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Judicial Independence – A Fundamental Value of Justice System

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Abstract

Access to justice has always been held as the paramount duty of the state. The Constitution of India casts a duty on the state to deliver the substantial promises of the laws, in other words, the state has been imposed with a duty of delivering justice to all the people within the territory of India. Therefore, the maintenance of a fair, impartial and independent justice system becomes sine quo non to achieve and maintain Rule of Law in a democratic country like India. In this context this paper attempts to analyse some fundamental values of justice system with special focus on theoretical foundations of the principle of judicial independence.

1. Introduction

Study of the values underlying the justice system is important in national legal systems as it is an essential guarantee for democracy and liberty. The maintenance of a fair, impartial and independent justice system is an essential feature of a democratic country which proclaims to be governed by the Rule of Law. Under the Constitution the judiciary has the power as also duty to uphold the Constitution which constitutes the supreme law of the country. It plays an important role in preserving a government which is for the people, of the people and by the people. The Judiciary is entrusted with the function to shape the processes of the law to actualize the constitutional resolve to secure equal justice to all. The increasing role which the judiciary plays in many jurisdictions further emphasizes the significance of clarifying the conceptual framework and the theoretical rationales of the values of the justice system, and reinforces the need to define the role of the judiciary *vis-à-vis* the other branches of government. The aim of this article is to analyze the five fundamental values of the judicial system. These values are: procedural fairness, public confidence in the courts, efficiency, and access to justice and judicial independence. The article will pay special attention to the theoretical foundations of the principle of judicial independence, including individual independence, collective independence and internal independence.

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2. The Five Fundamental Values of the Judicial System

The proper administration of justice is dependent upon adherence to certain fundamental values which lie at the foundations of most judicial systems. These values include: procedural fairness, efficiency, accessibility, public confidence in the courts and judicial independence,[1] and the value of constitutionality, i.e. constitutional protection of the judiciary. Each of these values allows the courts to fulfill their main function, which is resolution of disputes.

These fundamental values are interrelated. Sometimes they strengthen one another, being one the result of, or the condition to, the existence or the application of the other, while at other times there may be a tension between them. A proper legal system is one which advances each of these values on its own, and achieves a suitable balance between them whenever they conflict with one another.

a) Fairness of the Adjudication Process

The purpose of the courts is to fairly resolve disputes and to pursue justice. In order to ensure justice, special procedural rules have been established to govern the method and manner in which such disputes are resolved by the courts. An elaborate and complex body of laws and rules govern court procedures which regulate the method of evaluating and weighing the facts and evidence submitted to the courts. In particular, these rules are concerned with safeguarding the rights of persons charged with violating the law. The purpose of these rules and laws is to attain justice and to ensure a fair trial by subjecting the conflicting claims to a vigorous and thorough investigation in order to ascertain the truth. It must be mentioned, though, that a strict application of the procedural fairness value, however important, may affect the efficiency of trials or the disclosure of the truth, and this may eventually affect the public confidence in the courts. A suitable balance must be achieved between these conflicting values.

b) Efficiency of the Justice System

Society expects the courts to ensure procedural fairness, but it also expects them to be efficient. The courts are the machinery for enforcing laws and regulations. The legal system might have very good laws which provide substantive rights to the citizen *vis-à-vis* his fellow citizens, and

[1] For a detailed discussion of the fundamental values of the administration of justice *See* Shetreet: *The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts*,' 13 UBC L Rev 52 (1979); Shetreet: *The Limits of Expeditious Justice*, in *Expeditious Justice* (Justice Howland, ed), Canadian Institute for Administration of Justice, 1 (1979); Shetreet: *Time Standards of Justice* (1979) 5 Dalahousie LJ 129.

vis-à-vis the government, but these laws are of little value if the legal system does not provide an accessible, convenient and efficient method for enforcing laws and obtaining redress for violation of rights; hence, the demand for efficient court procedure, for a judicial process which is not unreasonably slow, and for judicial services which can be obtained at a reasonable cost. The demand for efficiency in the administration of justice is equally strong in the criminal and civil spheres.

The judicial system faces a very serious challenge of increasing backlogs and delays in the court. This requires the court system to develop three main models of coping with the backlogs.[2] The first model is to make the judicial system and the judicial process more efficient, thus saving resources. The second model is to introduce reforms which reduce the number of cases which come into the court. The third model is to increase the resources allotted to the court system.

