JUDICIAL INDEPENDENCE ON TRIAL: TENSIONS ANDİCOMPROMISES IN PURSUIT OF THE RULE OF LAW

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I. RULE OF LAW

Although the Rule of Law is a very popular concept, its definition is elusive. Generally, it connotes the idea of a government of laws, not of men, or that no one is above the law. If a king or dictator enjoys too much power, his "word is law," so the law follows his whim. That is the rule of man, not the Rule of Law. Whatever the Rule of Law is, therefore, it is *not* the rule of man, because it is incompatible with placing anyone above the law.

When Southern Sudan achieved autonomy under its Comprehensive Peace Agreement in 2005, the new chief judge of the Southern Sudan Supreme Court hailed the end of hostilities as a new era of "Rule of Law." He contrasted it not with the "rule of man" but with the "rule of the gun." In a region torn by decades of civil war, and other lawless banditry, including the ravages of the infamous Lord's Resistance Army, the power was exercised at gunpoint, and whoever held the gun made the rules. In this case, it is not the king or dictator, but the person who is armed and threatening violence, who is above the law.

The Rule of Law therefore means that the government and its highest leaders, as well as the armed and dangerous, are subject to the same laws as everyone else, that they must comply with the law, and that they will be held accountable, even punished, for violation of it. But to what degree is it achievable in any society? And who enforces it, to ensure that it happens?

II. JUDICIAL INDEPENDENCE

The problem is that whoever or whatever is empowered to protect the Rule of Law is simultaneously empowered to destroy it. Western reformers argue that an "independent judiciary" is the *sine qua non* for the Rule of Law, that the judiciary must be sufficiently independent to make it possible for it to apply the law even-handedly and fairly. Only an independent judiciary can

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ensure that everyone, regardless of their popularity, unpopularity, political influence, or practical power, is treated equally under the law.

Empowering the judiciary over otherwise-powerful people in government and society, arguably necessary to ensure those individuals are not "above the law," however, may be nothing more than a shift of power from political elites to the judiciary itself. If the Supreme Court is empowered to declare what the law is, then the members of the Court themselves might be viewed as "above the law." Indeed, the Court may be characterized as the new political elites, with king-making power. An example from the United States is the case of *Bush v. Gore* in 2000, when the Supreme Court effectively picked the next president of the United States, in a decision that appeared to be driven more by politics than by principle.

To the extent judicial independence has this effect, it does not safeguard the Rule of Law. A strong and independent judiciary could be a major threat to the Rule of Law.

III. DO WE, CAN WE, SHOULD WE TRUST THE JUDICIARY WITH INDEPENDENCE?

Western ideology places tremendous trust in independent judiciaries. Within Western circles, the desirability of an independent judiciary, particularly as a Rule of Law bulwark, is assumed, treated as axiomatic. Rule of Law promotion projects often articulate one of their goals the creation of an independent judiciary, or the "strengthening" of the independence of the judiciary.

A. What do we Mean by "Independence"?

In this context, the term "independent" is generally understood to mean that the judicial branch and the judges themselves are insulated from political or other retribution for their decisions. On an individual level, we call this "decisional independence," freeing a judge to make his or her decisions without outside influence or fear of repercussions. Judicial independence has an institutional component to it as well, calling for Constitutional separation of powers, so the political branches of government have only the most limited power to police or discipline the judiciary. This is called "institutional independence."[1] Rule of Law reformers tend to focus on structures that promote both institutional and decisional independence.

[1] Stephen H. Legomsky, *Deportation and the War on Independence,* 91 CORNELL L. REV. 369, 386 (2006) ("it is common to distinguish decisional independence from institutional and other components of judicial independence").

But true decisional independence is actually a function more of judicial behavior than of formal structure. Judges who are subject to executive branch oversight may nonetheless conduct its business without regard for how the executive branch will react.[2] Similarly, a judiciary that has formal, structural protections built into the Constitution may still take cues from the executive for any of a number of reasons: political affinity, personal friendship or loyalty, bribes and corruption, etc. So the existence of structures that insulate judges from political repercussions for their decisions may be neither necessary nor sufficient for them to act independently.

