42. The "Ōtsu Event" also reflected the historical background of that time. The then-Prime Minister Matsukata's view was that "since the state appeared early before the law, there is no reason to consider that law is more important than state." The President of the Supreme Court, Kojima, argued measure for measure that to maintain the dignity of law and independence of the judgement was the right way to ensure the freedom of the state and acquire the respect of other countries. KOBAYASHI, *supra* note 21, at 297.

43. *See* HASEGAWA, *supra* note 12, at 108; NOBUYOSHI TOSHITANI, NIHON NO HŌ O KANGAERU [CONSIDERATIONS ON JAPANESE LAW] 5-13 (1985).

44. As Professor Hasegawa pointed out, since World War II, many judges believed that having a trial under the name of the Emperor was the reason Japan could create judicial independence. HASEGAWA, *supra* note 12, at 22.

45. When rebutting the arguments of Prime Minister Matsukata, Kojima replied, "It is the Emperor who appointed me to the position of the President of the Supreme Court. No matter how the Cabinet criticizes me or exerts pressure on me, I will never cater to interpretations that violate the spirit of law." HASEGAWA, *supra* note 12, at 20.

independence (including the relatively strict system of judicial bureaucrats and the system safeguarding the judges' status) was also established to support judicial independence. However, just as today's Japanese jurists have recognized, the maintenance of judicial independence in prewar Japan was "not totally perfect."[46] During this historical period, Japan committed itself to realize judicial independence only in a sense relative to other state organs, especially the administrative organs, because the Meiji Constitution had just formally established the modern system of "separation of powers." The achievements of this period are quite limited. As mentioned above, the full task of judicial independence was basically completed in the postwar period.

Moreover, even today, there are many problems concerning judicial independence in Japan. In the multi-level management and supervision system of the judicial administration, the Supreme Court controls the judicial operation power, but the independence of the judges' individual authority suffers from the pressure of the judicial administration supervision.[47] A Chinese jurist has summarized such a situation as the "external independence and internal control" of the court.[48] The so-called "judicial crisis" during the late 1960s and early 1970s took place in just such a setting.

However, the above problem not only originates in the concrete legal system itself, but according to many Japanese jurists, it is also concerned with the internal composition of the ranks of judges in postwar Japan. Though they experienced the postwar reform of the judicial system, many prewar judges were not investigated for liabilities (including possible war crimes), but were kept within the ranks of judges. Meanwhile, the prewar bureaucratic system of judges was also maintained, resulting in the reproduction of bureaucratic judges surrounding the Supreme Court. Therefore, judges of the Supreme Court had a kind of intimate relationship with the long-term conservative regime of the central administrative organs.[49]

Japanese jurists have suggested several reform proposals to these problems. The main contents of the proposals include *inter alia* absorbing the common law approach of unifying the judicial professions, appointing judges from the lawyers' ranks, reforming the traditional bureaucratic judicial system, granting more financial power to the

46. IENAGA, *supra* note 22, at 10.
47. Abe & Ikeda eds., *supra* note 6, at 139, 140.
48. *See* GONG RENREN, PERSPECTIVE OF JAPANESE JUDICIAL SYSTEM 28-36 (1993).
49. Abe & Ikeda eds., *supra* note 6, at 150, 151.

judicial organs through increased budgets, and setting up an independent consulting committee with regard to the appointments of judges.[50]

V. CONCLUSION: REVIEW FOR CHINA

As mentioned above, China faces various obstacles in the process of realizing judicial independence. It must be clearly pointed out that although there are only subtle differences in the verbal expression, there are extensive differences in content between China's "jurisdictional independence" and Japan's "judicial independence."

First, procuratorial organisations in China are not subject to judicial administrative organizations, but belong to the judicial organizations together with the courts. Many Chinese jurists are also of the view that in addition to the courts and its prosecutors' offices, the public security and national security organizations and the judicial administrative organizations are all parts of the judicial organizations.[51] Therefore, it is commonly considered that "jurisdictional independence" in China includes judicial independence with respect to the court and the prosecutor's office.[52] As for judicial independence with respect to the court, Article 126 of the present Constitution of China stipulates that "The People's Court shall, in accordance with the law, exercise judicial power independently, and is not subject to interference by administrative organs, public organizations or individuals." However, it must be noted that common interpretation holds that judicial independence stipulated by Article 126 of the Constitution does not include independence of judges' individual authority.[53]

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50. NIHONSHAKAI TO HO [JAPANESE SOCIETY AND LAW], *supra* note 41, at 213-215.