As to the first, efficiency can be attained by transferring the cases from adjudication by a panel for adjudication by a single judge, or in the case of jury trials, the movement towards a majority verdict and many juries. As for the second model for introducing efficiency, reduction of cases can be achieved by decriminalization or by no-fault liability in tort cases of road accident or by no-fault divorce reforms. Also alternative resolution mechanisms have been introduced to reduce the number of cases in the courts. The third model is to increase of court resources such as appointing additional judges and adding to the courts' budget. All three models have to be used to meet the challenge.

c) Access to Justice

The need for an accessible judicial system should not be underestimated. The significance of accessibility is to be found in the opening of the doors of the courts to the public. Accessibility includes the provision of judicial services to the public at reasonable cost. This includes provision of the means to go to court (legal aid) for those unable to pay legal costs, as well as increasing the awareness of the community so that citizens within the community appreciate that they are entitled to turn to the courts in order to defend their rights and obtain redress for wrongs.

[2] Shetreet: *Time Standards of Justice* (1979) 5 Dalhousie LJ 129; Shetreet: *Adjudication: Challenges of the Presents and Blueprints for the Future* in *Festschrift in honour of Professor Walther J. Habscheid* (W Germany, 1989), 285; Shetreet: *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges* (2009) 10 U Chicago J of International Law, 275-332.

The greater accessibility of the courts, particularly through legal aid, has contributed to the increasing number of court cases, especially in criminal matters. It has meant that more defendants are pleading `not guilty' to charges, and criminal trials are taking more time. As Lord Widgery, the Lord Chief Justice of England commented to the Royal Commission on Legal Services in 1977, 'I find it really inescapable that the increasing length of these trials is in some way connected with the greater freedom of the purse'.[3] International treaties and transnational jurisprudence recognize the importance of the value of access to justice. Article 6(1) of the European Convention of Human Rights, as interpreted, also ensures the fundamental values of access to justice.

d) The Value of Public Confidence in the Courts

The courts can only perform their societal function as an institution of dispute resolution if they enjoy public confidence. They have recognized the indispensability of this value to the functioning of the legal system. Public confidence in the judiciary is the most valuable asset that this branch possesses. This is also one of the most valuable foundations of the nation. The courts can only enjoy such confidence if the court is seen to be independent and unbiased, and if the process of resolving the dispute is fair, efficient, expedient, and accessible, as described above. Furthermore, public confidence in the courts is enhanced by numerous principles and practices, which are intended to assure that justice will not only be done but also seen to be done.

The 'open court' principle is a fundamental principle of the legal system. This principle stands as one of the pillars of criminal and civil procedure, and is one of the most important means of ensuring a fair and impartial trial. Another fundamental and basic requirement for maintaining public confidence in the legal system may be found in the court's duty to state reasons for the decisions at which it has arrived.[4] This significant obligation to contribute to the development of logical-analytical methods of thought lies at the foundation of the legal process, and allows for the review of decisions on appeal and the standard of precedents. Article 6(1) of the European Convention on Human Rights requires a court to provide a reasoned judgment. The Convention requires that a judgment should contain reasons that are sufficient to demonstrate that the

[3] *The Times* (London) 1 November, 1977.
[4] Akehurst: *Statements of Reasons for Judicial and Administrative Decisions* (1970) 33 MLR 154.

essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved.

The importance of public confidence in the courts is also reflected in the rather strict tests applied for self-disqualification of judges for bias.[5] The test does not require proof that bias has actually influenced the judge, but rather that there is a real likelihood that it will influence the judge.[6] The traditions of the Bench go even further than the strict requirement of the law of bias.

It is important to emphasize the perception of the judiciary in the eyes of the public. As Chief Justice Howland of the Ontario Supreme Court put it in a leading Canadian constitutional case where the principle of judicial independence was discussed at length:

> *It is most important that the judiciary be independent and be so perceived by the public. The judges must not have cause to fear that they will be prejudiced by their decisions or that the public would reasonably apprehend this to be the* case.[7]

In the appeal the court confirmed that it is 'important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.' However, the perception had to 'be a perception of whether the tribunal enjoys essential objective conditions of guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions and guarantees.'[8]

Recognition of public perceptions is required by the need to ensure public confidence in the courts, which is one of the fundamental values of the administration of justice. The concern for public confidence in the court imposes restrictions on the behaviour of judges even outside the courtroom. This is due to the fact that public confidence in the legal system is maintained by proper judicial conduct and is adversely affected by judicial misconduct, on and off the bench. Public confidence in the courts is also enhanced by broad reflection in the judiciary of all social strata, ethnic groups and geographical regions in a given country.