B. The Desirability of Independence

In previous articles, I have identified this attribute, a judge's personal independence, or willingness to act independently, as "judicial courage." This can be a critical quality for judges, vital to establish the Rule of Law, but only if the judges retain a commitment to lofty principles of justice. If a judge has courage and acts independently, without fear of retribution, she will be able to do the right thing despite the various pressures that may swirl around her. But if the judges lack a commitment to the principles of justice, the power enjoyed by an independent judiciary can be both corrupted and corrupting, ultimately frustrating the Rule of Law.

C. Contrary Perspectives, Cultural Differences

Of course in other cultures and other ideologies, as well as at other times in history, the judiciary has not been allowed to be independent precisely because the judiciary is not trusted. While the ideology of industrialized Western nations has long embraced the notion that judicial independence is good, because we can and should trust judges to do the right thing, other cultures have reached the opposite conclusion.

1. Common Law Culture

The legal tradition in common law countries is a product of its history, when courts often functioned to protect individuals from the abuses of the crown. Those countries have been happy to empower courts, to grant them greater independence, seeing them as part of the greater Rule of Law

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[2] Lady Brenda Hale once responded to this concern, that the Law Committee of the House of Lords, the highest judicial body in the UK, was in fact formally a part of the Legislative Branch. She easily asserted that what matters is not the structure of the institution, but what people do. [citation]

solution.[3] The judiciary must be independent of the executive, the thinking goes, because it is the judiciary who must protect the people (in their individual capacity) from oppression by the executive.

2. Communist/Socialist Culture

Consider, in contrast, the role of the judiciary in the Second World, under communist ideology. The role of the socialist state, or perhaps more precisely, of the Party in that state, is as a champion of the rights and interests of the workers. The system is built on the principle, inter alia, that workers will be exploited by capitalists without the intervention of the Party, whose actions are an expression of the collective will of the workers.

In the Socialist state, therefore, the Party protects the rights of the people not from public government oppression (because the government is already on the side of the "people") but from private economic exploitation. Because the Party is already on the side of the people, there is no contradiction if the Party places a telephone call to a judge in an important case and dictates the desired or appropriate outcome to him. Such "telephone justice" was apparently common in Eastern bloc nations before communism's dramatic and sudden decline in the late 1980s. And from the ideological perspective of a Marxist/Leninist, there is nothing offensive about it. Indeed the problem comes only when one doubts the wisdom, judgment, or ethics of the Party which makes the decision in that case.

The Westerner views "telephone justice" as a wholesale corruption of the Rule of Law, an archetypal example of how and why judicial independence is important. To the Westerner, who defines justice in individual terms, the defendant in the telephone justice example receives no justice. But from a different ideological and cultural perspective, the benefit of the whole is more critical than the rights of the individual, and the Party is the appropriate entity to determine what is in the best interests of the people in general.

Put another way, common law society embraces judicial independence because it trusts courts, and has less confidence in political parties, or in political branches of government. Communist society, in contrast, trusts the Party, and has less confidence in the courts. In either case, the Rule of Law

[3] The history in France led to contrary conclusions. There, in the years leading up to the French Revolution, the courts were perceived as being a vehicle for the King's oppression of the people. The French, therefore, sought to severely circumscribe the powers of the courts, particularly with respect to the power of judicial review and constitutional interpretation.

depends upon the integrity of the entity that is empowered; it depends on whether that entity deserves the trust and confidence reposed in it.

IV. WHAT ROLE DOES PUBLIC CONFIDENCE PLAY?

The issue of public trust is not important solely as a matter of constitutional structure. Certainly the constitution must entrust *some* person or institution to uphold and enforce the Rule of Law. But for a judicial system to perform its intended role in any society, the public must have confidence in the quality of justice that it dispenses. Otherwise, the public will not resort to the courts for resolution of disputes.

Vigilantism is an expression of the public's lack of confidence in the courts: if they don't trust the courts to deal adequately or appropriately with wrongdoers, they will "take the law into their own hands." At the same time, in private law, citizens who have grievances or disputes with their neighbors, or with those they do business with, will not resort to the courts for dispute resolution. They will seek to resolve their differences through extrajudicial dispute resolution. Such resort is usually a problem for the Rule of Law, because it often involves threats, violence, or other disruptive self-help.

