

## THE MORE AUTHORITARIAN, THE MORE JUDICIAL INDEPENDENCE? THE PARADOX OF COURT REFORMS IN CHINA AND RUSSIA

*Yueduan Wang\**

### ABSTRACT

*Drawing conclusions largely from democracies, existing theories often positively associate judicial independence with political competition. This Article argues that a negative relationship exists in some authoritarian or hybrid regimes that prefer independent courts: political competition reduces a regime's control over local agents, decreasing its ability to protect the judiciary from external intervention. To test this hypothesis, the Article compares China's ongoing judicial reforms with similar reforms in Russia, which were both aimed to make courts more independent from local elites. However, while both achieved some success in cutting formal ties between frontline judges and powerful local actors, informal channels for exercising extrajudicial influence remain available in both countries. Russian President Vladimir Putin failed to suppress these channels in part because he was dependent upon local elites' support in elections. China's "advantage" of being unconstrained by democratic formalities, however, allowed President Xi Jinping to better control the behavior of local officials and court leaders, significantly reducing external court interference. Consequently, China's judicial reforms seem closer to achieving some limited version of judicial independence than their Russian counterparts.*

---

\* S.J.D. Candidate, Harvard Law School. I thank Vicki Jackson, Chris Carothers, Yizhou Wang, and Ying Xia for helpful discussions and comments.

## TABLE OF CONTENTS

INTRODUCTION .....	531
I. POLITICAL COMPETITION AND JUDICIAL INDEPENDENCE: FRAMEWORKS UNDER DIFFERENT REGIME TYPES .....	533
II. WHO BETTER CHAMPIONED JUDICIAL INDEPENDENCE? COMPARING JUDICIAL REFORMS IN RUSSIA AND CHINA .....	540
III. JUDICIAL REFORMS IN RUSSIA: A CAUTIONARY TALE .....	541
IV. JUDICIAL REFORMS UNDER XI JINPING: A BETTER START? .....	549
V. COMPARISONS AND IMPLICATIONS .....	556
CONCLUSION .....	559

## INTRODUCTION

Why do countries—or more precisely, politicians—support judicial independence from other government branches? One explanation is insurance theory, which argues that politicians facing intense political competition are more likely to support judicial independence because they believe an independent judiciary will better protect their rights, liberties, and preferred policies once they lose power.<sup>1</sup> Another explanation focuses on incumbents' ability to interfere with the judiciary: intense political competition makes it difficult for incumbents to intervene in the judiciary without significant political backlash from the opposition and the public.<sup>2</sup> However, these theories are largely informed by observations of democracies.<sup>3</sup> Do they apply in countries with authoritarian or hybrid regimes?

This Article argues that political competition has the opposite effect on judicial independence under hybrid and authoritarian regimes that demonstrate a preference for independent courts. Such regimes, which have grown considerably in number over the past few decades,<sup>4</sup> may want a judiciary with some degree of independence for many reasons, including attracting foreign investment, improving legitimacy, and strengthening administrative compliance within the bureaucracy.<sup>5</sup> However, most of these regimes face a daunting task: even assuming adequate success in establishing formal protection for judges (e.g., life tenures), local courts will likely remain

---

<sup>1</sup> See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 247–50 (2003) (“[W]here two or three parties of roughly equal strength are engaged in constitutional design, . . . [t]hey therefore may prefer a system of judicial review where a court has extensive formal powers . . . .”); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 741–43 (1994) (“By politicizing appointments but depoliticizing control, in short, [American political leaders] augment their influence during periods when they are out of power.”); Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003).

<sup>2</sup> See, e.g., Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT’L L.J. 595, 620 (2005); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 LAT. AM. POL. SOC. 31, 39 (2007).

<sup>3</sup> See, e.g., GINSBURG, *supra* note 1; Brinks, *supra* note 2; Ramseyer, *supra* note 1; Ríos-Figueroa, *supra* note 2; Stephenson, *supra* note 1.

<sup>4</sup> See Tom Ginsburg & Tamir Moustafa, *Introduction: the Functions of Courts in Authoritarian Politics*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1–2 (2008) (“In many different countries, the scope and impact of judicial authority are expanding, and judges are making decisions that were previously reserved for majoritarian institutions.”); Peter H. Solomon Jr., *Courts and Judges in Authoritarian Regimes*, 60 WORLD POL. 122, 135 (2007) (referencing nondemocratic countries that have “empowered and used their courts”).

<sup>5</sup> See Ginsburg & Moustafa, *supra* note 4, at 4 (identifying primary functions of courts in authoritarian states).

subject to many external interventions. This is because these countries' judiciaries are usually heavily intertwined with local elite networks, which serve as informal vehicles through which powerful local actors can intervene in court cases despite formal barriers. And without the mechanisms usually present in democracies—such as free media and civil society—the courts are powerless to defend themselves without the help of the regime leadership. To protect courts from external interventions through these networks, the regime must assert tight control over its local agents and their rent-seeking behaviors. Such control necessitates highly consolidated power within the central leadership. However, political competition, even under an authoritarian system, will likely oblige the central leadership to rely on local elites to maintain its power, which can undermine the regime's effort to protect the courts from external interventions.

This Article tests the above hypothesis by examining the judicial reforms of two authoritarian countries—Russia and China. Both countries suffered decades of judicial dependence on local governments, leading to frequent external interventions in court cases. In recent decades, both countries launched ambitious and largely genuine reforms aimed at increasing their judiciaries' independence from local elites. The Russian reforms began in the late 1980s and lasted through the mid-2000s, and the Chinese reforms started a couple years after Xi Jinping became President in 2012. Evidence from various sources—such as surveys, interviews, and cross-country indexes—suggest that despite establishment of similar formal protections for courts and judges, the less competitive regime (China) made more progress in promoting judicial independence. For example, according to the World Bank's World Governance Indicators, China's Rule of Law ("ROL") Indicator rose from -0.54 in 2012 to -0.26 in 2017.<sup>6</sup> In contrast, Russia's Rule of Law Indicator *dropped* during its judicial reforms. From 1996 (the year of the World Bank's earliest report) to 2006, Russia's indicator decreased from -0.79 to -0.95.<sup>7</sup> This finding is consistent with the prediction that political competition is negatively associated with authoritarian and hybrid regimes' ability to achieve judicial independence.

---

6 The ROL Indicator ranges from -2.5 to 2.5, with higher numbers representing a higher level of confidence in abiding by the rules of society—in particular, the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. *Worldwide Governance Indicators*, WORLD BANK GROUP, <http://info.worldbank.org/governance/wgi/#doc> (follow "Interactive Data Access" hyperlink, select "Table View," and check "Rule of Law" and "China") (last visited Jan. 26, 2020).

7 *Id.*

This Article—particularly Part IV, focused on China—draws on findings from fieldwork conducted in the summer of 2018. The fieldwork included sixty-seven in-depth, one-on-one interviews with legal professionals from Zhejiang, Chongqing, and Yunnan, including thirty-four judges from eight courts and thirty-three lawyers from seven law firms.<sup>8</sup> Scholars who had connections with the courts and law firms arranged the interviews, which were semi-structured and lasted from 20 minutes to 2.5 hours. Interviewees were asked to describe and evaluate the implementations of specific reforms on the local courts, including the judicial accountability reforms (司法责任制改革) and the judicial centralization reforms (人财物上收).

### I. POLITICAL COMPETITION AND JUDICIAL INDEPENDENCE: FRAMEWORKS UNDER DIFFERENT REGIME TYPES

A vast body of literature discusses the relationship between judicial independence and political competition, and most studies find a positive association. One prominent explanation is insurance theory, which argues that incumbents in competitive political systems tend to cede power to the judiciary to prepare for potential loss of power, as an independent judiciary is better able to protect their interests when they leave office.<sup>9</sup> For example, William Landes and Richard Posner argue that an independent judiciary is likely to ensure that legally enacted policies are implemented even after the politicians who enacted them lose power.<sup>10</sup> Similarly, Mark Ramseyer argues that incumbents facing intense competition will likely support judicial independence because doing so ensures that the judges they appoint can

---

<sup>8</sup> These interviews are coded using two letters and a number: the first letter indicates whether the interviewee was a judge or lawyer (J: Judge, L: Lawyer); the second letter indicates which province the interview was conducted in (A: Zhejiang, B: Chongqing, C: Yunnan); and the number indicates the interview number. For example, an interview could be coded as “JA01” or “LB02.”

<sup>9</sup> See, e.g., GINSBURG, *supra* note 1, at 247–50 (“Because . . . no party can predict with confidence that it will be able to maintain power indefinitely, it makes sense for all parties to adopt judicial review as an alternative forum in which to challenge government policy . . .”); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (contrasting judges who are “merely agents of the current legislature” with an independent judiciary that would “interpret and apply legislation in accordance with the original legislative understanding”); Ramseyer, *supra* note 1, at 741–43; see also Stephenson, *supra* note 1.