[5] Shetreet: *The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts*, 13 UBC L Rev 52 (1979).
[6] Shetreet: *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North-Holland, 1976) 303-305.
[7] *R v Valente* (1983) 2 CCC (3d) 417, 423.
[8] *Valente v Her Majesty the Queen* [1985] 2 SCR 673, 689.

The Press plays a significant role in maintaining public confidence in courts and judges by reporting what is going on in the courts. Courts and judges should not be immune to fair criticism, so long as it is done in good faith and in good taste, and judges should use very sparingly the extreme measure of contempt of court to suppress criticism of the courts. While recognizing the importance of exercising the power of contempt of court with great caution and restraint, one should be aware of the dangers which lie in undue popular pressures on judges. Excessive popular pressure and irresponsible journalists hungry for sensational pieces may put judges in an unbearable position, and may threaten the independence of the judges who very often have to act against popular wishes to protect dissenters and members of minority groups. There is a continuous tension between judicial independence and public accountability of judges in a democracy.[9] This tension should be reconciled by the exercise of wisdom and good judgment so that the proper balance between these very important principles is maintained.

e) Independence of the Judiciary

Central to the judicial process is the principle of judicial independence. The meaning and content of this principle vary somewhat from one country to another, depending upon the system of government, local traditions and climate of political opinion, and even in the same country it may carry different meanings in different periods. The theoretical basis for judicial independence is the Doctrine of Separation of Powers, which in its modern form does not mean total separation of the branches of government but 'checks and balances'.[10] The judicial branch has to be independent in order to carry out its function of controlling and balancing *vis-à-vis* the other two principal branches of government: the executive and the legislature. Judicial independence requires that judicial accountability will be shaped in a very careful way. One of the important points is that incompetence will not be grounds for the removal of judges. The model of judicial accountability in a given society determines, to a large extent, whether or not the judiciary is independent. Using a conceptual approach, one can say that when the method of judicial

[9] Lord Hailsham: *The Independence of the Judicial Process* (1978) 13 Isr L Rev 1, 8-9; PA Nejelski, *Judging in a Democracy: The Tension of Popular Participation* (1977) 61 Jud 166.

[10] This can be illustrated by the experience in the United States regarding executive control over court administration; prior to 1939 the central responsibility for court administration at the Federal level was vested in the Attorney-General, when in that year the responsibility was vested in the judiciary: 28 USCA § 605. See, Friesen et al, *Managing the Courts* (1971) 87-88. Similarly, we have witnessed in several other countries some transformation in the concept of judicial independence, particularly in the area of control over judicial administration.

accountability follows the repressive model, i.e., when it is vested exclusively in the executive branch, then judicial independence is not adequately safeguarded.[11]

The theoretical analysis of judicial independence requires a distinction between two aspects of the concept of the independence of the judiciary: the independence of the individual judges and the collective independence of the judiciary as a body. The independence of the individual judge comprises two essential elements: substantive independence and personal independence. Substantive independence means that in making judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law. Also rules of judicial conduct should exclude the judge from financial or business entanglements likely to affect or rather to seem to affect him in the exercise of his judicial functions. Personal independence means that the judicial terms of office and tenure are adequately secured. Personal independence is secured by judicial appointment during good behaviour terminated at retirement age, and by safeguarding judicial remuneration. Thus, executive control over judges' terms of service, such as remuneration, pensions, or travel allowance, is inconsistent with the concept of judicial independence.

A modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole. The concept of collective independence of the judiciary, which has been accepted by transnational jurisprudence, is equally important. One of the important contributions of the international standards of judicial independence developed by the International Bar Association in the Montreal Conference was recognition of this important conceptual component of the principle of judicial independence in modern society.

The concept of collective judicial independence may require a greater measure of judicial participation in the central administration of the courts, including the preparation of budgets for the courts. Depending on one's view of the nature of judicial independence, the extent of judicial participation may range from consultation, sharing responsibility with the executive (or the legislature), or even exclusive judicial responsibility.

