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THE ROLE OF JUDICIAL INDEPENDENCE FOR THE RULE OF LAW

by Prof. Dr. Hans-Georg HEINRICH
Institut für Politikwissenschaften Universität, Wien

Judicial independence and the rule of law have become undisputed standards for democracies and societies aspiring to this status. Like masterpieces of the arts and architecture they are secular accomplishments in the evolution of mankind.

Whether there is a link between judicial independence and the rule of law is almost a moot question. There are no examples of systems that combined the rule of law or the Rechtsstaat with politically dependent courts or judges. Judicial independence, then, has the status of a necessary condition for the rule of law: Without the first the latter cannot exist. The question, of how exactly the two are linked is, however, a largely uncharted territory. Both principles are highly abstract and show a wide variety of concrete incarnations. Each of these configurations is the product of centuries of evolution. The patterns which have emerged (e.g. the Anglo-Saxon system of justice, the Italian/French court culture, the German/Austrian Rechtsstaat etc. show a high degree of stability over time and are therefore not easily amenable to social or political choice. Reforms were, by and large only successful under the conditions of a radical change of the social and political environment, such as the period of re-education in post- WWII Germany.

The fact that judges can be independent only in a strictly legal sense has, of course, not gone unnoticed even in legal literature. The relevant literature, however, seems heavily biased towards the discussion of legal and democratic principles to the detriment of empirical studies. Empirical studies show an inclination to explore independence issues in a national context, focussing on problems that have a high relevance for a given legal and constitutional order or system of government. Thus, US authors have selected court packing and predictive models as well as the analysis of judicial decision making as a preferred topic. Critical theorists in Germany and Austria have exposed and lambasted the systematic social bias and the discriminating effects of the use of elaborate codes in the courtroom. Other studies have focussed on legal cultures and social figures in the judicial sphere.

In contrast to the bulk of relevant literature that eulogizes democratic principles or, on the contrary, exposes the alleged or real lack of legitimacy of bourgeois justice, this report focuses on the more practical problems of establishing and maintaining an independent judicial system. It tries to present a synopsis, discussing parameters of dependence and how they are interrelated. It departs from a juxtaposition of the principles of judicial independence and the rule of law to courtroom realities. It aims at conveying the experience of Western democracies and attempts to make a few conclusions relating to the special situation in societies in transition.

My reasoning will be based on the observation that despite the worldwide dissemination of the principle of independence as a uniform constitutional standard, the actual role of judges remains dependent on political, social and cultural parameters that account for the striking variance. Dependence will always be a fact of life, the wholly impartial judge, symbolized by the blindfolded goddess of justice, is forever a fiction, a myth.

No justice has ever been independent of anything – even a computer judge would be dependent on the programme that makes it take decisions. But this does of course not exclude attempts to minimise the judge´s dependence on blatant interference from outside. This is the minimum standard to achieve a meaningful rule of law.

The principle of the rule of law elicits the association “rule not by men“ and is intricately linked to the Anglo-Saxon system of justice. In contrast to systems relying on judge-made law, particularly in its US variant the continental Rechtsstaat idea is based on the supremacy of acts of parliament and

testifies to the heritage of distrust towards the judicial profession that dates back to the bourgeois revolutions. It is by no means accidental that on average the social status of judges and the trust in the judicial system is higher in common law systems. This system is much closer to the Germanic tradition of "finding" the law in concrete cases. In contrast, Roman Law in its codified form had been resented in the Holy German Empire for a long time as an imposition of an alien legal culture irrespective of its features that had a potential of promoting economic and social modernisation. The judges were consequently seen as the executors of the king´s will, not as servants of the law. The bourgeois revolutions in the 18th and 19th centuries tried to change this heritage by empowering the legislative assemblies and introducing the juries as organs of popular control.

Yet, both rule of law and rechtsstaat rely on the same democratic principles. Democracy is, however, always on the move, it is a process rather than a fixed status of society. The current state of judicial independence and the rule of law reflects the learning process of a society, in which the rulings of the courts have the function to get the wheels moving.