<sup>10</sup> William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (contrasting judges who are “merely agents of the current legislature” with an independent judiciary that would “interpret and apply legislation in accordance with the original legislative understanding”).

protect their preferred policies from future officeholders.<sup>11</sup> However, some scholars challenge insurance theory by pointing out that it does not seem to apply in less developed democracies. For example, Aylin Aydın argues that—due to factors such as public distrust in the judiciary and lack of media oversight—power holders in less developed democracies can interfere in judicial decisions at relatively low political cost.<sup>12</sup> Consequently, the short-term benefits that incumbents can obtain from interfering in court cases may be higher than the long-term “insurance” benefits of supporting judicial independence.<sup>13</sup>

A related line of literature stresses the positive relationship between political fragmentation—often a result of heightened political competition—and judicial independence. According to this theory, judges tend to act independently only when the political landscape is fragmented—often through frequent alteration of parties or gridlock within the government—because such fragmentation prevents political actors from effectively retaliating against the courts.<sup>14</sup> For example, Daniel Brinks argues that political fragmentation in Brazil protected its judiciary from over-politicization, as judicial appointments and disciplinary actions were controlled by politically diverse entities without “a truly monolithic political environment.”<sup>15</sup> Julio Ríos-Figueroa similarly argues that power fragmentation limits coordination among elected government branches, which reduces a government’s ability to retaliate against objectionable court decisions.<sup>16</sup> In contrast, when a dominant party effectively controls judges’ careers, it will use such power to punish those who decide cases contrary to government positions.<sup>17</sup>

---

<sup>11</sup> See Ramseyer, *supra* note 1, at 741–43; see also GINSBURG, *supra* note 1, at 247–50 (“Because . . . no party can predict with confidence that it will be able to maintain power indefinitely, it makes sense for all parties to adopt judicial review as an alternative forum in which to challenge government policy . . . .”); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); Stephenson, *supra* note 1.

<sup>12</sup> See Aylin Aydın, *Judicial Independence Across Democratic Regimes: Understanding the Varying Impact of Political Competition*, 47 L. & SOC’Y REV. 105, 111–14 (2013).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 60–61 (2003); Brinks, *supra* note 2; Ríos-Figueroa, *supra* note 2.

<sup>15</sup> Brinks, *supra* note 2, at 620.

<sup>16</sup> Ríos-Figueroa, *supra* note 2, at 49.

<sup>17</sup> J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 60–61 (2003) (“[T]he Secretariat uses its control over personnel matters to create a distinctly political set of incentives. . . . [J]udges who decided cases contrary to government positions seem to have suffered in their careers . . . .”).

Most of these studies, however, pay little attention to the relationship between political competition and judicial independence under authoritarian and hybrid regimes, which together account for almost half of all countries.<sup>18</sup> These countries often have good reason to want a court system that is politically loyal to the regime but otherwise independent from external interventions. Tom Ginsburg and Tamir Moustafa list five primary functions of courts in authoritarian and hybrid countries:

- (1) establish social control and sideline political opponents, (2) bolster a regime's claim to "legal" legitimacy, (3) strengthen administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.<sup>19</sup>

Many of these functions, such as bolstering legitimacy and solving coordination problems among factions, can only be effectively managed by a court system that is reasonably independent from the government, except in the rare cases involving the regime's core interests. Indeed, some authoritarian and hybrid governments have made considerable efforts to increase their courts' independence.<sup>20</sup> For example, Hootan Shambayati describes how the Turkish military twice changed the country's constitutional law, each time making the judicial system significantly more independent from the legislative and executive branches.<sup>21</sup> Similarly, the authoritarian government in Egypt established a constitutional court with "considerable independence from regime interference," which was used to signify to potential investors the regime's resolve in protecting private property.<sup>22</sup> Here, the same questions emerge: Does political competition affect the willingness and ability of these regimes to pursue (limited) judicial independence? If so, how?

The relationship between political competition and judicial independence under authoritarian or hybrid regimes is very different from

---

18 See THE ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2018: ME TOO? POLITICAL PARTICIPATION, PROTEST AND DEMOCRACY 2* (2019), [http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy\\_Index\\_2018.pdf&mode=wp&campaignid=Democracy2018](http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2018.pdf&mode=wp&campaignid=Democracy2018).

19 Ginsburg & Moustafa, *supra* note 4, at 4.

20 See, e.g., *infra* notes 21–22.

21 Hootan Shambayati, *Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 290–95 (Tamir Moustafa & Tom Ginsburg eds., 2008).

22 Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 138 (Tamir Moustafa & Tom Ginsburg eds., 2008).

that under democracies, partly because their courts operate within drastically different environments. In a democracy (especially a consolidated democracy), a local government official must consider a range of factors before intervening in a court case, for example: the free media may reveal such intervention to the public; the public will likely be outraged by an attack on judicial integrity; and high levels of public participation and a vibrant civil society ensures that anyone found interfering with the courts will pay a high political price.<sup>23</sup> Under an authoritarian or hybrid political system, however, judges usually do not have these protections from external intervention: the media is generally not free; the public is accustomed to external court interference; and the state's monopoly on power leaves limited ways to punish such behavior. In other words, under these regimes, judges essentially stand alone when faced with the vast network of executive power—and thus have little choice but to submit to its influence unless other external forces intervene on their behalf.

As a result, under an authoritarian or hybrid regime, a judiciary's best ally (if any) is often the political leadership in the central government. From a cost-benefit perspective, the central leadership usually has many more reasons than local agents to desire the court system be independent from local elites. For example, although a local government's intervention in a court case might weaken the entire regime's claim to "legal" legitimacy, the specific local government will bear only a fraction of such damage; the central leadership, as the representative of the regime, will suffer the direct consequences of lost legitimacy. Moreover, one important benefit of a relatively independent court, namely strengthening the administrative compliance of local bureaucracies, can only be enjoyed by the central government. Indeed, such benefit is normally detrimental to local governments, as it likely chips away at their discretion and rent-seeking opportunities.

It is also quite clear that local governments bear most "costs" of judicial independence. The vast majority of external interventions in court cases are local in nature because they are usually made at the request of local enterprises, officials' friends and relatives, or other powerful local figures.<sup>24</sup>

---

<sup>23</sup> See Aydın, *supra* note 13, at 113–14 (“[I]n order for the citizens to efficiently hold the officials, who intervene in the judiciary accountable, the electorate (1) has to be informed about the wrongdoings of the incumbents . . . (2) has to have high levels of confidence in the judiciary and (3) has to be capable and willing to punish the incumbent.”).

<sup>24</sup> See, e.g., Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L & SOC. INQUIRY 848, 855–56 (2012).



The central leadership, on the other hand, only interferes in the judiciary under relatively rare circumstances, such as in cases involving prominent political dissidents or core national policies.<sup>25</sup> Moreover, the central leadership has more political tools at its disposal, allowing it to control the outcomes of such cases without resorting to case-by-case intervention. For example, a central leadership sometimes changes laws or even amends the constitution to “legalize” its crackdown on political opponents.<sup>26</sup> It also normally controls judges’ careers, which is often enough to secure judgements favorable to the regime in cases with high political stakes.<sup>27</sup> Therefore, the central leadership often has an incentive to promote judicial independence from local politics at the expense of its local agents.

Assuming the leaders of an authoritarian or hybrid regime want to push for more judicial independence from local elites, they must accomplish two things: formal protection of judges through institutional arrangements and sufficient control of local government agents to shield judges from informal interventions. It is relatively easy for the central leadership to establish formal protections for judges and courts through laws or constitutional amendments, as it usually controls the national legislative process.<sup>28</sup> However, scholarship on courts in developing countries has long found that formal judicial independence (e.g. life tenure and secured budgets) correlates

---

25 See, e.g., Interview with LC06, Partner, Anonymous Law Firm, in Yunnan, China (July 12, 2018) (describing a case where the central government used courts to enforce the policy of terminating all commercial leases on military-owned lands) (on file with author).

26 See, e.g., Li-ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 PAC. BASIN L.J. 1, 58–59 (2002) (describing an instance in which the Singapore government legislatively overruled an unappealing Court of Appeals decision by amending the constitution and the Internal Security Act).

27 See, e.g., Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 403 (2015) (“In 1986 a senior trial judge [in Singapore] was transferred to the attorney general’s office after he ruled in J.B. Jeyaretnam’s favor in a politically charged case.”); see also Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 83–84 (Tamir Moustafa & Tom Ginsburg eds., 2008) (“Singapore’s legal judicial community had been sent a very clear message about what might happen to judges whose rulings were not finding favor with the government . . .”).

28 See, e.g., Kathryn Hendley, *The Role of Law*, in *PUTIN’S RUSSIA: PAST IMPERFECT, FUTURE UNCERTAIN* 83, 86 (Stephen K. Wegren ed., 6th ed. 2016) (discussing the depoliticization of the Russian judicial selection process under Yeltsin, including life tenure of for all judges); Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 L. & SOC’Y REV. 653, 662–63 (2006) (“The new court was granted constitutional review power . . . and it was provided with a high level of formal independence from the political establishment. . . . Additional guarantees on tenure security ensured that no one could tinker with the independence of the court without violating the constitution.”).

poorly with behavioral/actual judicial independence.<sup>29</sup> A key reason for this divergence is the existence of informal means of intervention. For example, although federal judge nominations in Russia are made by the Judicial Qualification Commission (which consists mainly of sitting judges), it is reported that decisions have been heavily influenced by lobbying from court chairs, local officials, and even private businesses.<sup>30</sup> Such informal practices give local elites opportunities to curry favor with judges and interfere with their cases despite formal barriers established by the regime.