51. For an introduction, see WU LEI, THE JUDICIAL SYSTEM OF CHINA, 64-65 (1997).

52. *See* Tan, *supra* note 7. Due to the constraints of this article's topic, I will only discuss the problems concerning judicial independence with regard to the courts.

53. *Id.* In addition, Fayuan Zuzhi Fa [The Law on the Organization of the People's Courts] (1995) has regulations concerning the right of judges to "adjudicate the case according to the law with no interference from administrative organizations, social groups or individuals." *See* art 8. sec. 2. Whether such regulation can be interpreted as the independence of the individual authority of judges remains to be seen. According to the author's personal views, such an interpretation would be difficult to justify under the framework of the present constitutional system and judicial system in China. One important reason is that according to Article 11 of the Constitutional Law of the Court, a task of the adjudicatory committees in the People's Courts is to discuss important and difficult cases and other problems concerning adjudicatory affairs.

Second, under the present constitutional system, though the court is a relative independent judicial organization, it is subject to multiple supervision: supervision by state organs (the People's Congress),[54] supervision by organizations of legal supervision (the People's Procuratorate),[55] and internal supervision of the courts' system. In addition to the multiple supervision set out above, the adjudicatory work of the court must also accept the leadership of the ministerial party (the Chinese Communist Party). Further, all the People's Courts have the internal organization of the Communist Party.

In the face of the important differences in the concepts of "jurisdictional independence" in China and "judicial independence" in Japan, in order to realize more fully judicial independence as in Japan, China must first conduct great reforms in its present constitutional system. Reform requires a change of the superior position of the controlling party over the state organs. Reform also requires the People's Congress system to change into a western congress form in order to establish a check-and-balance mechanism. In the predictable future, it would be difficult to realize these two changes.

Even accepting the present established system, there are still other practical problems concerning the issue of judicial independence. First, although the power of judicial administration is allocated to all levels of People's Court by administrative organizations (the Ministry of Justice and its subordinate institutions),[56] the financing of the courts still depends on the administrative organizations. The judicial organizations do not have financial independence. Second, since the actual scope and form of supervision by the People's Congress have not yet been established, some local People's Congresses have adopted various

54. According to Article 3 Section 3 of the Constitution, the state administrative organizations, judicial organizations and procuratorial organizations are all created by the People's Congress and should hold themselves responsible to the People's Congress and accept supervision by the People's Congress.

55. According to Article 129 of the Constitution, the People's Procuratorate is the state organ of legal supervision. Furthermore, according to Article 5 Section 4 of the Law on Organization of the People's Procuratorate, the People's Procuratorate has the right "to implement supervision over the adjudicative activities of People's Court."

56. After the founding of the People's Republic of China, the central government set up the Ministry of Justice, which governed the management of judicial staff, legal education, lawyers, notarial matters and other work of judicial administration during the period from October 1949 to 1959. In 1959, the Ministry of Justice was dismissed and parts of its tasks taken over by the Supreme Court. In September 1979, the National People's Congress passed a resolution to re-install the organizational system of the Ministry of Justice. However, since May 1982, the judicial administration affairs of all levels of the People's Court have been managed by the courts themselves.

methods such as appraisal, suggestion and even inquiry to implement the supervision, which has resulted in extensive disputes amongst jurists.[57] Third, within the court system, there is no clear standard of supervision of superior courts over subordinate courts. Supervision of judicial administration and supervision of adjudication mutually overlap. There is an inclination termed the "administrationization of adjudicatory activities (*shenpan huodong xingzhenghua*),"[58] and there are additional phenomena of "interrogation but no judgment" (*pan er bu shen*), "judgment but no interrogation (*shen er bu pan*),"[59] and "disjointing of the interrogation and judgment (*shen pan tuo jie*)"[60] inside individual courts.[61]

To review China's problems in light of Japan's course towards judicial independence and Japan's experiences and lessons, it can be seen that the problems concerning implementation of judicial independence in China are both complex and structural in nature. As an oriental country with similar traditions of legal culture as Japan,[62] China should be able to absorb the experience and lessons of the "Japanese model" to solve China's problems. However, two points must first be recognized.