[11] M Cappelletti, 'Who Watches the Watchmen? A Comparative Study on Judicial Responsibility' (1983) 31 Am J Comp L 1; Shetreet and Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht 1985) 570-5.

Another aspect of judicial independence recognized in international standards, is the internal independence of the judiciary, that is, the independence of a judge from his judicial superiors and colleagues. This also transcends both the substantive and personal independence of the judge *vis-à-vis* his colleagues and superiors. With regard to judge's independence in administrative matters in court processes it is generally accepted that judges cannot claim independence from required and necessary guidance and supervision in 'administrative' aspects of adjudication. The US Supreme Court accepted this position that judges should be subject to administrative supervision concerning matters such as case assignment and backlog management.[12]

Whether and to what extent the judiciary in any country can be viewed as independent will not only depend on the law and constitution of that country, but also on the nature and character of the people who hold the office of judge, on the political structure and social climate, and on the traditions prevailing in that country. This proposition may be expressed in broader terms so as to include the traditions and rules of judicial conduct governing the protection of judicial independence.

3. The Formulation of the Fundamental Values in Transnational Jurisprudence

In transnational jurisprudence Article 6(1) of the European Convention on Human Rights represents the formulation of the core values of the justice system. It refers both to the position of the judge and the tribunal that adjudicates and also refers to the rights accorded to everyone who stands before the tribunal. Article 6(1) of the Convention provides that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

Most of the text of article 6(1) refers to procedural fairness. The phrase 'fair hearing' includes a number of procedural rights, among others: the right to be present at an adversarial hearing; the right to equality of arms; the right to fair presentation of the evidence; the right to cross examine opponents' witnesses; the right to a reasoned judgment. It also includes 'public hearing' and the public announcement of decisions, and hearing within a reasonable time. The text of the article

[12] See *Chandler v Judicial Conference*, 398 US 74 (1970).

also contains a central requirement that everyone is entitled to be tried before an independent[13] and impartial[14] tribunal established by law. In other treaties it is provided that the tribunal has been previously established by law.[15]

In UK Section 3 of the Constitutional Reform Act 2005 requires the Lord Chancellor and all other ministers to uphold the continued independence of the judiciary and provides that they 'must not seek to influence particular judicial decisions through any special access to the judiciary'. The Act also imposes the duty on the executive government to uphold judicial independence.

4. Conclusion

Study of the fundamental values of the justice system is of great importance due to the increasing role of the courts in society. The increased role of the judiciary in society may be seen as natural and objective, but there are also causes for increased judicialization that may be termed 'convenience-based processes of judicialization'. This refers to the judicialization of issues largely for the political convenience of the other branches of government. As Justice Sir Ninian Stephen once put it:

> *Both the legislature and the executive may find it very convenient to shift to the judiciary the task of initiative - taking in [sensitive] areas . . . Elected bodies may have much to fear if they have to decide such issues for themselves; wise politicians may well prefer to avoid the issue for fear of an electoral backlash.*[16]

Such a trend may be observed in India, where the relative role of the executive has declined, whereas the judicial role has increased. Two major processes are taking place. First, the realization of the public that the ordinary bureaucratic and political institutions are failing to solve issues has diverted the public to seek judicial redress where these other institutions have

[13] *Starrs v Ruxton* 2000 JC 208, 243; 17 November 1999 *The Times* (High Court of Justiciary) (Lord Reed); *Millar v Dickson* [2002] 1 WLR 1615 (PC); *ECP* 4.02–4.27 (judicial independence).
[14] *Porter v Magill* [2002] 2 AC 357 (HL).
[15] 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature'. Article 8 of the American Convention on Human Rights (1969).
[16] Ninian Stephen: *Judicial Independence - A Fragile Bastion* in Shetreet and J Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht 1985) 529, at 543.

failed. Secondly, the executive has sometimes intentionally shifted questions to the courts in order to secure a judicial resolution of disputes which are economic or political in nature, to avoid having to pay the political price of the decision. There are other factors which brought about the expansion of the role of the judiciary in society. This increasing judicialization is in part a result of social developments, such as the massive industrialization or the expansion of the welfare state. Wide-ranging primary and secondary legislation has been enacted, and consequently there has been a corresponding expansion in litigation against government services, as well as the development of 'social rights', a typical by-product of the welfare state. In addition, collective procedures, such as the 'class action' have developed, which have brought about a 'massification' of the law, transforming the traditional two-party litigation into a major multi-party complex litigation.