As mentioned previously, in democracies, mechanisms such as free media and vibrant civil society significantly raise the cost of intervening in the courts through these informal channels.<sup>31</sup> Under authoritarian and hybrid regimes, which usually lack these mechanisms, however, it is crucial that the central leadership otherwise control its local agents and discourage informal court interventions. One common tool for controlling these local agents is the anti-corruption campaign, which in theory should discourage local court and government officials from intervening in court cases as a way of exchanging favors—a major source of external influence over the judiciary.

However, the effectiveness of an anti-corruption drive—or any other form of central control over local agents—is often negatively associated with political competition under authoritarian or hybrid regimes. Political competition often creates political fragmentation, which weakens the central leadership's ability to control its local agents. In particular, when competition takes the form of elections, a central leadership will usually need its local agents' help to garner votes, either legally (such as through connections with local voters) or illegally (such as through election fraud). The more competitive the election, the more help is needed.<sup>32</sup> Such political

---

<sup>29</sup> See, e.g., Brinks, *supra* note 2, at 597–98 (asserting that institutional judicial independence, such as secure tenure and salary, “correlate[s] poorly (indeed, often negatively) with actual independent behavior on the part of the courts”); Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 *WORLD POL.* 587, 587–88 (2012) (“[J]udicial independence, while perhaps enabling, does not automatically or inevitably lead to positive independence.”).

<sup>30</sup> Alexei Trochev, *Judicial Selection in Russia: Towards Accountability and Centralization*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 387 (Kate Malleson & Peter H. Russell eds., 2006) (“Russia’s judicial bureaucracy dominates the process of staffing courts from top to bottom, inviting collusion between the heads of the judicial corps, governors, and private businesses, who actively lobby for their preferred judicial candidates.”).

<sup>31</sup> See Aydın, *supra* note 13, at 113–14.

<sup>32</sup> See, e.g., Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, 37 *L. & SOC. INQUIRY* 848 (2012) (noting that the Chinese government tackles judicial corruption by adopting “measures mainly aimed at reducing corruption at the lower level without changing the system as a whole”).

reliance on powerful local actors inevitably chips away at the central government's ability to shield the judiciary from informal interventions; how can the central leadership expect local officials to manufacture votes on its behalf when it aims to eliminate their rent-seeking opportunities? In other words, under an authoritarian or hybrid regime, greater political competition might reduce the regime's ability to control its local agents, thus curtailing its ability to pursue judicial independence.

Compared to similar discussions of judicial independence in democracies, the term "judicial independence" in this Article focuses more on external interventions from local actors rather than those from the central government. Judicial independence is usually defined as the degree to which judges decide cases on the bases of law and case merits, without interferences from other actors, including both central and local governments.<sup>33</sup> However, interventions from local governments are typically much more prevalent under hybrid and authoritarian regimes than in democracies. As discussed earlier, the lack of protective mechanisms, such as free media and civil society, make it easier for powerful actors in non-democracies to intervene in court cases. Since the controversies in most cases are local rather than national, external interventions from local actors (often in the form of rent-seeking activities) are much more common than those from the national government. In contrast, local interventions are much less frequent in democracies due to the high costs associated with the above-mentioned protective mechanisms—which is why theories about judicial independence in democracies are generally more concerned with national actors who have the power to appoint judges.<sup>34</sup>

The proposed theory does not suggest that political competition is the only factor—or even the most important factor—accounting for varying levels of judicial independence in authoritarian and hybrid countries. Many other factors, such as a country's size and diversity, its legal culture and tradition, and even its leadership's commitment to the concept of "rule of law," may significantly impact an authoritarian or hybrid regime's willingness and ability to pursue or maintain judicial independence. This Article aims to test the proposed theory by comparing two countries that

---

<sup>33</sup> For general discussions on the definition of judicial independence, see Brinks, *supra* note 2, at 596–602 (discussing the different definitions and taxonomies of judicial independence); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 608 (1996).

<sup>34</sup> See generally J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT'L L.J. 595 (2005).

resemble each other in these other factors but have considerably different levels of political competitiveness.

## II. WHO BETTER CHAMPIONED JUDICIAL INDEPENDENCE? COMPARING JUDICIAL REFORMS IN RUSSIA AND CHINA

To test its hypothesis about the relationship between political competition and judicial independence, this Article compares the recent judicial reforms in China with similar reforms in Russia, which were implemented between the late-1980s and the mid-2000s. These two countries were selected based on their many similarities relevant to the subject of this Article. Prior to their respective reforms, both countries had highly dependent court systems. For decades, the local Communist Party branches and executive agencies in both countries had treated the courts as subordinates.<sup>35</sup> In addition, unlike consolidated democracies, both countries lack the factors that can deter external court intervention—such as free media and civil society.<sup>36</sup> Furthermore, China and Russia are both large and diverse countries, which means local governments have considerable administrative discretion and informational advantages vis-à-vis the central government.<sup>37</sup> This means that any attempt by the central government to tightly control its local agents is politically difficult. Most importantly, both countries launched institutional reforms, such as centralized judicial appointment systems and court budgets, aimed at boosting their courts' independence from the influence of powerful local actors.<sup>38</sup> These similarities allow meaningful comparisons between the outcomes of the two countries' reforms.

---

<sup>35</sup> See Ling Li, *The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L. & SOC. INQUIRY 848 (2012); Peter H. Solomon Jr., *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 COMMUNIST & POST-COMMUNIST STUD. 351, 353 (2010).

<sup>36</sup> See THE ECONOMIST INTELLIGENCE UNIT, *supra* note 18.

<sup>37</sup> Vladimir Gelman, *The Dynamics of Subnational Authoritarianism*, 48 RUSS. POL. L. 7, 14–15 (2010) (noting that the disintegration of the Soviet Union led to the weakening of "the coercive capacity of the center" and the transfer of "the most important levers of government, including powers in the sphere of institutional regulation, from the center to the local level."); Yongnian Zheng, *Explaining the Sources of De Facto Federalism in Reform China: Intergovernmental Decentralization, Globalization, and Central-Local Relations*, 7 JAPANESE J. POL. SCI. 101, 107 (2006) (claiming that China's center-local relations can be characterized as "de facto federalism").

<sup>38</sup> See, e.g., PETER B. MAGGS, OLGA SCHWARTZ & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 159 (6th ed. 2015); *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform*, CHINA.ORG.CN (Jan. 16, 2014), [http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_3121260\\_2\\_9.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_3121260_2_9.htm).

Also essential to this comparison, during the period of the judicial reforms, the two countries differed on the main variable of interest (i.e., level of political competition). Even after Putin had consolidated his power and turned the country into a fully authoritarian regime around the mid-2000s, Russia maintained some competitive elements, thanks in part to the constitutionally mandated democratic formalities.<sup>39</sup> Many politicians—including Putin and other members of his United Russia party—must periodically face popular elections to maintain their legitimacy to rule.<sup>40</sup> Although heavily manipulated, these elections are not meaningless—even Putin himself has felt the need to boost his popularity and manufacture votes to avoid being embarrassed at the ballot. China, on the other hand, has long been a constitutionally one-party state with almost no meaningful popular elections beyond the lowest level of government.<sup>41</sup> This has allowed Xi Jinping to govern without much competitive pressure since successfully eliminating his factional rivals in the center. In other words, although neither Putin nor Xi face immediate threats to their personal rules, Russia has more political competition than China, as Putin and his allies must maintain their legitimacy through winning popular elections.

Given this contrast between the two countries, the traditional theory about the relationship between political competition and judicial independence predicts that Russia will have more successful judicial reforms due to its higher level of political competition. The theory presented in this Article, on the other hand, suggests that the Chinese leadership is better able to protect the courts from external interference due to its superior ability to control its local agents.

### III. JUDICIAL REFORMS IN RUSSIA: A CAUTIONARY TALE

Russia's judicial reformation was a lengthy process that spanned from Mikhail Gorbachev's presidency to Putin's. During the final years of the Soviet Union, Gorbachev advocated for *pravovoe gosudarstvo*, which is the

---

<sup>39</sup> See, e.g., Noah Buckley & Ora John Reuter, Performance Incentives Under Autocracy: Evidence From Russia's Regions 2 (Nov. 2015) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2506868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506868).

<sup>40</sup> See generally Rodion Skovoroda & Tomila Lankina, *Fabricating Votes for Putin: New Tests of Fraud and Electoral Manipulations From Russia*, 33 POST-SOVIET AFF. 100 (2017).

<sup>41</sup> *China (People's Republic of)'s Constitution of 1982 with Amendments through 2004*, CONSTITUTE, [https://constituteproject.org/constitution/China\\_2004?lang=en](https://constituteproject.org/constitution/China_2004?lang=en) (last visited Jan. 30, 2019); Deyong Ma & M Rosemary Pang, *The Rise and Fall of Electoral Democracy: A Social Evolutionary Approach to Direct Election Experiments in Local China*, 22 J. CHINESE POL. SCI. 601, 602 (2017).