First, Japan started to establish a modern legal system and a relatively complete modern judicial system in the prewar period. The basis of this was a constitutional foundation, and the support it provided for the establishment of judicial independence. The situation in today's China is very different. At present, the Chinese legal and judicial systems contain many problems awaiting reform and renovation, and legal and judicial systems adapted to a social transition of modern Chinese legal culture have not yet been established properly. Further, a

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57. *See* Jiang Huiling, *Judicial System Reform and Political Structure of the State*, RENMIN SIFA [PEOPLE'S JURISDICTION] No. 2, 1995, at 35; Li Xiaobing, *Oppugning the Way that People's Congress Inquiries the Court*, FAXUE YU SHIJIAN [LEGAL SCIENCE AND PRACTICE] No.3 1997, at 19.

58. *See* Jiang Huiling, *The Canker of the Administrationization of Adjudicatory Activities*, RENMIN SIFA [PEOPLE'S JURISDICTION] No. 9, 1995, at 32. This indicates that the operation of the judicial activities is similar to the administrative activities.

59. This term refers to a situation where the judge who adjudicates a case does not make a decision. Rather, the decision is made by other judges or institutions, such as the high ranking judges or judges of the adjudicational committee.

60. This term refers to both "*shen er bu pan*" and "*pan er bu shen.*"

61. *See* Jiang Jiyao, *The Modernization of Jurisdiction: An Inevitable Requirement of Rule of Law*, FA XUE [LAW], No. 5, 1995, at 2.

62. Japan was deeply influenced by China through the diplomatic missions called "*kenzuishi*" and "*kentōshi*" during the perioed of 600 to 839. Most Japanese scholars believe that the feudal law of Japan (laws before the modern period) were a part of the Chinese law family. For detailed information, see HE QINHUA ET AL., RIBEN FAZHI SHI [A HISTORY OF JAPANESE LAW] 1-20 (1999).

class of professional judges with the necessary professional training is not yet formed. Nor has the safeguard system of judges' status been established. In such circumstances, China will inevitably meet with more obstacles in the process of establishing independent judicial power.

Second, at present, it is impossible to realize judicial independence as it exists in Japan, either in the present constitutional system and judicial system, or in actual social circumstances. Therefore, China still needs long term efforts in order to realize judicial independence. In this process, China can utilize Japan's experience and lessons for reference, by first focusing on the independence of the judicial organ from other state organs, and then putting the issue of the independence of judges' individual authority onto the historical agenda.

Of course, it should be recognized that since the 1980s, China has nonetheless made some progress toward the independence of the courts' adjudicatory power. After 1982, the power of judicial administration was allocated from administrative organizations (the Ministry of Justice and its subordinate institutions) to judicial organizations. This was an important move to help realize the court's independence from the administrative organizations. According to the Japanese experience, to further the independence of the court, it is necessary to establish an independent financial system for the court. Moreover, the courts must also maintain their independence from legislative organizations, which may lead to a kind of internal tension with the People's Congress system stipulated by the present Constitution of China. However, it is also possible to establish the principle of non-intervention by the People's Congress in the court's defined activities, and to define the concrete scope of supervision by the People's Congress, concurrently with the premise of maintaining the present system. As for the concrete forms of supervision by the People's Congress, the impeachment system of judges in Japan may also prove useful reference.[63]

Finally, we can also establish a supervision model of higher courts over lower courts and define the supervision scope by the higher courts within the court system. The supervisory power over judicial administration and the supervisory power over concrete adjudicatory activities should be entirely separated. Last but not least, in order to

63. For example, we can establish impeachment and judgment institutions and a procuratorial committee for judges under the Standing Committee of the National People's Congress, or grant the power of prosecution to the procuratorial organizations, so that the supervision power by People's Procuratorate as stipulated by Article 5 of the Law on Organization of the People's Procuratorate can be further implemented. Meanwhile any groups, organizations or individuals may be granted the right to submit appeals, launch impeachment or prosecution processes.

realize completely and indeed put into practice the "independence of the court," the supervisory power over adjudicatory activities should be annulled if possible.