As a rule, any reduction of dependence improves the chances for democracy and the rule of law. There is still a lot to be done even in the most advanced systems. However, there are legal and practical limits to an infinite increase of judicial independence. There is, for example a systematic bias concerning death penalty in US system: the large majority of death row inhabitants in US prisons are black, juries and judges are much more likely to pass death sentences on black defendants for the same crimes than on whites. This is a somewhat paradoxical consequence of the conflict between two democratic principles, namely popular participation and judicial independence. On the more practical side, it seems obvious that one cannot keep the courtroom free of politics or social conflicts. Courtrooms are a part of society and reflect its basic structures and cultures. The balance between these two principles will always be precarious, since courts are elitist institutions that are governed by the current values of the intellectual and cultural elites. A "clash of civilizations" is inevitable.

Another conflict is produced by the role that democratic politics accords to the media. The US Supreme Court has consistently come out for the primacy of the First Amendment rights. The freedom of the press and of the media in general is one of the sacred cows of American politics. Despite the precautions that US procedural law has developed against an undue influence of TV or newspaper footage and commentary of court proceedings, their insufficiency is obvious. Juries cannot be sealed off from the stream of information for weeks or months and the judges themselves cannot always remain aloof of popular moods as reflected in the media. To make matters worse, the insistence of the Supreme Court to give preference to First Amendment rights over other principles overlaps with the professional interests of the defense counsels (and partly with the career interests of district attorneys) who are provided with public relation campaigns they could never finance from their own pocket. The conflict between the 3rd power (the judicial branch) and what has been termed the 4th power (the media) creates a specific dependence, which is increasing as the impact of the media on society increases. President Clinton´s troubles are to a large part due to media and defense counsel interests.

Another peculiar dependence which is largely overlooked is the dependence on the law; a contradiction in itself, as it would seem. The point of this argument is that judges may enjoy a larger or more narrow leeway in their decision making. This is basically a political decision and reflects the amount of trust that the courts enjoy with the political elites. Only high-trust systems accord a high degree of judicial autonomy. The case in point is the US (and generally common law systems) – for example, the US Supreme Court can refuse to decide a case because of its political implications. Judges have to enjoy a certain amount of independence from the law, the density of legal regulation may stifle judicial activity.

A new type of dependence is generated by the beginning demise of the nation state and the formation of supranational political-legal units. On a more general level, there is an increasing impact of international standards such as gender equality minority protection or political correctness – a kind of globalisation of justice. Speaking practically,not only do European judges have to heed European law, but national justice is also subordinated to central European courts, whose rulings limit the decision-making autonomy of the national judges. The still unresolved conflict between European law and national judicial authority may lead to paradoxical consequences. If, for example, the Constitutional Court in Karlsruhe had upheld the complaint filed by four German economists against the decision of the German government to participate in the European Monetary Union on the grounds of its unconstitutionality, the Court would have had to enforce compliance with this ruling against the European Union, thus upsetting the EMU for a long time. To all appearance, the Karlsruhe Court had these disastrous consequences in mind when they declined the complaint on 2 April, 1998.

Critics of the formal conception of the law and the rule of law are right in their insistence that legal and constitutional guarantees cannot safeguard correct compliance and implementation. Even the constitutions of totalitarian dictatorships had the most perfect constitutional safeguards for judicial independence and the rule of law. To bring a constitution to life, however, requires both the willingness of the political elites to abide by the wording of the constitution as interpreted by the courts as well as judicial self-restraint to avoid a usurption of political roles by the judges. In other words, the rule of law is dependent on the compliance with civic rules of conduct and mutual respect. Civic rules of political conduct emerge as the result of long-term experiences and cannot be created by administrative fiat. The amount of trust invested in judges by politicians must increase with the political importance of the courts involved. The factual independence of the judges is directly dependent on political trust. The evolution of the Austrian Constitutional Court since 1945 illustrates this point very clearly.