Russian translation of *Rechtsstaat* or rule of law. He sought to eliminate the Communist Party's control over the judiciary in several ways.<sup>42</sup> First, he changed judges' terms from five to ten years and transferred appointment power from the party apparatus at the same administrative level as the judges to the regional legislature at a higher level.<sup>43</sup> Second, for all judicial appointments and removals, the new system required preliminary screening by the Judicial Qualification Commission, which consisted entirely of judges.<sup>44</sup> Finally, Gorbachev made intervention in court cases a criminal offense.<sup>45</sup>

Although Gorbachev lost his power before completing these reforms, the trend of judicial modernization continued under President Boris Yeltsin throughout the 1990s. In 1992, a law gave life tenure to all judges,<sup>46</sup> subject only to an initial three-year probationary term.<sup>47</sup> The 1993 Russian Constitution established that judges be appointed by the President and that higher court appointees be confirmed by the Federation Council.<sup>48</sup> The President's appointments are largely based on the recommendations of the Judicial Qualification Commission—"a noteworthy reversal from the previous system in which judges served at the pleasure of the Communist Party."<sup>49</sup> Furthermore, the 1996 Federal Constitutional Law No. 1-FKZ, On the Judicial System of the Russian Federation, eliminated the Ministry of Justice's oversight of the judiciary and created the Judicial Department within the Supreme Court, which is responsible for personnel, organization, and resource support of the judicial system.<sup>50</sup> These changes ensured the formal independence of the judiciary from executive influence.

However, when Yeltsin stepped down in 1999, he left a court system that was dependent upon the regional and local governments. The economic crisis of the 1990s badly damaged the Federation's ability to fund the courts, which lacked money to repair deteriorating buildings, purchase office

---

<sup>42</sup> Hendley, *supra* note 28, at 85.

<sup>43</sup> Peter H. Solomon, Jr., *Judicial Power in Authoritarian States: The Russian Experience*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 261, 273 (Famir Moustafa & Tom Ginsburg eds., 2008).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> MAGGS, SCHWARTZ & BURNHAM, *supra* note 38, at 159.

<sup>47</sup> Solomon, *supra* note 45, at 275. Later, a mandatory retirement age was fixed at sixty-five, and later to seventy. See MAGGS, SCHWARTZ & BURNHAM, *supra* note 38, at 160.

<sup>48</sup> Hendley, *supra* note 28, at 86.

<sup>49</sup> *Id.*

<sup>50</sup> MAGGS, SCHWARTZ & BURNHAM, *supra* note 38, at 159.

supplies, or even pay judges' salaries.<sup>51</sup> As a result, courts throughout Russia were forced to take "supplementary payments" from local and regional governments.<sup>52</sup> According to a survey conducted by Peter Solomon and Todd Foglesong, 58% of courts received financial help from local governments in 1996 and 1997.<sup>53</sup> Although such assistance was usually small, half of the surveyed judges "admitted that the contributions produced in them a sense of gratitude to local governments and that their sponsors seemed to have expectations from the courts."<sup>54</sup>

Perhaps more importantly, the local and regional governments gained significant power over the appointment of judges within their jurisdictions, largely due to the general decentralization of political power during the Yeltsin Era. Although the 1993 Constitution theoretically established a unitary court system whose judges were appointed by the President and the Federation Council, the system in practice was quite messy. Some regional leaders directly asked Yeltsin to appoint specific judges, while others refused to accept the unitary system and continued to appoint judges on their own.<sup>55</sup> Yeltsin compromised by seeking consent from the regions on judicial appointments, thereby establishing the appointment of judges as an area of joint jurisdiction between the federal government and the regions.<sup>56</sup> The most obvious indication of the regions' political clout is the 1996 Federal Constitutional Law No. 1-FKZ, which stipulates that the appointment of lower, general jurisdiction judges requires approval from regional legislatures, effectively giving the regions veto power over the majority of judicial appointments.<sup>57</sup> Under these circumstances, it was reported that "federal elites . . . sometimes lobbied regional governors to influence President Yeltsin's choice among judicial candidates."<sup>58</sup>

Putin partially reversed this trend of dependency. Early in his presidency, he famously made the slogan "dictatorship of law" the hallmark of his administration—a phrase that "reflected Putin's real, even naïve, faith in laws as the basis for political order."<sup>59</sup> Reversing Yeltsin's course, Putin

---

51 *Id.* at 160.

52 Solomon, *supra* note 45, at 276.

53 PETER H. SOLOMON JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 39 (2000).

54 *Id.* at 40.

55 Trochev, *supra* note 30, at 380.

56 *Id.*

57 MAGGS, SCHWARTZ & BURNHAM, *supra* note 38, at 71.

58 Trochev, *supra* note 30, at 380.

59 Peter H. Solomon Jr., *Vladimir Putin's Quest for a Strong State*, 22 INT. J. WORLD PEACE 3, 4 (2005).

offered judges important formal protections against local intervention by significantly centralizing both fiscal and appointment power over the Russian judiciary.<sup>60</sup> The surge in oil prices allowed Putin to channel far more resources into the courts than his predecessor.<sup>61</sup> Under the Plan for the Improvement of the Courts, 2002–2006, large sums of money were used to raise the salaries of judges, hire more court staff, and repair court buildings.<sup>62</sup> A second plan, starting in 2007, continued this trend of ensuring the courts were well funded by the federal budget.<sup>63</sup> Thanks to the new funds, the courts are no longer financially dependent on local governments. Putin also eliminated the regional consent requirement for judicial appointments in 2001 amid opposition from several regions.<sup>64</sup> Alexei Trochev noted that “it is widely believed that President Putin himself rather than governors, oligarchs, or judicial bosses will have the final say” in judicial appointments, representing another dramatic departure from the Yeltsin Era.<sup>65</sup>

However, these reforms, which lasted from the late-1980s to the mid-2000s, had limited impact on cases in which powerful local actors might interfere through informal channels. For low-stakes cases, it was found that “judges decide cases in accordance with their *bona fide* interpretation of the law,” but for high-stakes cases, powerful people usually prevail.<sup>66</sup> In these cases, the Soviet practice of “telephone law”—defined as “a practice by which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law”—remained widespread.<sup>67</sup> It should be noted that these high-stakes cases were not limited to the famous ones concerning the Kremlin, such as the Pussy Riot and Khodorkovsky cases.<sup>68</sup> More often, it was political and economic elites in the localities that improperly influenced the outcomes of court cases, including the thousands of criminal cases orchestrated by the business rivals of the defendants.<sup>69</sup> In effect, this created a “dualistic” legal system: the same judge would resolve the vast majority of mundane cases according to the law,

---

60 Peter H. Solomon Jr., *Assessing the Courts in Russia: Parameters of Progress Under Putin*, 1 INT'L J. CT. ADMIN. 26 (2008).

61 *See id.*

62 *See id.* at 28.

63 *Id.*

64 MAGGS, SCHWARTZ & BURNHAM, *supra* note 38, at 71; Alexei, *supra* note 30, at 387.

65 Alexei, *supra* note 30, at 388.

66 Maria Popova, *Putin-Style “Rule of Law” and the Prospects for Change*, 146 DÆDALUS 64, 68 (2017).

67 Kathryn Hendley, *‘Telephone Law’ and the ‘Rule of Law’: The Russian Case*, 1 HAGUE J. RULE L. 241, 242 (2009).

68 KATHRYN HENDLEY, *EVERYDAY LAW IN RUSSIA* 3 (2017).

69 *Id.*



while bowing to extrajudicial influences in cases involving important national and—more frequently—local powerful actors.<sup>70</sup>

Surveys suggested that the public also viewed the post-reform courts as untrustworthy when ordinary citizens opposed the rich and powerful. Between 2004 and 2012, Levada conducted five large-scale surveys (n=1,600) on the attitudes of Russian citizens towards the courts and other law enforcement institutions. When asked if they believed the courts would defend citizens against the abuse of power by law enforcement, less than 30% answered positively—about 5% answered “definitely yes” and 25% answered “yes,”<sup>71</sup> while 39–44% answered “no” and 15–18% answered “definitely no.”<sup>72</sup> Similarly, in a 2014 national survey that asked Russian citizens about their trust in government institutions, only 26% responded that the judiciary “deserved” their trust, while 45% answered that it “did not fully deserve” their trust and 17% that it “did not deserve [their trust] at all.”<sup>73</sup> In contrast, 79% and 54% said that the President and the church deserved their trust, respectively.<sup>74</sup> Such poor confidence in the judiciary is also reflected in Russia’s abysmal performance in the World Bank’s Rule of Law Indicators, which measure the perceptions of “a large number of enterprise, citizen and expert survey respondents” on various law-related indicators, including “fairness of judicial process” and “judicial independence.”<sup>75</sup> From 1996 to 2017, Russia’s Rule of Law Indicator ranked in the lowest 16–28% among all measured countries, roughly on par with Pakistan (18–26%), and remained low throughout the period despite reforms.<sup>76</sup> In her 2007 fieldwork, Kathryn Henley also found that Russian citizens generally reported skepticism about the law’s ability to protect them from elites and—more specifically—“a weariness with the claims of

---

<sup>70</sup> *See id.*

<sup>71</sup> LEVADA ANALYTICAL CENTER, *RUSSIAN PUBLIC OPINION 2012-2013*, at 98 (2013), available at [http://www.levada.ru/sites/default/files/2012\\_eng.pdf](http://www.levada.ru/sites/default/files/2012_eng.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> Kathryn Hendley, *Justice in Moscow?*, 32 *POST-SOVIET AFF.* 491, 492 (2016) (citing *From Opinions—To Understanding*, LEVADA ANALYTICAL CENTER (Nov. 13, 2014), <https://www.levada.ru/2014/11/13/doverie-institutam-vlasti-3/>).

