

Independence of the judiciary

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Abstract

There are many factors which influence the independence of the judiciary. In a decision making process, judges, at any rate, must be able to act independently of any direct or indirect restriction, improper influence, inducement, pressure, threatening or obstacle. The law should provide explicit punishment measures against anyone who tries to impose any of the above means upon the judges. Any judge should possess the inviolable freedom of judging impartially, by his/her consciousness and interpretation, and pursuant to law. However, this is often impossible for judges are frequently put under various pressures that should be avoided. I have employed theoretical and practical methods for the purposes of this article. In conclusion, the research results have shown a heavy infringement of the independence of the judiciary in our country. There is a quite frequent tendency to influence the judges' decisions. Common violations of law and judicial independence, to a large extent, remain unnoticed and unpunished. A considerable number of judges think that such tendencies have no significant influence on the management of justice.

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1. Preliminary

The most diffused model of democracy is based on the separation of the powers, which in normal circumstances implies the three branches of power including executive, legislative and judicial power. It is impossible to speak of separation of power in every aspect, because there are a considerable number of issues that require interconnection and interrelation between the three powers. Therefore, a democratic governing system should guarantee that different powers have equal responsibility and force so as the balance between the powers may be achieved.

The judicial independence is considered as the basis for the ruling of the legal state. Many international documents and agreements, such as the Basic Justice Principles of the United Nations and the European Charter on the Status of Judges, emphasize the importance of judicial independence and try to explain the key elements of independent justice. Although there is not a clear definition of the term "judicial independence", it may be generally stated that the extent of justice independence is determined by two factors²:

- The first relates to the way judges are kept in safe from the improper influence of third parties (individuals or institutions),

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² Russel/O'Brien (editors), Judicial Independence in the years of democracy, 2001

- Whereas, the second related to the extent judges think, act and decide independently of certain factors other than actual and lawful ones.

The first factor refers either to the legal system, or practically to the judicial system, whereas the second factor refers more to the opinion of the judges. The relation between both factors is evident. A judge will not feel free to make a decision pursuant to law, if the legal system provides no sufficient defense against eventual attempts to influence his/her judgment. On the other hand, a good legal framework will not guarantee for independent judgments, if the judges themselves fail to make decisions pursuant to law but tend to act by their “preliminary opinion” under external influences.

Accordingly, the judicial independence is determined either by a good legal framework, or by its application in practice and the perception judges have on their independence.

2. International Standards

The judicial independence is generally viewed as the foundation of justice rules. Many international documents and agreements emphasize its vital importance. Referring to the basic principles of the United Nations on judicial independence, “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the Country. It is the duty of all government or other institutions to respect and observe the independence of the judiciary”³.

The right to independent trial is sanctioned in the European Convention of Human Rights (ECHR), as wells as in the International Agreement on Civil and Political Rights. Yet there is no generally accepted theory or definition of judicial independence⁴. However, some international documents define the main elements of judicial independence.

In 1983, the First World Conference on the Judicial Independence was held in Canada. The approved the Universal Declaration on the Independence of the Judiciary, which states, “The Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source”. The Universal Charter of Judiciary states, “The judiciary, as bearer of the judiciary office should be able to exercise the judicial power free from any social, economic or political pressure, independently of other judiciaries”. The judicial independence may be guaranteed only if the framework within which judges exercise their function provides for sufficient safeguard against improper attempts to influence the judiciary administration. Again, the differences between national jurisdictions and legal systems enable the development of a universal formula with all the necessary

³ Basic Principles of the United Nations on Judicial Independence approved by the Seventh Congress of the United Nations.

⁴ Russell, “Toward a general theory of judicial independence”, page 1 in: Russell/O’Brian: Judicial Independence in the democratic era, 2001

criteria to be met for judicial independence might exist. However, there are some factors to determine if the legal framework of a given country creates the conditions for judicial independence. For the purpose of examining the independence issues we should refer to and consider the judgments of European Court of Human Rights (ECHR), where the Court established the “independence” criteria, which include: the method of judiciary appointment, the term of office of judges, the guarantees against external pressure and the questions, should the body present a view of independence⁵.

