PART I

1

Judicial independence and accountability: core values in liberal democracies

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The study of judicial independence is important in national legal systems as it is an essential guarantee for democracy and liberty. Judicial independence is also an essential feature in ensuring a globalised economy. Corporations must have confidence in the impartiality and independence of the tribunals that will adjudicate disputes in the multiple jurisdictions in which they operate around the world.

Recent decades have witnessed a marked increase in the relative role of the judiciary in society. This general trend is shared by countries with different legal traditions and various systems of government. The judiciary is a significant social institution, and like the other branches of government, contributes to shaping the life of the community. The increasing role which the judiciary has assumed warrants some re-examination of the conceptual framework and the theoretical rationales which define its position in relation to the other branches of the government. One of the most significant aspects of the role of the judiciary in society is its independence and impartiality.

The modern conception of judicial independence is not confined to the independence of an individual judge and to his or her personal and substantive independence. It must include the collective independence of the judiciary as an institution. Likewise, judicial independence should not be perceived only in terms of shielding the judge from executive pressures or legislative interferences. It must also encompass internal independence, namely, the independence of the judge from his or her judicial colleagues or superiors.

The law and practice regarding judges and judicial independence in various countries reveal many common ideas and shared principles, but also sometimes sharp differences and even conflicts. These differences sometimes stem from a different conceptual approach, and at times, from a historical coincidence. The purpose of this chapter is to study the contemporary concept of judicial independence in a comparative context.

This chapter will examine the constitutional and practical dimensions of the key concept of 'judicial independence' and its various facets ('institutional' and 'individual' independence). Why is judicial independence so fundamental to a democratic polity? Is the requirement for judicial 'accountability' incompatible with the notion of judicial independence? The chapter will begin by analysing the broader spectrum of the core values of the judicial system: procedural fairness, public confidence in the courts, efficiency, access to justice and judicial independence. Then the chapter will examine in detail the theoretical foundations of the principle of judicial independence, including individual, collective and internal independence. The chapter will examine the necessary constitutional infrastructure required for the protection of judicial independence.

Judicial independence in the broader spectrum of core values: the fundamental values of the judicial system

General

The proper administration of justice is dependent upon the 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, in the sense of the constitutional protection of the judiciary. Each of these values allows the courts to fulfil their main function, namely, the resolution of disputes.

These fundamental values are inter-related. Sometimes they strengthen one another, being 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.

[1] For a detailed discussion of the fundamental values of the administration of justice, see S. Shetreet, 'Practical and Value Problems in the Administration of Justice', in S. Shetreet (ed.), *Recent Developments in Israeli Case Law and Legislation*, *Collection of Lectures Delivered at the Judges' Conference* (Jerusalem: Harry Sacher Institute, 1977), p. 80; S. Shetreet, 'The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts' (1979) 13 *University of British Columbia Law Review* 52; S. Shetreet, 'The Limits of Expeditious Justice', in Justice Howland (ed.), *Expeditious Justice* (Canadian Institute for Administration of Justice, 1979), p. 1; S. Shetreet, 'Time Standards of Justice' (1979) 5 *Dalhousie Law Journal* 129; S. Shetreet, 'Adjudication: Challenges of the Present and Blueprints for the Future', in *Festschrift in Honour of Professor Walther J. Habscheid* (West Germany, 1989), p. 295.

Procedural fairness

The courts seek to resolve disputes in accordance with fair procedures and to do 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 public confidence in the courts. As mentioned above, a suitable balance must be achieved between the conflicting values.

Efficiency

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 for the granting of substantive rights to citizens in relation to their fellow citizens, and to 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.[2]

Accessibility

The importance of the need for an accessible judicial system should not be underestimated. The significance of accessibility is to be found first and foremost in the opening up of the doors of the courts to the public. The courts have emphasised the great importance of this value.[3]

[2] The demand for efficiency in the administration of justice is equally strong in the criminal and civil spheres.
[3] Miscellaneous Petitions (M.P.) 678/82 *Tayar* v. *State of Israel* 36(3) PD 386.

Accessibility includes the provision of judicial services to the public at reasonable cost, provision of the means to go to court (legal aid) for those unable to pay the cost, 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.