<sup>74</sup> Hendley, *supra* note 73, at 492.

<sup>75</sup> WORLD BANK GROUP, *supra* note 6 (click on “Rule of Law” hyperlink). For an explanation on the World Bank Group Report, see generally Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators Methodology and Analytical Issues* (World Bank Development Research Group, Policy Research Working Paper 5430, 2010), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1682130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130).

<sup>76</sup> WORLD BANK GROUP, *supra* note 6; Kaufmann, Kraay & Mastruzzi, *supra* note 75.

successive post-Soviet regimes to be moving closer to the ‘rule of law’ through institutional innovations.”<sup>77</sup>

Why would Russian judges bow to power when they enjoy life tenure and other institutional protections? Although the judicial reforms established formal barriers between the courts and other local actors, less formal channels through which judges can be compromised have remained.<sup>78</sup> For example, although in theory judicial nominations are based on the professional opinions of the Judicial Qualification Commission, it has been reported that the commission’s recommendations are “often under the de facto control of the chairs of the regional courts.”<sup>79</sup> Thus, the appointment process is tainted by “collusion between the heads of the judicial corps, governors, and private businesses, who actively lobby for their preferred judicial candidates.”<sup>80</sup> Perhaps more importantly, court chairs have significant discretion in disciplining judges through the Judicial Qualification Commission, which often gives considerable deference to court chairs on matters of disciplinary action.<sup>81</sup> As a result, “the chairs of courts retained considerable discretion . . . to punish judges who showed political immaturity by giving too many acquittals or refusing to cooperate in a case with a powerful intervener”<sup>82</sup> and “[j]udges are expected to conform to expectations of their chairs . . . regarding their verdicts and decisions.”<sup>83</sup> Such loopholes enable practices such as “telephone law” to thrive despite the various institutional protections established by the judicial reforms.

However, the existence of these loopholes does not necessarily mean they are widely utilized. The Russian central government’s—including Putin’s—lack of control over local and regional elites, especially over their rent-seeking activities, also facilitates court interference, including collusion between these elites and the court chairs.<sup>84</sup> After all, it is difficult for the “weakest branch” to resist demands from powerful local actors without some form of political

---

77 Hendley, *supra* note 67, at 246.

78 See, e.g., Trochev, *supra* note 30, at 387; Peter H. Solomon Jr., *Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform, in RUSSIA, EUROPE, AND THE RULE OF LAW* 79, 85 (Ferdinand Feldbrugge ed., 2007).

79 Trochev, *supra* note 30, at 387.

80 *Id.* (citations omitted).

81 See Peter H. Solomon Jr., *Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform, in RUSSIA, EUROPE, AND THE RULE OF LAW* 85 (Ferdinand Feldbrugge ed., 2007).

82 *Id.* at 84.

83 *Id.* at 85.

84 NOAH BUCKLEY, FOREIGN POLICY RESEARCH INST., CORRUPTION AND POWER IN RUSSIA 12 (2018), available at <https://www.fpri.org/wp-content/uploads/2018/04/buckley.pdf> (last visited Nov. 19, 2019).

protection, even if institutional arrangements guard its formal independence. In authoritarian countries like Russia, where free media and public supervision are in short supply, such protection may only come from a central government that prefers its judiciary be relatively independent from local elites.<sup>85</sup>

To be sure, Putin did drastically centralize Russian politics, especially compared to the highly decentralized structure of the Yeltsin Era. He created a new layer of government above the states and appointed his representatives to govern them, thereby reducing the state governors' direct access to the central executive.<sup>86</sup> He strengthened the vertical chain of command in the regional offices of several federal agencies.<sup>87</sup> He created a new political party, United Russia, to recruit and control local and regional politicians.<sup>88</sup> He even abolished the direct election of governors in 2005<sup>89</sup> and replaced it with presidential nomination.<sup>90</sup> In theory, these changes should make it easier to prevent local governments from intervening in court cases.

In reality, however, such centralization of power was aimed at providing political stability and—more importantly—guaranteeing election results that were favorable to Putin and his United Russia party, rather than limiting the rent-seeking activities of regional and local officials.<sup>91</sup> This was due in part to Putin's and United Russia's reliance on these actors' resources—including

---

<sup>85</sup> See Aydın, *supra* note 13.

<sup>86</sup> Irina Busygina, *Putin's Russia: The State-Building Strategy*, 1 RUSS. POL. 81, 82 (2016).

<sup>87</sup> Nikolai Petrov & Darrell Slider, *Regional Politics*, in PUTIN'S RUSSIA: PAST IMPERFECT, FUTURE UNCERTAIN 63, 71–72 (Stephen K. Wegren ed., 6th ed. 2016) (describing Putin's effort to “regain[] control over appointing and monitoring personnel in federal agencies” as an effort to “strengthen the vertical chain of command from the Moscow-based ministries or agencies to the federal district agencies and from there to ministry officials in the regions”).

<sup>88</sup> *Id.* at 73 (“Another vertical hierarchy established to increase central control over the regions was the new political party that Putin helped found, United Russia.”).

<sup>89</sup> The elections were reinstated in 2012, with the Kremlin maintaining control of the results through the filtering of candidates. See Helge Blakkisrud, *Governing the Governors: Legitimacy vs. Control in the Reform of the Russian Regional Executive*, 31 EAST EUR. POL. 104, 114–15 (2014) (noting the “formal sifting of candidates” that the Kremlin undertook).

<sup>90</sup> Petrov & Slider, *supra* note 87, at 74 (describing an “appointment process . . . fitted with a veneer of democratic choice”).

<sup>91</sup> See Busygina, *supra* note 86, at 82 (noting that “outside the agreements with federal executive[s] (that basically included provision of political stability in the regions and certain guaranteed results for ‘United Russia’ at the elections) the governors had rather free hands”); Vladimir Gelman, *The Dynamics of Subnational Authoritarianism*, 48 RUSS. POL. L. 7, 19 (2010) (“The economic base of [local] regimes was built on a system of politically conditioned exchanges of resources between the center and regional and local bodies of power, which flowed as in the well-known model of the ‘political business cycle,’ except that payoffs were not made to citizens but to local elites.”).

“compliant regional assemblies, courts and electoral commissions”—to deliver favorable results in national and local elections.<sup>92</sup> For example, after eliminating gubernatorial elections, Putin reappointed the vast majority of the governors who were elected prior to 2005, as they had demonstrated their loyalty to him by delivering votes for United Russia, sometimes through massive election fraud.<sup>93</sup> These appointments “showed no sign that [Putin] had any interest in fighting corruption and political stagnation.”<sup>94</sup> Indeed, under the new arrangement, corruption became “the glue that helps keep [Putin’s] regimes together by rewarding insiders and co-opting them into a unified structure.”<sup>95</sup> It was observed that “[t]urning a blind eye to their corrupt practices is a reward for loyalty. Pyramids of corruption thus incentivize low-level bureaucrats who otherwise may not help the regime drive voter turnout.”<sup>96</sup> Some scholars characterize this arrangement as “freedom [for local elites] . . . in exchange for maintaining local order and authority”<sup>97</sup> or “retention of [the local elites’] monopoly power in exchange for the ‘right’ election results.”<sup>98</sup> It is therefore unsurprising that Putin did little in his first two terms to meaningfully curb rent-seeking behaviors,<sup>99</sup> including the use of less formal channels (such as “telephone law”) to interfere in court cases, despite his growing power over local elites.<sup>100</sup>

Russia’s experience thus serves as a cautionary tale for legal reformers, especially those under authoritarian and hybrid regimes. Although the

---

<sup>92</sup> Cameron Ross, *Municipal Elections and Electoral Authoritarianism Under Putin*, in *FEDERALISM AND LOCAL POLITICS IN RUSSIA* 284, 298 (Cameron Ross & Adrian Campbell eds., 2009) (citation omitted); see also Tomila Lankina, *Regional Developments in Russia: Territorial Fragmentation in a Consolidating Authoritarian State*, 76 *SOC. RES.* 225, 233 (2009) (noting that, during the 2003 Duma elections, “[a]t a regional level . . . [United Russia] tended to succeed in those regions where the regional executive himself headed the party list”).

<sup>93</sup> Petrov & Slider, *supra* note 87, at 74 (“Governors who organized massive vote fraud [in the 2007 Duma Elections] were rewarded for their actions [by Putin] and never faced punishment.”); Gelman, *supra* note 91, at 19 (noting that local leaders who supported Putin received economic benefits).

<sup>94</sup> Darrell Slider, *Putin and the Election of Regional Governors*, in *FEDERALISM AND LOCAL POLITICS IN RUSSIA* 106, 114 (Cameron Ross & Adrian Campbell eds., 2009).

<sup>95</sup> NOAH BUCKLEY, FOREIGN POLICY RESEARCH INST., *CORRUPTION AND POWER IN RUSSIA* 11 (2018), available at <https://www.fpri.org/wp-content/uploads/2018/04/buckley.pdf>.

<sup>96</sup> *Id.* at 12.

<sup>97</sup> See Busygina, *supra* note 86, at 82.

<sup>98</sup> GRIGORII V. GOLOSOV, *POLITICAL PARTIES IN THE REGIONS OF RUSSIA: DEMOCRACY UNCLAIMED* 33 (2004).