- The method of appointment – It is a universally known fact that the process of judges appointment by their political views without considering their integrity, professional skills and proper qualifications and by excluding the judiciary from the appointment process, shall be considered as a failure to meet the independence criteria⁶. The Basic Principles on the Independence of the Judiciary does not suggest any particular method of appointment; however, they admit that “any method of judiciary selection shall be against judiciary appointment for improper reasons”⁷.
- The preventive measures against external pressure – This criterion is closely related to the tenure, which, on its part includes the restrictions for the dismissal of judges and it is complemented by the following principle, which states: “Judges, whether appointed or elected shall have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” The non-substitutability of judges should not be formalized but be known as a fact and bear other present guarantees.
- The performance of independence – It should be harmonized with the principle of impartiality.

3. Transparency

In a first glance, transparency seems to have nothing to do with the independence of justice. The publicity of judgments, which is a substantial transparency element of judiciary procedures in general⁸, is to the best interest of the concerned parties. ECHR states, “The public character of the procedure (...) saves the concerned parties from the secret and unsupervised administration of justice.” Just like Jeremy Bentham, the law philosopher of the 18th century affirmed, “The judge himself makes publicity by trying in the courtroom”.

⁵ ECHR, *Campbell&Fell vs. UK* (matter no. 7829/77, 7878/77) judgment of 28.06.1984, section 7.

⁶ S. Stavros: *Guarantees to the accused pursuant to section 6 of the European Convention on Human Rights – the right to fair trial* (Martinus Nijhoff Publishers, 1993), p. 127.

⁷ Basic Principles of the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime held in Milan from 26 August to 6 September of 1985, and endorsed by the General Assembly resolutions 40/32 of 29.11.1985 and 40/46 of 13.12.1985.

⁸ ECHR, *Preto vs. Italy*, Judgment of 08 December 1983, paragraph 21.

Although the independence of the judiciary is determinant to the ruling of law, it should not mean that judges are free from any kind of control. We now quote the words of the UCLA law professor Lynn M.LoPucki, “The independence of the judiciary is not a freedom granted to the judge so as he might act as he wishes; rather it is a freedom granted to the judge so as he might act as he should”. Accordingly, the courts’ transparency is important for the balance of the independence of the judiciary. Furthermore, justice is based and depends on the trust of the public. The transparency of courts and the publicity of procedures contribute to the increase of public trust in judiciary system. The ECHR possesses that public character of procedure which is also a means to hold the trust in courts⁹.

Practical mechanisms for the application of the transparency principle depend on the way judgments are made public, the transparency of court finances and the publication of judgment schedules. The automatic distribution of cases entered in the internal judicial system is one of the most efficient ways to provide transparency of the judiciary of a given country.

General Principles on the Independence of the judges:

1. All necessary measures should be taken to respect, protect and promote the independence of the judges.
2. In particular, the following measures should be taken:
 - a. The independence of the judges should be guaranteed in accordance with the provisions of the convention and the constitutional principles, for example by entering special provisions in constitutions or other legislations.
 - I. The court judgments should not be subject to any examination out of any appeal procedure as it is provided by law.
 - II. The term of office and the remuneration of the judges should be guaranteed by law.
 - III. No other authority, except for the judiciary, should be entitled to decide on its competences as provided by law.
 - IV. Except for amnesty, acquittal or similar decisions, the government or the administration is not entitled to make any decision that would retroactively void the court judgments.
 - b. The executive and legislative power should guarantee the independence of the judiciary and no steps that might jeopardize the independence of the judiciary should be taken.
 - c. Any decision related to the professional career of the judges should be based on objective criteria and the election and career of the judges should be based on their merits, by respecting their qualifications, integrity, skills and efficiency. The authority which decides on the election and career of the judges should be independent from the government and the administration. So as the independence of the judiciary might be safeguarded, it should be

⁹ 73 ECHR, Werner vs. Austria, Judgment of 24 November 1997, paragraph 45

provided by rules that, for example, its members are elected among the judiciary and authorities decide by themselves on their procedural rules. However, where constitutional or legal provisions and traditions allow for the judges to be appointed by the government, some guarantees should exist to provide for transparent and independent procedures on the appointment of judges, whereas their judgments should not be influenced by motives other than those related to the above objective criteria.

