

**IMPORTANCE OF AN INDEPENDENT  
JUDICIARY IN A DEMOCRATIC STATE**

by

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**I. Introduction**

The Judiciary is an important organ of the government which primarily administers the law by expounding and defining its true meaning. It applies the law to resolve disputes between private individuals, between large private organizations (i.e., companies), between public bodies (i.e. government departments, local authorities, nationalized industries etc.), or between a private individual and a government department. The judges apply facts to legal rules and interpret those as best as they can. In a free society, the necessity of the judiciary is keenly felt to ascertain and decide both public and private rights, to administer justice, to punish crimes and to protect the innocent from injury and usurpation. The judges, by their rulings and dicta, powerfully and usefully contribute to adapt the law to the needs of a rapidly changing society. In countries where there is a written constitution, which can not be overridden by ordinary legislation, the judges are guardians of the constitution and may declare a statute to be unconstitutional and invalid and thereby ensure the observance of the rule of the law. "When questions arise" says James Bryce, "as to the limits of the powers of the Executive or of the Legislature, or-in a Federation-as to the limits of the respective powers of the Central or National and those of the State Government, it is by a Court of Law that the true meaning of the Constitution, as the fundamental and supreme law, ought to be determined, because it is the rightful and authorized interpreter of what the people intended to declare when they were enacting a fundamental instrument."<sup>1</sup> Thus the judiciary plays a vital role to shape the life of the community and to secure the observance of the rule of law. The judiciary can perform its function properly only when it is completely independent and impartial. A democratic government is, therefore, a prerequisite for the existence of an independent and courageous judiciary as in a

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<sup>1</sup>. Bryce, James, *II Modern Democracies* 384-85 (1929)

totalitarian state the judiciary is expected to act in accordance with the policies of the central authority and, as such, political absolutism is obviously to have free rein.<sup>2</sup>

At modern times, it is contended that the independence of the judiciary is principally a result of the application of the doctrine of separation of powers, the doctrine which means the distribution of powers among different organs of the government. Although the doctrine in its earlier history had nothing to do with the independence of judges, it may now be said to have received its application in democratic countries by securing the independence of the courts from the control of the executive.<sup>3</sup>

The most central and traditional meaning of the independence of the judiciary is that the judges are in a position to arrive at their decisions free from interference of the political branches, especially the executive, and apprehension for suffering personally as a result of exercising their judicial powers. But the concept of judicial independence has broadened over the years. It has now many facets. Recent international efforts have particularly led to four meanings of judicial independence :

(a) substantive independence;<sup>4</sup> (b) personal independence<sup>5</sup> (both these two comprise of the independence of the individual judge); (c)

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2. For example, in the Nazi era in Germany, there was no independent judiciary as the judges were expected to follow the wishes and orders of the Fuehrer. In the Third Reich (the Federation) Judges were under a duty to consider" the will of the Fuehrer" as their supreme role.

3. Phillips, O. Hood (& Jackson, Paul) Constitutional & Administrative Law, 15 (1978);

4. Substantive independence, which is also described as functional or decisional independence, means the independence of judges to arrive at their decisions in accordance with their oath of office without submitting to any kind of pressures- outside or inside- (from government and from other centers of power, public and private; and, on the other hand, the inside pressures from the parties themselves) but only to their own sense of justice.

5. Personal independence means that judges are not dependent on Governments in any ways which might influence them in coming to decisions in individual cases. Griffith, J.A.G., The Politics of the Judiciary 29 (1977).

collective independence<sup>6</sup>; and (d) internal independence<sup>7</sup>. It should be stressed here that the concept of personal and substantive independence of the individual judges is universally recognized by law and by legal writers. But the concept of collective and internal independence of the judiciary as a body was recognized first by the International Bar Association's Minimum Standards of Judicial Independence, 1982 and following them by the Montreal Universal Declaration on the Independence of Justice, 1983. This recognition is considered as one of the significant contributions of the international standards to judicial independence.

However, the object of this paper is to examine the importance of an independent, courageous and enlightened judiciary in a democratic state.

## **II. Importance of an Independent Judiciary**

Judicial independence is a *sine qua non* in a democratic society proclaiming the rule of law. For, the judiciary is charged with the ultimate decision over life, liberty, freedom, rights, duties and property of citizens. Therefore, in "all countries cases, sometimes civil, but more frequently criminal, arise which involve political issues and excite party feeling. It is then that the courage and uprightness of the judges become supremely valuable to the nation commanding respect for the exposition of the law which they have to deliver"<sup>7a</sup>. In a parliamentary system of government where the cabinet is comprised of the leaders of the ruling party who command majority in parliament, the problem of judicial independence from the executive is very significant. "The importance of an independent judiciary" says Lord Hailsham, "is not less but all the greater when judges have to serve under an all-powerful parliament dominated by a party cabinet,

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6. Collective independence means the institutional, administrative and financial independence of the judiciary as a whole vis-a-vis other branches of the government namely the executive and the legislative.

7. Internal independence of the judiciary means the independence of a judge from his judicial superiors and colleagues. That is the independence of a judge or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding disputes.

