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Judicial Independence

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In modern democracies, judicial independence, along with the separation of powers, is a fundamental constitutional principle. For some decades, there have been new political and institutional developments based on the principle of judicial independence. For instance, it is one of the conditions for the protection of human rights in the United Nations Commission of Human Rights.

Traditionally, scholars have distinguished two forms of independence: (1) the first form is external and objective and concerns judges' connections with politics; and (2) the second form is internal and subjective and concerns the relationship between a judge and the judicial hierarchy. The two forms vary according to judicial traditions. As they evolve, their differences are blurred but not erased.

Common Law Tradition

In common law countries, judicial independence does not apply to nonprofessional lay judges, who occupy a lower level in the administration of justice. Supervising judges or even executive officials can relieve lay judges of their functions without resorting to disciplinary procedures. Lay judges are unlikely to join the professional magistracy.

The selection of professional judges involves issues of political power and the absence of transparency in methods of selection. Nevertheless, the weight of politics is counterbalanced by substantial decentralization in the real choices of judges and by the influence of barristers in England or a more informal group of lawyers in the United States. It is from these groups of lawyers that politicians find persons who are eligible to become professional judges. Once installed, professional judges almost always serve for life. They are, in addition, largely sheltered from disciplinary procedures because such procedures are difficult to implement.

In England, for instance, impeachment has become obsolete. The procedure for removing judges from the High Court or the Court of Appeals is so cumbersome that it is rarely used. Disciplinary regulation is above all the act of a professional group of "peers," that is, the bench and the bar of barristers. In the United States, impeachment of federal judges is also rare. In order to impeach a judge, the House

of Representatives must investigate the judge and issue articles for crimes or gross misconduct. The judge must then be tried in the Senate, and two thirds of the senators must find the judge guilty. Discipline for lesser offenses is the purview of judicial councils instituted at the appellate courts.

Finally, professional judges in common law countries do not participate in a truly hierarchical structure. Until recently, judges served out their careers in a single court and were not dependent upon advancement, which would have rendered them dependent on political pressure. If a professional career path is gradually taking shape, it is because professional judges are being selected from among part-time magistrates and movement between inferior and superior jurisdictions is becoming more common. The hierarchical structure is still in an embryonic state, however, and the notion of a judicial career remains limited.

Civil Law Tradition

In European continental countries, where a civil service model of justice dominates, the progressively imposed system of competitive examinations limits arbitrary political influence in judicial selection. The disciplinary regimes are less protective of judicial independence, however, and are largely supervised by [p. 850 ↓] the executive branch. In some countries, the top of the judicial hierarchy gained the possibility of playing a role in the selection and promotion within the magistracy due to its awareness of relevant political interests and its capacity to assure the discipline of the profession. If high court justices do not have the power to promote individuals, they at least retain the power to harm an individual's career.

The modest income earned by judges in the lower ranks, combined with a complex pyramidal structure that expands the lower levels, results in a system of career advancement controlled by politics. A judge's desire to have a successful career undermines the fundamental principle of independence of the judiciary, which otherwise would be supported by prohibiting the relocation of a judge without his or her assent. Some republics, particularly France, struggle to resolve this dilemma by recognizing judicial independence in their constitutions.

Corporatist Independence

There is a recent tendency to reinforce a corporatist type of independence among judges. Previously, judges defined independence as a personal capacity to resist external influences. Today's judges conceive of it above all as a matter of statutory and collective guarantees. This evolution has been evident, first, in the development of promotion by seniority. Second, it appears in the assertiveness of professional associations of magistrates who have founded a new form of autonomous professional organization and created superior councils that intervene in career management and disciplinary matters. These new entities, consisting of magistrates and nonmagistrates, appeared at first to be a reaction against the subordination of judges by fascist regimes. Today, these entities seem to serve as representatives of the magistracy and guarantors of judicial independence, but they may also accommodate politicians and officials in the judicial hierarchy, depending on the country. This situation favors improving the collective independence of the judicial corps and the independence of each individual magistrate.