Absent the Rule of Law, the more peaceful approaches to private dispute resolution, such as mediation or negotiation, are unlikely to function well. The resolution of disputes by negotiation depends very much on each party's "threat point," *i.e.* the expected outcome if a settlement negotiation breaks down. In ADR this is threat point is whatever the parties would get by going to court. Thus private settlements will always reflect, in large degree, the expected outcomes from the courts themselves. If the courts are unpredictable, private settlements are difficult to do, because the parties threat points are uncertain. Even worse, if the courts will favor one party over another, the favored party will have negotiating power to extract a favorable settlement, replicating in private negotiation the very injustice that would be expected from the courts.

The Rule of Law requires that everyone knows what the law is and that most of the people most of the time choose to abide by it.[4] In addition, the Rule of Law carries the expectation that those who break the law will be punished under the terms of the law, and that those whose rights have been violated in some way can be vindicated as prescribed by law. If the public has

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[4] JANE STROMSETH, ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS, 2006.

no confidence in the integrity or effectiveness of the courts, the judiciary cannot play its proper role in establishing the Rule of Law, and the public may find little reason to abide by it.

Summarizing, lack of public confidence in the courts means the public will get their dispute resolution needs met elsewhere. But more than that, lack of confidence in the courts may skew private settlements, prompting unjust resolutions even outside the courts. But even worse, if the courts are perceived as unwilling or unable to enforce the law fairly, the public has little incentive to abide by the law in the first place.

V. MISPLACED FAITH IN JUDICIAL INDEPENDENCE

Serious problems arise when judicial independence is superimposed on a system that is not ready for it or not worthy of it. The value of independence, of the courage of the judges, is entirely dependent on whether the judges are worthy of that trust. In a culture or society where judges do not have a tradition of integrity, where they do not enjoy public confidence, judicial independence will do more harm than good.

The principle can be illustrated with a few simple graphs. Judicial integrity is depicted on the vertical axis and judicial courage on the horizontal axis. Every judge or judicial candidate/nominee has some endowment of judicial integrity and some endowment of judicial courage, allowing her to be plotted at a unique spot on the graph. The graph can then be subdivided into four quadrants, those on the right including judges of high courage, and those on the top including judges of high integrity.

More specifically, in the Northeast quadrant (Quadrant A), we find the judges of the highest integrity and the highest courage. These are our "heroes." In the Northwest quadrant (Quadrant B), we find judges who want to do the right thing, but are vulnerable to outside threats and pressures; their integrity is high, but their courage is lacking.[5] Quadrant C, in the Southwest, includes the "corruptible" judges, whose integrity is dubious, and who, lacking courage, are susceptible to pressure. Here is where you might find judges who

[5] While it may be hard to know how many judges fall into this quadrant, literature is full of tragic characters who know what is right and want to do what is right, but who succumb to pressure. They have not lost their moral compass – indeed they are tortured by their ethical lapses – but at the critical moment they lacked the courage to do the right thing. Two that come to mind quickly are Joseph Conrad's *Lord Jim*, and Lt. Col. Markinson in Aaron Sorkin's play (and Rob Reiner's film) *A Few Good Men.* JOSEPH CONRAD, LORD JIM (1968); AARON SORKIN, A FEW GOOD MEN (1990); A FEW GOOD MEN (Columbia Pictures 2001).

pander to the whims of the executive branch or even be in the pocket of the mob. They are not bent on pursuing their own corrupt agenda (see Quadrant D, *infra*) as they lack the courage for such an enterprise, but are manipulable, and may well end up doing the bidding of others. In the Southeast (Quadrant D) we find the scariest of all, the judges with low integrity and ample courage; these are what Judge Noonan described as "Monsters" in his book on judicial ethics – judges who boldly pursue their own corrupt objectives.[6]

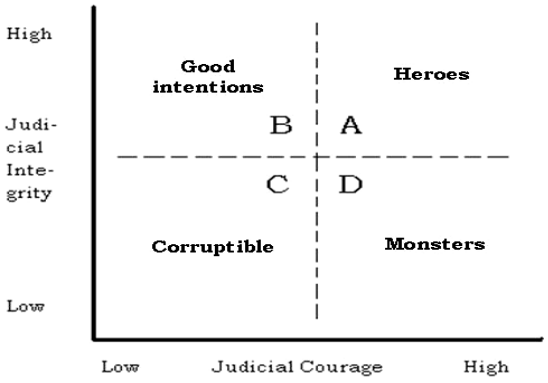


Fig. 1 – *Categorizing Judicial Types by Quadrant*

If judicial independence is enhanced, in the form of greater structural protections for judges, it will bolster the exercise of judicial courage, nudging judges to the right, wherever they may start on the graph. Those in Quadrant B will be pushed toward Quadrant A, a positive development, when additional protections are provided to judges to strengthen their position and insulate them from outside threats and pressures. This is the dynamic that prompts reformers to call for greater protections, to support the ideal of greater judicial independence.