7a. Bryce, James, op.cit.384.

and concentrating all the powers, and more than all powers, of the executive and legislature combined in one coherent complex."<sup>8</sup> However, without a free and independent judiciary, ready to adjudicate between individuals and between the state and individual in an impartial manner, justice is a meaningless word. "There is no better test of the excellence of a government", rightly says James Bryce," than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice.... if the Law be dishonestly administered, the salt has lost its savour; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness!"<sup>9</sup> Referring to the importance of the independence of the judiciary, an eminent authority, namely, Henry Sidgwick, has gone so far as to say that "in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and another, and as between private citizens and members of the Government."<sup>10</sup>

Hence in the Charter of the United Nations, the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination. Since its modern beginnings, international human rights law has incorporated the principle of judicial independence within its jurisprudence. The 1948 Universal Declaration of Human Rights, with which began the real history of human rights at the level of international law, enshrines the principle of the independence of the judiciary in the following terms :

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the

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8. Hailsham, Lord, *The Door Wherein I went*, 245 (1975)

9. James, Bryce *op.cit.*384.

10. Sidgwick, Henry, *The Elements of Politics*, 481 (1897)

determination of his rights and obligations and of any criminal charge against him."<sup>11</sup>

Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 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."<sup>12</sup>

Later both the International Covenant on Civil and Political Rights, 1966 and the American Convention on Human Rights, 1969 impose upon governments the duty to preserve judicial independence in the administration of criminal justice, by guaranteeing each person facing criminal charges a hearing by an "independent and impartial tribunal."<sup>13</sup>

However, in a free society professing the rule of law, the necessity of an independent judiciary is keenly felt in order to enforce fundamental rights, to secure the people against the usurpations of the executive and legislative departments and to earn public confidence in judicial impartiality.

### **A. Enforcement of Fundamental Rights**

A mere declaration and insertion of fundamental rights in the constitution is meaningless unless their enjoyment is effectively guaranteed by an effective, easy and independent judiciary. The precise meaning and application of constitutionally guaranteed rights to particular situations is left to the judiciary. The enforcement of

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11. Art. 10, of the Universal Declaration of Human Rights

12. Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedom.

13. Art. 14 of the International Covenant ("All persons... shall be entitled to a... hearing by a (n) independent and impartial tribunal established by law."); Art. 8 of the American Convention ("Every person has the right to a hearing by a (n) independent, and impartial tribunal, previously established by law.")

rights is assured only by an independent and impartial judiciary. In Madison's view :

"Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those (constitutionally protected) rights. They will be naturally led to resist every encroachment upon rights expressly stipulated in that Constitution by the declaration of rights."<sup>14</sup>

Therefore, "Every one has the right to an effective remedy by the competent national tribunal for acts violating the Fundamental Rights granted to him by Constitution or by law."<sup>15</sup> Without an independent judiciary to interpret and enforce them, such constitutional guarantees are of little worth. One of the Conclusions of the International Conference of Jurists, held in Bangkok in 1965, emphasized the importance of judicial independence to enforce rights thus :

"The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous judiciary and upon adequate provision for the speedy and effective administration of justice."

Thus a bill of rights will only be as effective as the judiciary is independent. Unless and until the common man finds that the judiciary upholds the constitutional guarantees independently and earnestly, the roots of the rule of law cannot go deep into the society. The judiciary must be watchdog and formidable protector of the rights of the individuals entrenched in the constitution.

Since the adoption of the Universal Declaration of Human Rights in December 1948, the international community has made considerable progress towards the promotion and development of transnational jurisprudence of substantive human rights embodied in a good number of international conventions, global and regional, general

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14. Quoted in Agresto, J, *The Supreme Court and Constitutional Democracy*, 25 (1984).

15. Art, 8 of the Universal Declaration of Human Rights.

and specialized. Effective mechanisms for the enforcement of human rights in the national, regional and international systems of justice are a fundamental requisite as without such mechanisms human rights will remain unfulfilled injunctions in the constitutions or in the regional and international conventions. "An impartial judiciary composed of competent judges is the best guarantee of proper administration of justice, and in the final analysis, of defense of human rights."<sup>16</sup> The increasing attention of the United Nations (the first U.N. standards in the field is the Basic Principles on the independence of the Judiciary adopted in 1985), and other international organizations to formulate universal principles and safeguards of judicial independence demonstrates the realization that the independence and impartiality of courts is essential to the effective implementation of human rights instruments and perhaps, even more, important than providing for human rights.

### **B. Protection of People Against the Usurpations of the Executive and Legislative Departments**

The independence of the judiciary is indispensable to secure the people against the intentional as well as unintentional usurpations of the executive and legislative departments. As Madison says :

"Independent tribunals of justice will consider themselves....  
an impenetrable bulwark against every assumption of power  
in the Legislature or Executive."<sup>17</sup>

Modern governments necessarily pose a greater threat to individual liberties as they intervene in areas previously little regulated. The citizen must look primarily to an independent judiciary for redress if there is a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law. An independent and impartial judiciary can only determine whether the executive actions challenged were exercised outside the provisions

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<sup>16</sup>. Annual Report of the Inter-American Commission of Human Rights, 182 (1985)

<sup>17</sup>. Quoted in Agresto, J, *op.cit.*, 25

of the constitution and other laws of the country. In addition to reviewing executive actions, such a judiciary can also determine, by reference to the constitution, the validity of challenged legislation remaining unaffected either by the policy or the wishes of the government of the day. With regard to the practice as well as wide scope of judicial review of executive action and of statutes in America (the Supreme Court of the United States assumed the power of judicial review in the case of *Marbury v. Madison* in 1803), Erwin N. Griswold once commented, "in the United States there is scarcely any sort of governmental action, or threatened government action, which is not subject to judicial review.