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 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.'[4]

Article 6(1) of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights, also ensures the fundamental values of access to justice. In this context it is significant to mention the reference to this basic right by the United Kingdom higher courts. Lord Bingham in *Brown* v. *Stott* [5] explained that:

> Article 6(1) contains no express right of access to justice, but in *Golder* v. *UK* the European Court of Human Rights said that it was 'inconceivable' that this provision should give detailed procedural guarantees without protecting access to justice.[6]

The court in the *Golder* case conceded that this implied right was not absolute and so admitted limitations.[7]

Public confidence

The courts can perform their function as an institution to resolve disputes in society only if they enjoy public confidence. The courts have recognised the indispensability of this value to the functioning of the legal system. Justice Barak has held, in *Tzaban* v. *Minister of Religious Affairs*, that '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.'[8] The courts can enjoy such confidence only if they are seen as independent and unbiased, and if the process of

[4] *The Times*, 1 November 1977. [5] [2003] 1 AC 681, 694, PC.
[6] (1975) 1 EHRR 524, 536 at [35]. [7] (1975) 1 EHRR 524, 536 at [38].
[8] HC 732/84 *Tzaban* v. *Minister of Religious Affairs* (1986) 40(4) PD 141 at 148.

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 aim to ensure that justice will not only be done but also seen to be done.[9] These principles are discussed as follows:

> The 'open court' principle is one of the fundamental principles of the legal system, and it has also found a basis in statutory law. For example, s. 3 of the Israeli Basic Law: Adjudication[10] states that 'a court shall sit in public unless otherwise provided by Law or unless the court otherwise decide under Law'. This principle has also attained a wide recognition in decisions of the Israeli Supreme Court. This court has designated the open court principle as 'one of the pillars of criminal and civil procedure, and are of the most important means of ensuring a fair and impartial trial'.[11]

Restrictions on the principle have, indeed, been enacted in law.[12] These reservations allow for the hearing of a matter *in camera*, or for the removal of a person from the court, both at the discretion of the court and on grounds which are enumerated in the statute. These grounds include the safeguarding of state security and its foreign relations, the protection of morality, the security of witnesses, the protection of the interests of the parties involved in a sex offence, the privacy of the parties involved in a personal status case and the protection of minors.[13]

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 it has arrived at.[14] This significant obligation also contributes to the development of logical, analytical methods of thought which lie at the foundations of the legal process, and allows for the review of decisions on appeal, and for a reliance upon them as precedents.

[9] For English examples, see S. Shetreet, *Judges on Trial, A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland, 1976), p. 204.
[10] See *Sefer Ha Hukim*, 8 March 1984, p. 78; 38 *Laws of the State of Israel* 101.
[11] Cr A 334/81 *Haginzer* v. *State of Israel* (1982) 36(1) PD 827.
[12] Israel Courts Law (Consolidated version) 1984, *Sefer Ha Hukim*, p. 198; 38 *Laws of the State of Israel* 271, ss. 68–9.
[13] An additional reservation on the open court principle is the *sub judice* rule, found in s. 70 of the Israel Courts Law.
[14] For a general discussion of the duty to provide a reasoned decision see: R. Gavison, 'The Court and the Duty to Reason' (1970) 2 *Mishpatim* 89; M. Gavish, 'The Duty to State Reasons for Decisions' (1989) 17 *Israel Tax Quarterly* 207; I. Zamir, 'On Justice in the High Court of Justice' (1970) 26 *Hapraklit* 212 at 226–9.

At common law, there is no general obligation to give reasons for judicial decisions.[15] The Court of Appeal in *English* v. *Emery Reimbold & Strick Ltd* noted that Article 6(1) of the ECHR requires a court to provide a reasoned judgment.[16] In that case the court ruled that the convention requires that a judgment should contain reasons that are sufficient to demonstrate that the 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.[17] 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.[18] The traditions of the bench go even further than the strict requirement of the law of bias.[19]

The concern for public confidence in the court even imposes restrictions on the behaviour of judges 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.[20]

Public confidence in the courts is also enhanced if the judiciary broadly reflect all social strata, ethnic groups and geographical regions in a given country. In England, the narrow social background of the judiciary, being drawn predominantly from the upper middle class, has been the source of heated public debate for some time.[21]

[15] See, M. Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 *Modern Law Review* 154; for a discussion of the law in the United States, see *Mildner* v. *Gulotta* 405 F.Supp (EDNY 1975), 182 at 215–20, *per* Weinstein J. (dissenting), aff 'd, 425 US (1976) 901. In Canada judicial decisions have sometimes been reversed on account of insufficient reasons given. See, *Barrette* v. *R* 68 DLR (3d) (1977) 260 and the cases cited therein, at 264, *per* Pigeon J. See also, A. Hooper, 'Comment' (1970) 48 *Canadian Bar Review* 584. In Quebec, Article 471 of the Code of Civil Procedure RSC c. C-25 imposes a duty to give reasons.

[16] [2002] EWCA Civ. 605; [2002] 1 WLR 2409, CA; and see *Flannery* v. *Halifax Estate Agencies Ltd* [2000] 1 WLR 377, CA; J. A. Jolowicz, 'A Duty to Give Reasons' (2000) 59(2) *Cambridge Law Journal* 263.