<sup>99</sup> See Leslie Holmes, *Corruption in Post-Soviet Russia*, 24 *GLOBAL CHANGE PEACE & SEC.* 235 (2012) (discussing corruption during Putin’s first two terms); Alexander Pavroz, *Corruption-Oriented Model of Governance in Contemporary Russia*, 50 *COMMUNIST & POST-COMMUNIST STUD.* 145 (2017).

<sup>100</sup> See Hendley, *supra* note 67, at 242.

installation of formal protections for judges—such as life tenure and financial independence from local governments—might enable them to act professionally in the majority of mundane cases, local elites can still find less formal ways to influence court cases in which they have interests at stake. While the free media and public supervision in democracies may provide mechanisms for checking such behaviors, in authoritarian regimes like Russia's, such mechanisms are usually lacking.<sup>101</sup> Without additional political support from the central government to protect the courts from local elites, judicial reforms yield only limited improvements in rule of law metrics such as independence from local executive branches.<sup>102</sup>

#### IV. JUDICIAL REFORMS UNDER XI JINPING: A BETTER START?<sup>103</sup>

The judicial reforms under Xi Jinping share many features with the previously described Russian reforms, at least judging by their rhetoric and stated goals. Like Putin and his predecessors, Xi promised to bring “rule of law,” which includes making courts more independent from local governments and frontline judges more independent from their superiors.<sup>104</sup> In 2013, the Xi administration issued a resolution on its reform agenda, which included broad pledges to establish so-called “rule of law” China.<sup>105</sup> Specifically, it promised to ensure “the independent exercise of the judicial . . . power in accordance with the law.”<sup>106</sup> Among the various measures designed to achieve this goal, two are particularly relevant to judicial independence: (1) the judicial centralization reform, which aimed to transfer power over local judge appointment and local court budgets from the local government to the provincial government<sup>107</sup> and (2) the judicial accountability reform, which promised to eliminate court leaders’ power over the cases handled by frontline judges.

The implementation of both reforms started soon after the resolution. In 2014, the central government officially authorized six provinces to pilot these

---

<sup>101</sup> See Aydın, *supra* note 13, at 113.

<sup>102</sup> See WORLD BANK GROUP, *supra* note 6.

<sup>103</sup> See generally Yueduan Wang, *Overcoming Embeddedness: How China's Centrally-Imposed Reforms Make Its Judges More Autonomous*, 43 FORDHAM INT'L L.J. 737 (2020).

<sup>104</sup> *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform*, CHINA.ORG.CN (Jan. 16, 2014), [http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602\\_9.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602_9.htm).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Fan He, *Fayuan Ren Cai Wu Tongguan Bingfei* “Chuzhi Guanli,” FAZHI ZIXUN 63, 63 (2013).

reforms,<sup>108</sup> and in 2015, the Supreme People's Court officially laid out the specific reform measures for the entire Chinese judiciary.<sup>109</sup> About a year and half later, the Supreme People's Court declared that most reform tasks "had been basically accomplished."<sup>110</sup>

In actuality, however, the centralization was only partially successful. Prior to the reform, power over local courts' personnel and budgets was mostly controlled by local governments.<sup>111</sup> Regarding personnel, the centralization reform attempted to transfer the power to appoint and remove local court presidents, vice-presidents, and judges to the provincial governments.<sup>112</sup> According to the interviewed judges, the power over frontline judges has been completely centralized at the provincial level in all three provinces.<sup>113</sup> The power over presidents and vice-presidents, however, merely appears to have been transferred to the provincial governments, with much actual power either remaining with the local governments or transferring to the higher courts.<sup>114</sup> The failure to completely transfer power over presidents and vice-presidents is largely logistical in nature: unlike appointing judges, which involves only uniform tests and interviews, appointing a president or vice-president requires personal knowledge of the candidate. Given the large number of courts in a Chinese province, many provincial governments simply lack the capacity to manage so many people.<sup>115</sup>

Similarly, the centralization of fiscal power has been successful in only some regions. In Zhejiang, the local governments still pay the local courts.<sup>116</sup> In Chongqing and Yunnan, the provincial government pays the salaries of

---

<sup>108</sup> *The Central Government Decided to Pilot Judicial Reforms in Six Provinces Including Shanghai and Guangdong*, CAIXIN (June 16, 2014, 7:59 AM), <http://china.caixin.com/2014-06-16/100690795.html>.

<sup>109</sup> *Views on Deepening the Reform of the People's Court*, SUP. PEOPLE'S CT. (2015), <https://www.china-court.org/law/detail/2015/02/id/148096.shtml> (last visited Jan. 29, 2020).

<sup>110</sup> SUP. PEOPLE'S CT., *ZHONGGUO FAYUAN DE SIFA GAIGE: 2013–2016*, at 4 (1st ed. 2017).

<sup>111</sup> Interview with JB01, Judge and Director of the Research Office, Primary People's Court, in Chongqing, China (June 22, 2018) (on file with author).

<sup>112</sup> SUP. PEOPLE'S CT., *supra* note 110, at 9.

<sup>113</sup> Interview with JA10, Judge and Chief Judge of 1st Civil Division, Primary People's Court, in Zhejiang, China (June 7, 2018) (on file with author); Interview with JB01, *supra* note 111; Interview with JC01, Judge and President, Primary People's Court, in Yunnan, China (July 10, 2018) (on file with author).

<sup>114</sup> Interview with JB01, *supra* note 111.

<sup>115</sup> See Xiaojian Xie, *Sheng Yixia Difang Fayuan, Jianchayuan Ren Cai Wu Tongyi Guanli Zhidu Yanjiu*, LILUN YU GAIGE 153, 156 (2015) (on file with author).

<sup>116</sup> Interview with JA01, Judge, Primary People's Court, in Zhejiang, China (June 6, 2018) (on file with author); Interview with JA10, *supra* note 113.

judges and other court employees,<sup>117</sup> but the local governments of these two large cities pay judges significant bonuses based upon their workloads.<sup>118</sup> These bonuses can constitute a significant portion of a judge's paycheck, sometimes more than fifty percent.<sup>119</sup> Such uneven implementation is caused by the economic disparities among different regions. Local governments in large cities are much richer than their rural and small-city counterparts and can therefore afford to pay their judges more generously.<sup>120</sup> Since provincial governments often lack sufficient funds, they opt to allow local governments in developed regions to continue these payments to the local courts. However, despite these setbacks, the centralization of personnel and fiscal power still represent a significant step towards the judiciary's formal independence from local executive branches.

Compared to the centralization reform, the judicial accountability reform was implemented much more thoroughly. Prior to the reform, a judge's opinion usually needed to be co-signed by either a division head or a court president/vice-president before becoming valid.<sup>121</sup> Since the reform, a court opinion goes into effect right after being issued by the judge or the panel of judges that tried the case.<sup>122</sup> The reform also limits the scope of the adjudication committee's case reviews. Before the reform, many court cases that involved relatively large monetary, social, or political stakes were transferred from frontline judges to the adjudication committee, which consisted of court leaders, including the president, vice-presidents, and division heads.<sup>123</sup> The new rule stipulates that the committee only review "major and complicated cases" that involve "foreign affairs, security and social stability," or difficulty in "the application of law."<sup>124</sup> During the interviews, many judges confirmed that courts have used the committees less frequently following the reform.<sup>125</sup> This reform effectively eliminated the

---

117 Interview with JB01, *supra* note 111; Interview with JC02, Judge, Primary People's Court, in Yunnan, China (July 10, 2018) (on file with author).

118 Interview with JB01, *supra* note 111; Interview with JC06, *supra* note 111.

119 *Id.*

120 Interview with JC04, Judicial Assistant, Primary People's Court, in Yunnan, China (July 10, 2018) (on file with author).

121 Ling Li, *The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L. & SOC. INQUIRY. 848, 858-59 (2012).

122 *See, e.g.*, Interview with JA01, *supra* note 116; Interview with JC02, *supra* note 117.

123 KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* 91 (2017).

124 SUP. PEOPLE'S CT., *supra* note 110, at 32.

125 *See, e.g.*, Interview with JA05, Staff of the Political Dep't, Primary People's Court, in Zhejiang, China (June 6, 2018) (on file with author); Interview with JB06, Judge and Vice Chief Judge of the

main formal channel through which court leadership could influence the outcomes of court cases. Judges described their post-reform role as “independent judging,” “complete independent handling of cases,” and “the last gate.”<sup>126</sup>

As in Russia, local elites in China can still utilize informal channels to convey their preferences in court cases, even though the formal channels have been narrowed or closed by the above-mentioned reforms. Although the centralization reforms have reduced local governments’ power over court personnel and finances, local judges still rely on local officials for less formal “assistance.” During the interviews, judges relayed many instances in which local government collaboration was critical to their job. One judge said that he depends on the local village’s committees to find defendants who must be served notices.<sup>127</sup> Another said that he sometimes asks the local police to send a police car to his detached tribunal<sup>128</sup> to protect the judges from agitated litigants.<sup>129</sup> These largely discretionary forms of assistance rendered by local officials, although much less formal than the power over court personnel and finance, inevitably serve to maintain the judiciary’s dependency despite the centralization reforms.