- d. In a decision making process, judges, at any rate, must be able to act independently of any direct or indirect restriction, improper influence, inducement, pressure, threatening or obstacle. The law should provide explicit punishment measures against anyone who tries to impose any of the above means upon the judges. Any judge should possess the inviolable freedom of judging impartially, by his/her consciousness and interpretation, and pursuant to law. Judges should not be obliged to report on their extrajudicial merits to any person.
 - e. The distribution of cases should not be influenced by the expectation parties have on the case result. The distribution may be done for example through alphabetic automatic random selection or similar methods.
 - f. The case should not be removed from any judge without a valid reason, as it is the case of serious disease or conflict of interests. For any such reason, the procedure of case removal should not be influenced by any kind of government of administration interest. The decision of case removal should be approved by the authority holding the same independence as the judiciary.
3. Judges, whether appointed or elected, should have a guaranteed tenure until the mandatory retirement age or the expiry of their term of office.

The authority of judges:

1. All persons related to a case, including the state authorities and their representatives, should be subject to the judge's authority.
2. Judges should have sufficient power and should be able to exercise it for the purpose of accomplishing their duties and maintaining their authority and dignity.

The Principle of the Independence of the Judiciary, which is one of the most important principles, is fulfilled by some institutions provided in the Constitution. The constitutional formulation of the independence of the judiciary would remain just a declarative one if it was not guaranteed by the Constitutions itself. It goes with a series of rights-principles on the judicial function, such as the right of any person to a fair trial; the right to appeal at a higher court; the right to trial by an impartial member; the right to protection for the whole duration of the trial; the right to a justified judgment etc.

For the purpose of ensuring an independent judicial power, the Constitution has elected the authority of the Supreme Counsel of Justice to balance the three powers, which so far has failed to guarantee such balance. It is necessary that the Constitution includes certain provisions related to the appointment, transfer and dismissal of judges, and finds a proper formula aimed at providing the principle of the irrevocability of judges.

The exclusion of the hierarchical dependence system in the judiciary.

Unlike the public administration, the judicial system is not organized hierarchically. The article 145/1 of the Constitutions, "Judges are independent and subject only to the Constitution and laws", provides to ordinary judges an autonomous and independent position in comparison with some other authorities. Accordingly, it has enabled the exclusion of the hierarchical system in the judiciary; judges carry out different functions and do not depend on each other. The grading of legal proceedings does not presume a hierarchical dependence between different court grades.

The obligation of the judges to justify their judgments is one of the most important principles of justice. Only through justified judgments can the concerned parties know the extent of justification and appeal such judgments with their own arguments. This is considerably related to the principle of the review of judgments given by lower courts in higher courts up to the Supreme Court, which enables the right to appeal as a citizens' constitutional right.

The autonomy and independence of the judiciary is provided by a series of constitutional norms, which enshrine the status of the judge.

Conclusions

In conclusion, the research results have shown a heavy infringement of the independence of the judiciary in our country. There is a quite frequent tendency to influence the judges' decisions. Common infringements of law and of the principle of the independence of the judiciary, to a large extent remain unnoticed and unpunished. A considerable number of judges think that such tendencies have no significant influence on the management of justice. Judges perceive the mechanisms and instruments aimed at preserving their independence as inefficient; therefore they hardly employ them. The research shows a high level of distrust in judicial institutions and judiciary mechanism from the part of the judges. A considerable number of judges are not satisfied with their work conditions, retributions, career opportunities, the independence of the judiciary in our country and the possibility of plausible solution for overcoming current obstacles and strengthening independence.

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