Prosecutors as Part of the Magistracy

There is a tendency to extend the guarantees of judicial independence to public prosecutors. Until now, these guarantees benefited adjudicating magistrates (sitting judges), subject only to the law. Members of the public prosecution (or standing judges) were either civil servants without any particular status or magistrates belonging to a unique judiciary body, who were subject hierarchically to political power and did not have much protection from executive intervention.

These examples of institutional and political tendencies are not present in all countries in the civil law tradition. Germany, Austria, and Finland do not have superior councils. A superior council is the new organizational form for independence that has triumphed in Latin countries, in the Benelux nations, and even in a former communist bloc country, Bulgaria. In addition, nuanced differences exist between diverse national councils. Only those of Spain, Portugal, and, above all, Italy, truly manage magistrates' careers.

Italy's council (Consiglio superiore de la magistratura) represents the most radical model of selfmanagement, in which external as well as internal independence is the strongest. It decides on promotions based on seniority, which are almost automatic. The council, largely dominated by representatives of associations of judges, makes decisions concerning recruitment, appointment, promotion, and discipline. It manages prosecutors in much the same way and with the same guarantees. In Portugal, a superior council exists peculiar to prosecuting lawyers, headed by the minister of justice. Prosecutors are magistrates who cannot be removed and in this respect they are like their seated colleagues on the bench. Spain, alternatively, has no council to mitigate the power of the executive over the public prosecutors' office.

France

In France, the Napoleonic civil service model of justice, which was the model for a large part of nineteenthcentury Europe, was eroded by the emergence, after 1946, of a superior council of the magistracy (Conseil [p. 851 ↓] supérieur de la magistrature). This council remains a pale copy of its Latin counterparts, which tend to support strong judicial independence and are less resistant to the influence of politics. A 1993 reform weakened the power of the French president, who had previously been head of the council and official guardian of judicial independence. The president no longer designates the representatives of the magistrates, who now elect their own members. They serve at the heart of the council, so they have increased power over disciplinary matters and propose nominations for the highest judicial offices, even those in the executive branch. The president's power over the office of public prosecution has been reduced, as has his power over the attorney general. Despite some continuing limits on the council in France, the administration of justice has not been disrupted. In this way, it is similar to Belgium, where a superior council of the magistracy emerged later. Today, it seems more difficult for the executive branch not to take into account the opinions of the councils.

Accountability

The current situation sharpens the debate about the conception and limits of judicial independence. It increases the tension between two contradictory demands that function in democracies. In judicial matters, the democratic responsibility of everyone who exerts legal power, on one hand, conflicts with the defense of independence for judges, which also guarantees their impartiality, on the other. Some scholars favor an extension of the Italian self-managing model, presented as the realization of democratic principles founded on judicial independence. Others fear corporatism and push for councils dominated by authorities outside the magistracy.

The more independence judges have, the more the question of judges' legitimacy arises. Of course, this issue matters most in democratic countries, where politics has traditionally dominated and judges possess the highest form of legitimacy, based on elections. How does one admit that a professional independent judge, exempt from democratic elections, could stand in the way of political institutions formed from universal suffrage? Even in common law countries, where the place and legitimacy of the judge are traditionally more respected, scholars question whether judges should have disciplinary immunity, as well as how unrepresentative they are compared to the larger society due to their narrow social recruitment and obscure mode of selection, both elitist and partisan.

Another issue is whether independence should apply only to judicial duties, as in Austria, or should also apply to the administrative and financial tasks involved in running one or more tribunals. Some believe that such administrative or managerial responsibility will not undermine the independence necessary for resolving disputes.

Editor's Note: This entry was translated from French by Benn Williams.

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See also

- [Constitutional Law, Politics of](#)
- [Courts](#)
- [Judges](#)
- [Judges, Associations of](#)
- [Judicial Politicization](#)
- [Judicial Selection](#)
- [Lay Judges](#)
- [Prosecutors](#)
- [Rule of Law](#)

Further Readings

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