Similarly, while the accountability reforms curtailed court leaders’ formal power over cases handled by frontline judges, they did not eliminate their ability to influence these judges’ decisions through less formal means. Like the court chairs in Russia, Chinese court leaders hold great power over the advancement of frontline judges.<sup>130</sup> One lawyer explained: “[A]fter the reform, if the judge insists on a specific result, then the leaders have no way to force him/her to change the decision. But such insistence will be disadvantageous to him/her in the longer term, as it will negatively affect his/her relationship with the leaders.”<sup>131</sup> Therefore, despite the centralization and accountability reforms, local elites still find informal ways to influence frontline judges’ decisions.

---

1st Civil Div., Primary People’s Court, in Chongqing, China (June 27, 2018) (on file with author); Interview with JC06, *supra* note 111.

<sup>126</sup> Interview with JA01, *supra* note 116; Interview with JA03, Judge, Primary People’s Court, in Zhejiang, China (June 6, 2018) (on file with author); Interview with JC02, *supra* note 117.

<sup>127</sup> Interview with JC02, *supra* note 117.

<sup>128</sup> A tribunal located in remote regions, usually as part of a primary court.

<sup>129</sup> Interview with JC06, *supra* note 111.

<sup>130</sup> Interview with LB01, Partner, Anonymous Law Firm, in Chongqing, China (June 20, 2018) (on file with author); Interview with LB04, Partner, Anonymous Law Firm, in Chongqing, China (June 20, 2018) (on file with author).

<sup>131</sup> Interview with LB04, *supra* note 130.



Nonetheless, it seems that the Chinese government was somewhat more successful than its Russian counterpart in reducing the use of these informal channels of extrajudicial influence due to Xi Jinping's superior ability to control China's local bureaucrats. According to some judges and lawyers, extrajudicial interference has been steadily decreasing since 2013, two years prior to the launch of the judicial reforms. Soon after Xi became president in 2012, he started to push for centralization of government power, especially through a rigorous anti-corruption campaign. Some observers consider the campaign to be the longest and most sustained attack on rent-seeking activities in the post-Mao era.<sup>132</sup> Unlike Putin, whose centralization campaign resulted only in co-optation of local elites, Xi's initiatives more directly—and more effectively—suppressed rent-seeking activities by powerful local actors. The large-scale prosecution of corruption has made local officials more cautious when informally interfering with court cases, as these behaviors are now more intensely scrutinized.

At the same time, Xi has chosen to use the courts and formal laws as a chief venue for controlling the local bureaucracy under the banner of “governing according to the law.”<sup>133</sup> During the interviews, several judges and lawyers reported that they were invited or hired by the local government to help with “governing according to the law,” including evaluating the legality of governmental policies and the investment projects of state-owned enterprises.<sup>134</sup> Combined, these two moves—strict control over the behavior of local governments and the empowerment of the local courts—have given the judiciary unprecedented space to exercise its power in localities, and lawyers and judges recognize this improved legal environment. For example, one lawyer commented:

Now when clients ask us: “Do you have guanxi with the court?” We will say confidently: “We do not have guanxi, but you need to believe in the judges

---

<sup>132</sup> See, e.g., Melanie Manion, *Taking China's Anticorruption Campaign Seriously*, 4 *ECON. & POL. STUD.* 3, 6–7 (2016) (“The anticorruption campaign [led to] . . . the significant reduction of rent-seeking opportunities in China's economy . . .”); Minxin Pei, *Assessing Xi Jinping's Anti-Corruption Fight: Views From Five Scholars*, 24 *MOD. CHINA STUD.* 5, 7 (2017); Andrew Wedeman, *China's Corruption Crackdown: War Without End?*, 116 *CURRENT HIST.* 210, 210 (2017) (“[T]he anticorruption crackdown led by Chinese president and Communist Party . . . has become the longest, most sustained, and most intense attack on high-level graft in the post-Mao era.”).

<sup>133</sup> See Wang, *supra* note 103.

<sup>134</sup> Interview with LC07, Partner, Anonymous Law Firm, in Yunnan, China (July 12, 2018) (on file with author).

and the system. The old ways are gone. The court decisions will not deviate too much from what the law requires.”<sup>135</sup>

Similarly, the head of the administrative law division in a primary court discussed her experience regarding the changing environment: “twenty years ago, . . . the court was indeed subjected to the control of the [local] government in all aspects. . . . Now . . . the administrative agencies do not dare threaten us.”<sup>136</sup>

The combination of the judicial reforms and the changing legal “environment” seems to have altered litigants’ perceptions of the courts. Among the thirty lawyers who were asked to comment on the effect of the reforms on extrajudicial interference, twenty-four answered that they resulted in more independence for judges vis-à-vis their superiors and less extrajudicial influence on their cases.<sup>137</sup> Many lawyers attributed the change to the accountability reform, especially to the elimination of the case approval system.<sup>138</sup> Others pointed to the improving legal environment that leads to a reduction of informal influence on their cases.<sup>139</sup>

Why was Xi Jinping able to control his local agents and offer courts protection from informal interventions while Putin largely failed? One important reason is that Xi, unlike Putin, does not face the competitive pressure of popular elections. The Chinese Constitution clearly stipulates that the Chinese Communist Party (“CCP”) is not subject to political competition from other political parties,<sup>140</sup> and decades of practice has confirmed that the CCP’s position is unchallenged by competitive elections. To be sure, the power of top leaders in China could be constrained by factional competition within the CCP. The most prominent example is the fierce competition between President Hu Jintao’s faction (*Tuan Pai*) and former-President Jiang Zemin’s faction (*Shanghai Gang*) in the 2000s, which severely fragmented Chinese politics on both the central and subnational

---

<sup>135</sup> Interview with LC06, Partner, Anonymous Law Firm, in Yunnan, China (July 12, 2018) (on file with author).

<sup>136</sup> Interview with JC09, Judge and Chief Judge of the Admin. Div., Primary People’s Court, in Yunnan, China (July 11, 2018) (on file with author).

<sup>137</sup> See Wang, *supra* note 103, at 755.

<sup>138</sup> See, e.g., Interview with LA13, Assoc., Anonymous Law Firm, in Zhejiang, China (June 5, 2018) (on file with author); Interview with LC08, Assoc., Anonymous Law Firm, in Yunnan, China (July 12, 2018) (on file with author).

<sup>139</sup> Interview with LC06, *supra* note 135.

<sup>140</sup> *China (People’s Republic of)’s Constitution of 1982 with Amendments through 2004*, CONSTITUTE, [https://constituteproject.org/constitution/China\\_2004?lang=en](https://constituteproject.org/constitution/China_2004?lang=en) (last visited Jan. 30, 2019).

levels.<sup>141</sup> However, Xi Jinping, with no apparent affiliation to either of these two main factions, unexpectedly consolidated his power by crushing his opponents with his ruthless anti-corruption campaign. Once Xi eliminated meaningful competitors from within the regime, he no longer needed to worry about political competition—in stark contrast with Putin, who must confront elections despite holding an unchallengeable position within the ruling coalition. As a result, Xi was able to swiftly centralize control over the local government through political campaigns (e.g., anti-corruption and “governing according to the law”) and institutional arrangements (e.g., the supervision apparatus) with minimal resistance and little political cost to his power.

However, China’s current “success” in this regard is only successful relative to Russia’s abysmal record. Despite recent progress in reducing extrajudicial influence, most Chinese courts are still far from what can be legitimately described as “independent.” This is especially true in less developed regions. Kwai Hang Ng and Xin He argue that there are two types of courts in China: “work-unit” courts, which mostly exist in rural and less developed areas, and “firm” courts, which mostly operate in urban and more developed regions. “In work-unit courts, judges are accustomed to ask before making any consequential decisions.”<sup>142</sup> Judges in firm courts, on the other hand, are more inclined to rule based on law and are less influenced by extrajudicial factors.<sup>143</sup> This distinction was confirmed by several interviewed lawyers who have litigated in multiple jurisdictions across China. For example, one Chongqing lawyer said: “The judicial environment in Shanghai is better than Chongqing and other provinces. But places that have such a good environment are rare. Beijing is not as good, and Chongqing is even worse. But Chongqing is already the best in the Southwest region. Guizhou is the worst.”<sup>144</sup> Therefore, although it seems that China is on a better track than Russia, building a judiciary that is reasonably independent from local elites across the whole of China will likely

---

<sup>141</sup> See CHENG LI, *CHINESE POLITICS IN THE XI JINPING ERA: REASSESSING COLLECTIVE LEADERSHIP* 299–300 (2016) (“The region’s core political faction used to be the Shanghai Gang . . .”). See generally CHENG LI, *CHINA’S LEADERS: THE NEW GENERATION* 118–19 (2001) (exploring Hu Jintao’s rise to power through factional politics); BO ZHIYUE, *CHINA’S ELITE POLITICS: POLITICAL TRANSITION AND POWER BALANCING* 139–99 (2007) (analyzing the balance of political power among factional groups in China).

<sup>142</sup> KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* 194 (2017).

<sup>143</sup> *Id.*

<sup>144</sup> Interview with LB03, Partner, Anonymous Law Firm, in Chongqing, China (June 20, 2018).

take a very long time—even with the current level of political support from a powerful central leadership.