America has indeed moved a long way in the direction of government by the judiciary."<sup>18</sup> Thus the role of judges should be strikingly broad as in America.

### **C. Public Confidence in Judicial Impartiality**

The Judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order by settling legal disputes and thus promotes a harmonious and intergrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it and to submit to its judgments. What matters most, therefore, is the extent to which people have confidence in judicial impartiality. According to Justice Frankfurter "the confidence of the people is the ultimate reliance of the Court as an institution."<sup>19</sup> This point has eloquently been expressed by a distinguished Justice of the U.S. Supreme Court :

"The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of

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18. Griswold, Erwin N. "The Judiciary and the Government", a paper presented at the 2nd International Conference of Appellate Judges, Australia 28 (1980).

19. Frankfurter, "The Supreme Court in the Mirror of Justices" (1957) 105, University of Pennsylvania Law Review 781,796.



time and experience. But they flourish when judges are independent and courageous."<sup>20</sup>

Thus the "independence of the judiciary lends prestige to the office of a judge and inspires confidence in the general public."<sup>21</sup> In fact, the independence of the judiciary is essential for maintaining purity of justice in the social system and enabling it to earn public confidence in the administration of justice. "Nothing does" says James Bryce, "more for the welfare of the private citizen, and nothing more conduces to the smooth working of free government than a general confidence in the pure and efficient administration of justice between the individual and the State as well as between man and man."<sup>22</sup>

The public perception of the independence of the judiciary is also to assure public confidence in the courts. As Chief Justice Howland of the Ontario Supreme Court puts it in the case of *R.V. Valente*<sup>23</sup> thus

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"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."<sup>24</sup>

Similarly, the importance of public perception was stressed by the Ontario White Paper on Court Administration :

"The value of the courts as an important impartial forum for the resolution of disputes depends upon the public perception of the independence of the courts from the parties and particularly their independence from the government."<sup>25</sup>

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<sup>20</sup>. Douglas, William O, *From Marshal to Mukharjee : Studies in American and Indian Constitutional Law*, 345 (1956-Tagore Law Lectures)

<sup>21</sup>. Robson, W.A. *Justice and Administrative Law*, 47 (1951)

<sup>22</sup>. Bryce, James *op.cit.* 389.

<sup>23</sup>. 2.C.C.C. (3d) 417 (1983)

<sup>24</sup>. *Id.* at 423.

<sup>25</sup>. Ontario Ministry of Attorney General, *White Paper on Courts Administration*, 13 (1976).

In fact, the significance of public perception in the judiciary is well reflected in the oft quoted maxim that "Justice must not only be done, but must also be seen to be done." It is also reflected in the two basic rules of natural justice-impairity and fairness of the proceedings-applied for self disqualification for bias. The rule does not require that bias has actually influenced the judge, but rather that it is likely that it will influence the judge. Thus public perception is one of the fundamental values of the administration of justice.

### III. Conclusion

The foregoing discussion reveals that the central principle underlying the administration of justice is the independence of the judiciary. An enlightened, independent and courageous judiciary is a fundamental requisite, a basic element for the very existence of any society that respects the rule of law as a subservient judiciary cannot be relied upon to accomplish the task of protecting human rights and rule of law. If judicial independence exists in a democratic society, absolutism in government cannot establish there; and where it is absent, absolutism is likely to have free rein. For it is the independent judiciary which "stands between the subject and any attempted encroachments of his liberty by the executive, alert to see that any coercive action is justified in law."<sup>26</sup> Independent courts constitute the last bulwark of the citizen against the arbitrary encroachments of the state. It should be kept in mind that judicial independence is something which must never be taken for granted, and like freedom, exacts the price of eternal vigilance. "Justice", says Henry Cecil, "is such a precious commodity that everything reasonable should be done to attain the highest standard." He also added a rider that "if the public does not want to pay for the more expensive articles, it can have the cheaper."<sup>27</sup> An impartial administration of justice" is like

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<sup>26</sup>. Lord Atkin in his memorable war-time dissent in *Liversidge v. Anderson* (1942) A.C.206, 244.

<sup>27</sup>. Cecil, Henry, *The English Judge*, 113

oxygen in the air, they (the people) know and care nothing about it until it is withdrawn." (Lord Atkin). In the long run, the manner in which judges perform their duties can build up public opinion for the courts and public opinion is a better safeguard for the independence of judges than laws and constitutional guarantees. The public will support the courts if they are seen as an effective impartial forum for resolving disputes. Hence the independence of the judiciary should be protected with zealous care.