Like the Constitution, the Court was a creation of the two largest political parties (Social Democrats and Christian Socialists), who sought to overcome the mutual distrust that had persisted as a result of the civil war in the 30s by dividing the country and its institutions into distinct spheres of interests. The Constitutional Court was a “common institution“ whose members were appointed by the two parties according to an agreed scheme. The court´s decision were thus made calculable to a very high extent, which was in keeping with the preference of the political elite to avoid open conflict and informal problem-solving. The constitutional judges managed to win the trust of the elites, they never appeared in public and everybody was happy. The first TV appearance by a member of the Constitutional Court was made in 1987 and it marked a new tendency in the political system as such, because it could be interpreted as an appeal to public trust and legitimacy in lieu to the traditional logrolling. The parties could easily tolerate this “provocative conduct“ because they could control the court simply by changing the constitution with their 2/3 majority in parliament in case the ruling violated vital interests of their respective clienteles. Only recently the anticonstitutional conduct of the parties has come under media fire. Now, rulings are no longer predictable and the political independence of the judges has grown. It had to occupy pieces of the territory left by the crumbling social partnership. The parties underwent a brief period of panicking (the Social Democrats actually planned to introduce dissenting opinion as a means to split the bench) but in the long run, the Court`s reputation and the reputation of the Austrian legal system can only benefit from this development.

In a democracy, courts should be based on popular trust as well. Popular trust is based on 2 factors: accessibility and neutrality. Courts that serve elite interests or specific group interests only (e.g. rule consistently for house owners, employers, male spouses etc.) will enjoy the trust of these groups

only. Courts that rule in a neutral fashion, but squeeze out a majority of citizens by formidable financial or other entrance barriers will acquire a reputation of a legal caste with no regard for “real life“. The relevance of legislation and particularly of the constitution is of course also a matter of the jurisdiction of courts, as the US example shows. In the US legal system, ordinary courts have to judge on the constitutionality of any act of a public official. It is much more common to sue the authorities in the US than on the continent. The frequency of court proceedings and especially of complaints against the authorities is a good indicator of the trust judges enjoy, and, one may add, of their independence.

One must caution, however, against flatly accepting the fact that a high incidence of litigation is indicative of high trust. High trust necessitates more extra-legal conflict resolution and mediation in its turn. Irrespective of the cultural traditions in a society that determine the amount and the forms of pre-legal and extralegal conflict revolution, the independence of judges is at stake when courts can no longer handle complaints because of the heavy workload. This is why mediation is increasing on a par with the trust in the court system.

The respect judges enjoy in common law systems is also underscored by the legal protection of their dignity. Contempt of court is a formidable weapon to safeguard orderly conduct in court. Of course, the standards that are set for the independent judge are equally high, they are, so to speak, the price for independence. Other factors that are likely to increase trust in the legal system and particularly in judges are a high-quality legal education and permanent training, effective control and supervision, corporate identity of the judges as a profession, appropriate career mechanisms and reward systems, selective recruitment, the overall place value of the legal system and of the judicial branch, cultural traditions and the existence of a civil society, of which judges in their private lives usually are a part.

A few among these factors require some additional comment. Corporate identity can spill over into caste identity, when the activity of judges not under public control. Corporate identity is a powerful safeguard against political interference, but it safeguards the rule of law only if the mechanisms of recruitment and promotion do not harden into carapace, if the system remains open and flexible. The judicial corps in a democratic society should be as egalitarian as possible; the only hierarchical elements should be based on knowledge, experience and qualification. Bottom-up criticism should be possible. In Austria, the independence of lower courts is severely hampered by the tendency of judges to avoid conflict with higher instance courts. A higher number of complaints filed with higher instance courts may severely harm the career chances of junior judges. The system is clearly inflexible and is geared towards informality and consensus-seeking.

Justice has effective and dignified parts. The daily practice of judges, the hard part and the nitty-gritty of the job, is or should be highly effective; the judicial system is a part of the system of conflict resolution. Simultaneously, however, the figure of the judge has reflected its religious origins to this point. Judges are factually limited to imparting needlepricks in that only a split fraction of all conflicts or violations of the law ever reaches the courts. They can only hope that their rulings will have a disseminating effect. Justice is also a part of the education system. The rule of law in its turn is thought to be the product of judicial review and control.