## V. COMPARISONS AND IMPLICATIONS

When comparing Xi Jinping's judicial reforms with their Russian counterparts, the similarities are obvious. They both use the term "rule of law" without committing to the liberal ideologies normally associated with it. More specifically, both Xi and Putin aimed to centralize power over their courts' personnel and finances to make the judiciary more independent from powerful local actors. Both also tried to reduce judges' dependence upon court leaders. Russia did so by professionalizing the appointment process and granting life tenures to judges, while China eliminated the case approval system and limited the jurisdictions of adjudication committees.

Such similarities seem to suggest that the Chinese reforms will lead to poor outcomes. Years after the Russian judicial reforms, President Medvedev famously said that Russia remained "a country of legal nihilism."<sup>145</sup> His view echoes the surveys that indicate the Russian people's continuing distrust of the judiciary and formal laws despite years of reforms and arguable progress. Such pessimism is not without reason. "Telephone law" still plagues cases involving the interests of powerful figures, which reinforces the negative impressions of the courts held by citizens since the start of the Soviet Union.<sup>146</sup> Does this mean that the judicial reforms in China—a country that is similarly large, authoritarian, and relatively underdeveloped with a long history of highly dependent courts—will suffer the same fate?

Not necessarily. According to the World Bank's World Governance Indicators, which have provided a standardized indicator on "Rule of Law" since 1996,<sup>147</sup> China's judiciary seems to have achieved significant progress during the tenure of Xi Jinping. In 2012, the year Xi became President, China's Rule of Law Indicator was -0.54, ranking within the lowest 35.68%

---

<sup>145</sup> Lionel Barber, Neil Buckley & Catherine Belton, *Laying Down the Law: Medvedev Vows War on Russia's Legal Nihilism*, FINANCIAL TIMES, (Dec. 24, 2008), <https://www.ft.com/content/e46ea1d8-c6c8-11dd-97a5-000077b07658> (internal quotation marks omitted).

<sup>146</sup> See LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 34 (Denis J. Galligan & Marina Kurkchiyan eds., 2003) (discussing the "negative myth of the rule of law" in post-Soviet societies).

<sup>147</sup> WORLD BANK GROUP, *supra* note 6.

of all countries.<sup>148</sup> These numbers have since steadily risen. In 2017, China's ROL Indicator grew to -0.26, and its ranking rose to 44.71%.<sup>149</sup> Although some of Russia's reforms predate the dataset, their latter effects are discernable. In 1996, Russia's ROL Indicator was -0.79 with a ranking of 24.62%; by 2006, these numbers had *decreased* to -0.95 and 18.66%.<sup>150</sup> Although these decreases do not necessarily imply that Russia's judicial reforms negatively impacted judicial independence,<sup>151</sup> they do suggest that these reforms have not met their stated goals. Moreover, these data echo the previously discussed surveys and scholarship on Russia as well as the author's interviews with Chinese judges and lawyers. Taken together, this evidence suggests that the authoritarian regime in China did a better job than its Russian counterpart in achieving its courts independence from external influences. Why is this?

A key reason is that Russian leaders face more political competition than their Chinese counterparts, even as Russia has become a fully authoritarian regime under Putin. To be sure, neither Xi nor Putin face any real challenge to their personal hold on power—both leaders successfully established themselves as the single dominating figure in domestic politics just a few years into their presidencies. However, Russian politics remains more competitive than Chinese politics. The Economist Intelligence Unit's 2018 Democracy Index report labels both China and Russia as authoritarian regimes, with Russia's general democracy score (2.94 out of 10) lower than China's (3.32).<sup>152</sup> However, Russia performed better in both "electoral process and pluralism" (2.17) and "political participation" (5.00) than China (0.00 and 3.89, respectively), indicating that the Russian regime is considerably more competitive than China's despite both being fully authoritarian.<sup>153</sup> These numbers largely reflect differences between the two countries' constitutional arrangements. While both are authoritarian regimes, Russia has a formally democratic constitution that requires regular elections. China, on the other

---

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (follow "Interactive Data Access" hyperlink, select "Table View", and check "Rule of Law" and "Russian Federation").

<sup>151</sup> For a detailed discussion on how perceptions about rule of law may be biased against actual performance of the Russian courts, see Kathryn Hendley, *Resisting Multiple Narratives of Law in Transition Countries: Russia and Beyond*, 40 L. & SOC. INQUIRY 531, 546 (2015).

<sup>152</sup> China's higher general score was mostly due to its better performances on "functioning of government" and "political culture." See THE ECONOMIST INTELLIGENCE UNIT, *supra* note 18, at 17, 24.

<sup>153</sup> *See id.*

hand, is a constitutionally one-party state, which means politicians do not face the pressure of popular elections.

In line with the hypothesis of this Article, China's "advantage" of having less political competition makes a considerable difference in its ability to promote judicial independence from local elites. As mentioned earlier, Russia's democratic formality forces Putin and his allies to periodically face elections for various executive and legislative posts. To win these elections by a comfortable margin—and thus maintain the legitimacy of his dictatorial rule—Putin relies on local agents to deliver enough votes, often through large-scale election fraud. In exchange for such acts of loyalty, Putin tolerates these local officials' rent-seeking behaviors, including their interventions in the court system—an arrangement that significantly undermines Russia's quest for judicial independence. On the other hand, as Xi Jinping does not face popular elections, he has little need to make such a deal with local agents—at least not for the same political reasons as Putin. Consequently, he is able to tighten his grip on local elites and suppress their rent-seeking activities, which include interference in court cases. Therefore, compared to Russia, China's relative success in achieving judicial independence may be partially attributed to the regime's lower level of political competition.

That said, this Article does not suggest that the difference in political competition is the only factor—or even the most salient factor—that accounts for the different outcomes of China's and Russia's pursuits of judicial independence. Many other variables may also have had significant impact, such as the presidents' personal commitments to the idea of rule of law (or rule by law), the effectiveness of the anti-corruption apparatus, the socio-political-legal culture, etc. The argument here is that the level of political competition is one important variable that explains variance in the effectiveness of the judicial reforms in these countries.

It is important to note that a lack of political competitiveness can also pose problems for judicial reforms under authoritarian or hybrid regimes. The flip side of China's "advantage"—that the top power is not bound by democratic formalities or other institutional constraints—is its high dependence on the individual leader, which brings considerable unpredictability to any reform that requires long-term commitment. As discussed previously, given China's regional disparities, achieving a reasonable level of court independence from local elites across China would inevitably take a long time. However, Xi's control of local elites is highly dependent upon both his dominance over factional competitors in the central government and the centralization of local governments' power. If either of these elements diminish, progress towards a more powerful and autonomous

judiciary might halt. Therefore, while one can conclude that Xi Jinping has done better than the Russians at achieving judiciary independence thus far, only time will tell if he accomplishes anything close to his promise of “rule of law China.”

## CONCLUSION

Traditional theories often attribute a high degree of judicial independence to intense political competition. Insurance theory argues that when faced with a high probability of defeat, incumbents will move to strengthen the judiciary’s independence to protect their rights and preferred policies from future incumbents. Others argue that political competition often creates political fragmentation, which prevents a government from taking coordinated action against a judiciary that defies it. Both theories thus predict a positive relationship between political competition and judicial independence.

However, this Article proposes that the opposite relationship exists in authoritarian and hybrid regimes that prefer judicial independence, as political competition hampers the central leadership’s ability to prevent its local agents from intervening in court cases. Due to these regimes’ lack of mechanisms that politically protect judicial independence (such as free media and civil society), their judiciaries are extremely vulnerable when faced with local government intervention. Under such circumstances, the central leadership is often the best ally of the court, as the regime may believe that it can benefit from a judicial system that is independent from local elites. To achieve this goal, the central leadership must shield the courts from external interventions, which requires both institutionalized protections and highly centralized control over local governments’ rent-seeking behaviors. However, if factional or electoral competition causes regime fragmentation, it is difficult to achieve such centralized political control, which means political competition is likely to hamper the path towards judicial independence in these regimes.

This Article tested this theory by comparing the judicial reforms in China and Russia, both of which aimed at making the courts more independent from external influences. While both countries established similar institutional protections for the courts, such as centralized appointment systems and budgets, China was significantly more successful in reducing external interference. A key reason is that the Russian leadership must face regular elections, which are an importance source of legitimacy under their

formally democratic constitution. Even as Russia has become a fully authoritarian country, Putin still needs the votes for both himself and his United Russia party to maintain his power and legitimacy, which has led to his reliance on local agents to garner votes through both legitimate and illegitimate means. Such reliance has resulted in the arrangement of “retention of [the local elites’] monopoly power in exchange for the ‘right’ election results,”<sup>154</sup> which prevents Putin from effectively controlling his local agents and protecting the courts from their interventions. In contrast, due to China’s status as a constitutionally one-party state, China’s central leaders face little competitive pressure from popular elections. This “advantage” has allowed Xi Jinping to act much more forcefully than Putin against local governments’ rent-seeking behaviors. As a result, while surveys and studies suggest that Russia has made little progress in reducing the practice of “telephone law” during the span of its judicial reforms, most interviewed Chinese judges and lawyers conveyed that they have witnessed a considerable drop in external interventions in the past few years due to both the new institutional protections and the center’s tightened control over local governments. The comparison thus bolsters the proposed negative association between political competition and judicial independence under authoritarian and hybrid regimes that prefer more independent court systems.

---

<sup>154</sup> GOLOSOV, *supra* note 98, at 33.