At the same time, however, the strengthening of judges' structural protections may push judges from Quadrant C toward Quadrant D, turning them into monsters. If the judges already lack integrity, new protections may embolden them, convincing them that they can get away with pursuit of their own agendas, be they corrupt, self-serving, or political, rather than of the Rule of Law.

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[6] JOHN T. NOONAN, JR. & KENNETH I. WINSTON THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 35-47 (1993).

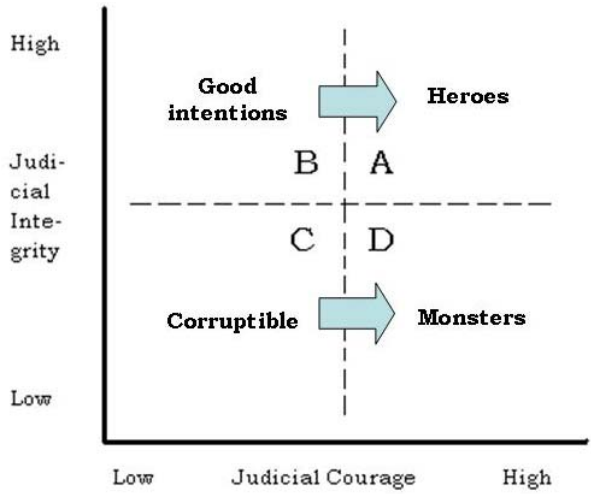


Fig. 2 – *Impact of increased judicial independence for judges*

VI. JUDICIAL ACCOUNTABILITY

The natural and obvious counterpoint to judicial independence is judicial accountability. If judges are subjected to scrutiny, evaluation, discipline and even removal, they will presumably be far more cautious about misusing or abusing their power and authority to undermine the Rule of Law. Accountability comes necessarily at the expense of independence. A judge who is concerned about consequences or repercussions of her judicial decisions is not entirely free to rule as she wishes. Defenders of judicial independence will lament this loss, but if the judges are in the lower half of the graph—low in integrity or otherwise inclined to pursue their own political agenda—a system of judicial discipline and removal may be necessary to help keep them honest.

Using the graphical depiction, we can see that the imposition of a disciplinary regime is not going to move judges from Quadrant D upward to Quadrant A. Monsters will not acquire integrity through the threat of discipline. Their courage numbs them to such influences—they are unlikely to be swayed by fear. Rather, the disciplinary regime will have its greatest impact on the left side of the graph, where judges are susceptible to outside pressures. For these judges, the threat of discipline will nudge them upward, from Quadrant C to Quadrant B.

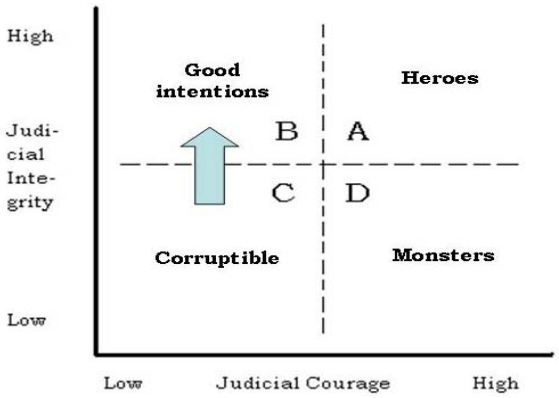


Fig. 3 – *The impact of a judicial discipline regime*

A. Accountability Mechanisms - The Problem of Political Accountability

One of the most serious challenges in this scenario, is how to design an effective system of judicial accountability. If we cannot trust our judiciary, who can we trust to police our judiciary?

It is tempting to give this power and authority to one of the political branches of government. Those branches bear, at the very least, an inherent accountability to the voters. The need to stand for re-election will certainly prompt elected officials to maintain some fealty to the public's demand for integrity, as well as the voting public's priorities in matters of policy.