At this point I would like to mention the extraordinary role that judges can play as active members of the civil society. Judicial restraint should be reserved to their professional life. In their private activities, they should act as leaders and models for others who enjoy less reputation and independence in their profession. Let us not forget that it was an association of judges that brought leading Mafia godfathers before Italian courts in 1992. A rather small group of judges, calling themselves mani pulite (clean hands) was able to break the spell and to restitute the traditional

reputation to the Italian courts, which they had lost in their abortive fight against corruption and crime.

For societies in transition, the judicial system poses a specific problem. Transitional societies expose, like in a magnifying glass, all the problems that also occur in Western societies, of course with a large amount of regional variation. In addition, they have specific problems arising from the heritage of real Socialism. I would like to thrash out three or four problem areas, which have the potential to threaten their otherwise prospective developmental trajectory towards the rule of law and a civil society

1) corruption: Imagine a judge with a monthly salary of US$70 that has to deal with litigation sums exceeding millions of US dollars. Corruption has become a socially accepted means of getting by and the moral inhibitions are likely to crumble in such a context.

2) Justice is a low-paid female reserve and has a very bad image. Trust figures are down and the role of formal procedures is minimal.

3) The negative impact of the yellow press in societies in transition poses a specific problem: There is a large factual impunitive leeway for tabloids and electronic media in societies that had never known freedom of the press. Media law is insufficient and ineffective, to say the least.

4) The economic impasse which many societies in transition face implies formidable barriers, eg. If all severance pays to which laid off workers are entitled were paid out, all firms would go bankrupt.

The most dramatic threat to judicial independence in societies in transition, in my eyes, comes from the financial and infrastructural deficiencies, not from political pressure or illicit interventions (the heritage of “telephone law“). The problem of justice in societies in transition is multifaceted and complex and it may well wind down to a vicious circle. The political place value of the judicial system is generally low (with the possible exception of constitutional courts) and corresponds to the role of law as a genuine mechanism of conflict resolution in general. The prestige of the judicial profession as well as trust in impartial justice is equally low, a fact which is reflected in the feminisation of the profession, the lack of infrastructure, low salaries and bad working conditions. The administrative branch uses its overweight to drain the judicial branch of necessary resources. It is much closer to politics and economics and not really interested in an effective judicial review or limitations of its flexible decision making.

An important contribution to judicial independence can be made by the political leadership. If the political leaders demonstrate that they are willing to accept court rulings that run counter to their interests, the image of justice will be greatly enhanced. Surveys in Hungary show that the trust in ordinary justice is quite low, but as a result of resolute action by the Constitutional Court trust in this institution soared (in April 1995, the Court actually struck down parts of the “Bokros package“, legislation introduced to balance the state budget by slashing social support expenditure. The Minister of Finance Bokros resigned. Other rulings included the abolition of the death penalty at the behest of 4 university professors, which is a good illustration of both the accessibility of the court as well as of its responsiveness. In both cases the political leaders abided by the rulings).

If there is (or were) political will to boost the role of justice, several decisions would have to be taken simultaneously. Salaries would have to be raised simultaneously with the qualification levels. Stricter selection criteria would have to be enforced relating to admission to training internships and to service positions and to higher career positions. All such decisions should be made dependent on

lists of candidates elaborated by other judges, from which the administrative authorities (e.g. the Minister of Justice or the president) can pick their candidate.

Any judicial system can only function properly if and only if it is supported by the political elites and (in a democracy) the population. Revamping an existant judicial system has therefore obvious limits. It is hard enough to pick a proper system as a model. One can educate a whole new generation of judges, raise their salaries and invest a sufficient amount of money in the court infrastructure as well as broaden their jurisdiction. But to change the system at short notice would also mean to replace the society, its habits of the heart and mind, as Tocqueville would have called this operation. Such an intervention, however, would neither be feasible, nor would it be desirable. It makes no sense in the world to transplant individual successful institutions such as administrative courts or personnel committees manned by judges. But one should be very hesitant about experimenting with entire societies, “в масштабе всей страны», as the Stalinist formula had it. Zealous market and democratic bolshevics can do as much harm as Lenin´s vanguard of the proletariat.