[17] See S. Shetreet, 'The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts' (1979) 13 *University of British Columbia Law Review* 52.

[18] S. Shetreet, *Judges on Trial*, at pp. 303–5.

[19] S. Shetreet, *Judges on Trial*, at pp. 305–14.

[20] See more in the *Tzaban* v. *Minister of Religious Affairs* 40(4) PD 141.

[21] B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (London: Heinemann, 1967), B. Abel-Smith and R. Stevens, *In Search of Justice* (London: Penguin, 1968); R. M. Jackson, *The Machinery of Justice in England*, 7th edn. (New York: Cambridge University Press, 1977), pp. 473–81; L. J. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972), pp. 152–75; R. G. Hood, *Sentencing*

The media 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, as long as it is done in good faith and in good taste; judges should use very sparingly the extreme measure of contempt of court to suppress criticism of the courts.

While recognising 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 their independence when they very often have to act against popular wishes to protect dissenters and members of minority groups.

Judicial independence

As Lord Hailsham said in his Lionel Cohen Lecture,[22] there is a continuous tension between judicial independence and the public accountability of judges in a democracy. This tension should be reconciled by the exercise of wisdom and good judgement, so that the proper balance between these very important principles is maintained.

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 the climate of political opinion, and even in the same country it may carry different meanings in different periods.[23]

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, rather, a system of 'checks and balances'.[24] The judicial branch has to be independent in order to

the Motoring Offender (London: Heinemann Educational, 1972), pp. 41–53; J. Baldwin, 'The Composition of the Magistracy' (1979) 16 *British Journal of Criminology*, 171; S. Shetreet, *Judges on Trial*, pp. 297–8. See also S. Shetreet, 'On Assessing the Role of Courts in Society' (1980) 10 *Manitoba Law Journal*, 357–414.

[22] Lord Hailsham, 'The Independence of the Judicial Process' (1978) 13 *Israel Law Review*, 1 at 8–9; see also, P. A. Nejelski, 'Judging in a Democracy: The Tension of Popular Participation' (1977) 61 *Judicature* 166.

[23] See generally Lord Hailsham, 'The Independence of the Judicial Process', and Nejelski, 'Judging in a Democracy'.

[24] 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 E. C. Friesen, E. C. Gallas

carry out its function of controlling and balancing vis-à-vis the other two principal branches of government: the executive and the legislature.[25]

The importance of the principle of an independent judiciary has grown and received increased attention, particularly as a result of the expanding role of the judiciary in society.[26] This increasing judicialisation is in part a result of social developments, such as massive industrialisation 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 American class action or the French *action collective*, have developed, which have brought about a 'massification' of the law, transforming the traditional two-party litigation into a major multi-party complex litigation.[27]

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 a ground for removal of judges.

Article 6 of the ECHR as a statement of the core values

The transnational jurisprudence, Article 6(1) of the ECHR, 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 to the rights

and N. M. Gallas, *Managing the Courts* (Indianapolis: Bobbs-Merrill, 1971), pp. 87–8. Similarly, we have witnessed in several other countries some changes in the concept of judicial independence, particularly in the area of control over judicial administration.

[25] As Dr Petren wrote, the maintenance of the independence of the judiciary is 'part of the Montesquian theory of division of powers. The tripartition of the public decision-makers into the executive, the legislative, and the judiciary is based on the idea that each of these three acting parts should have a certain independence in relation to each other': G. Pétren, 'The Independence of the Judiciary', in *Helsinki Symposium*, 1980, p. 95.

[26] See further, M. Cappelletti, 'Who Watches the Watchmen? A Comparative Study on Judicial Responsibility' (1983) 31 *American Journal of Comparative Law* 1 at 7–9. For further discussion on the increasing judicial role in society, see E. Vescovi, 'La Independencia de la Magistratura en la Evolucion Actual del Derecho', in W. Habscheid (ed.), *Effectiveness of Judicial Protection and Constitutional Order* (Bielefeld: Gieseking, 1983), pp. 169–72 at 161. See also, C. Das and K. Chandra, *Judges and judicial Accountability* (Commonwealth Lawyers Association, 2003). For an in-depth discussion of the cultural influences on judicial dispute resolution see Oscar G. Chase, *Law Culture and Ritual: Disputing Systems in Cross-Cultural Context* (New York: New York University Press, 2005).

[27] For an examination of the massification of the judicial system in criminal cases, see D. H. Whitbread (ed.), *Mass Production Justice and Constitutional Idea* (Charlottesville, VA: Michie, 1970), p. 1. Massification occurs in civil cases as well.