But the political branches are beholden only to the majority. As long as their actions satisfy a majority of the voting public, they have little incentive to do the right thing vis-à-vis the minority. Indeed, they may have very strong incentives to take positions hostile to an unpopular minority, as their re-election hopes depend on pleasing the majority.

But unpopular minorities have basic rights too, and someone must stand up to ensure that their rights are not trampled. Alexis de Tocqueville characterized this as a critical role for the judiciary, to protect the minority from the "tyranny of the majority."[7] The judiciary is uniquely qualified to perform this role precisely *because* they are not typically subject to majoritarian influences.

For these reasons, it is usually considered a best practice for oversight and discipline of the judiciary to be done from *within* the judiciary. Because the judicial

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[7] *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Ch. 15 (1835).

branch is usually insulated from majoritarian politics, the discipline carried out *by* the judiciary is unlikely to be tainted by political motivations. Moreover, judges are often highly motivated to root out the bad apples among them, the judges whose poor conduct or ethics reflects badly on the rest of the judiciary.

B. Threats to Judicial Independence From Inside the Judiciary

Of course, just because the judiciary as a whole is independent from the other branches of government—*i.e.* because there is institutional independence—it does not necessarily follow that individual judges enjoy decisional independence. The Japanese judiciary is a case-in-point. In Japan, the judicial branch has "almost from its inception been organized as a remarkably autonomous elite bureaucracy."[8] But despite this remarkably strong institutional independence for the Japanese judiciary, the individual judges suffer terribly from influence coming from *within* the judiciary.[9] To the extent the judiciary adopts is own political or ideological orientation, and then enforces it from within, the judiciary's legitimate role, and the Rule of Law, are threatened.

Accordingly, it is important to keep in mind the two different types of judicial independence, and not sacrifice decisional independence for the sake of institutional independence. The former is far more critical than the latter, and Japan has made an unfortunate trade-off.

VII. STRIKING THE BALANCES, ADDRESSING THE PROBLEMS

If the judiciary is pursuing its own fiercely independent agenda, as may be happening in Japan, what is the solution? Is there some way to rein in the judiciary without compromising important principles of judicial independence?

The answers come with a few cautions. First, judicial independence is difficult to establish; it can take a very long time, measured not in years but in generations. As already noted, changing the constitution does not necessarily affect human behavior, and judges without courage to act independently, without a culture and a tradition of doing so, are unlikely to change their approach overnight. Moreover, public confidence is something the judiciary must earn based on a significant track record of independence and integrity.

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8 John O. Haley, *Judicial Independence in Japan Revisited,* LAW IN JAPAN 25 (1993): 3.

9 David M. O'Brien and Yasuo Ohkoshi, *Stifling Judicial Independence from Within,* in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, 37, 39 (Peter H. Russell and David M. O'Brien, eds. 2001) ("[T]hey are manipulated by the chief justice and the General Secretariat so as to curb judicial independence on the bench.").

As noted above, even where courts *are* independent, they can't play their proper role without public buy-in.

Second, judicial independence can be frustrated and destroyed far more easily than it can be established. Accordingly, if there are concerns about an overly independent judiciary, reformers must move with caution. If reining in the judiciary destroys judicial independence, it may take generations to get it back. Whatever reforms are contemplated, they should be approached with an eye toward minimizing any compromise of judicial independence, particularly decisional independence.

A. Allowing Input From the Political Branches For Judicial Selection

One possible compromise, if a judiciary is asserting and enforcing a political ideology of its own independently of the political process, is to allow greater influence of the other branches of government in judicial *selection*. In the Unites States federal courts, there is participation by both the executive and legislative branches in selecting judges for appointment—the filibuster rules in the Senate mean that at least 60% of the Senate must approve the judge before she can take office, and that means that the minority party can usually block an appointment. The process ensures that judges appointed to the federal bench are relatively moderate in terms of political ideology, having been approved by Senators both in the majority and in the minority.

Once the judges are appointed, however, it is essential that they be beyond the reach and influence of the political branches of government. Some might fear that the politicized appointment process may foster a sense of obligation, rooted in gratitude, to the political interests responsible for the appointment. This has not necessarily been the case in the United States, however, with a number of celebrated examples of judges departing significantly from the politics of the President who nominated them shortly after assuming the bench.[10] Indeed, the culture and tradition of the American judiciary encourages judges to assert their independence in this way; it would be considered shameful if a judge were perceived as being under the thumb of the political actors responsible for his or her appointment.

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[10] Two that come immediately to mind are Justices William Brennan and Earl Warren. These two justices led a liberal revolution on the court during the 1950s and 1960s (Brennan being a liberal force through the 1980s), despite the fact that they were appointed by the very conservative President Dwight D. Eisenhower. More recently, conservative President George H.W. Bush was disappointed when his nominee David Souter turned out to be far more liberal than President Bush had anticipated.

There may be some value in allowing elected officials a role in the appointment of judges, therefore, as long as the structure and culture of the judiciary ensured complete decisional independence once such judges assumed the bench. If such a mechanism is approached carefully, especially to ensure that minority parties' participation in the selection, it can help ensure that the membership of the judiciary is within a reasonable and acceptable range on the ideological spectrum.

B. Diversifying the Council that Oversees Judicial Appointments and Operations

Another approach toward breaking an ideological headlock on the judiciary is to diversify the council that oversees the judiciary. If that body is monolithic politically, and self-perpetuating, the risk arises that it will acquire and pursue a political agenda of its own. But the council can be established with a diverse membership, bringing a variety of perspectives to the critical principles governing the judicial branch. As I have argued elsewhere, the council can be composed of judges from all levels (including first instance court judges) elected by their peers, representatives of the bar, of the legal academy, of lay persons.[11] There may be elements of geographic representation as well. The point is that the judiciary is unlikely to assume and assert a strong political ideology, or otherwise infringe on the decisional independence of its judges, if it is governed by a diverse body, representative of a variety of stakeholders in society, and in the justice system in particular.

That said, it is critical that diversification of the council does not include politicization of the council. The interests represented should not include representatives of the administration (*e.g.* it is a regrettably common practice for the Minister of Justice to serve ex officio on such councils), or of the legislature, or of any political parties. Partisan politics has no place in the administration of the third branch of government. Compromising this principle would certainly undermine judicial independence at the most basic operative level.

VIII. CONCLUSION

First, judicial independence is not always a positive influence on the Rule of Law. Where the judiciary is not, or cannot be, trusted to act consistently

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[11] David Pimentel, *Judicial Governance: Independence and Accountability as a Product of Constitutional Structure*, published in Turkish in a book by the Int'l Congress on Constitutional Law, University of Istanbul (forthcoming in 2011).

with the highest principles of justice, too much judicial independence can be a negative force, disrupting or defeating the Rule of Law.

If the judiciary is corrupt, then judicial accountability mechanisms—vehicles for judicial discipline and removal—must be adopted consonant with the requirements of the Rule of Law, even if this compromises judicial independence somewhat. Indeed, judicial independence supports the Rule of Law only if the judges can be trusted.

If the judiciary is not corrupt, but merely on its own ideological crusade, the problem is far more difficult to address. This may be an example of too much institutional independence at the expense of judges' individual decisional independence, illustrated by problems that have arisen in Japan. Discipline is an inappropriate mechanism for solving this problem, as the merits of judges' decisions should not be second-guessed by disciplinary authorities; only a court of appeals is competent to do that, and only for the purpose of correcting legal error, not for the purpose of disciplining the judge who got it wrong. Indeed disciplinary action based on ideological foundations represents the worst type of violation of decisional independence.

The problem of a judiciary that is too independent may come through allowing limited participation of the political branches in the judicial selection and appointment process, being careful to ensure that such influence does not carry over, after appointment is done. Even better may be a more thorough diversification of the membership of the council that oversees the judiciary. If that body represents the broad range of interests in society (sitting judges, including trial judges, lawyers, legal educators, lay public), the council cannot be easily captured by any political movement or party, and is unlikely to develop and pursue its own political agenda. The interests on the council will simply be too diverse to permit domination by anyone, including the majoritarian influence of the electorate.

The Rule of Law requires more than judicial independence. But sacrificing decisional independence in the pursuit of the Rule of Law is also likely to backfire. In the end, Constitutional structure—specifically the structure, membership and powers of the council governing the judiciary—needs to be crafted carefully, responding to cultural and historical factors, and carefully preserving whatever decisional independence already exists in the system. As long as the judges have basic levels of integrity, decisional independence is the vehicle for advancing the Rule of Law, and ensuring that the judges can play to role of "hero" in advancing it.