

Chapter 1

The Problem of Judicial Independence

1.1 Introduction

Few legal ideas have received as much attention in scholarship and invocations in judicial speeches as that of an independent judiciary. Chief Justice Brian Dickson of the Supreme Court of Canada once wrote that judicial independence is “the lifeblood of constitutionalism”.¹ Associate United States Supreme Court Justice Sandra Day O’Connor admonished Americans to ‘recommit’ themselves to maintaining judicial independence after arguing that “all of society has a keen interest in countering threats to judicial independence”.² Despite the near universal acclaim, however, the contours of judicial independence remain unclear and its meaning and practice in different legal systems are often poorly understood. In writing about judicial independence, Christopher M. Larkins observes:

The importance of judicial independence to democratic rule has been strongly advocated and to many degrees forcefully demonstrated in comparative political and legal studies. However, despite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law. On some level, as Theodore Becker noted more than twenty-five years ago, “we all know what it means,” yet its full significance, intricacies, and implications still seem beyond our reach.³

Larkins posits that in addition to formal legal rules and institutional arrangements, a number of other features within each country end up moulding its judicial system, with “varying impacts on [judicial] impartiality, insularity, and scope of authority.”⁴ Others have also observed the power of the local context in playing a strong role in shaping a country’s courts and the associated degree of judicial

¹*Beauregard v Canada*, [1986] 2 SCR 56, para 24.

²O’Connor (2006).

³Larkins (1996), p. 607 [footnotes omitted].

⁴*Ibid*, p. 614.

independence. In a recent speech, former Supreme Court of Canada Justice and UN High Commissioner for Human Rights Louise Arbour commented that

the evolution of the judiciary in a country towards an ever increasing level of deserved legitimacy and credibility is a process that takes time, and that involves all aspects of judicial independence . . . It is linked not only to formal rules but to cultural traditions and perceptions. . . .

In short, the construction of a competent, independent, credible and trustworthy judicial system, like the consolidation of democracy itself, is a long process. Proper formal institutions are necessary, but not enough. The most difficult part is to transform a culture accustomed to tolerating corruption, impunity and mediocrity.⁵

While these observations suggest that features outside of formal legal rules influence the meaning and practice of judicial independence, producing different judicial systems in different places, international organisations promoting the rule of law continue to focus on model rules that are seen as connected to the establishment of an independent judiciary. Similarly, while nearly all legal scholars see judicial independence as an essential ingredient of the rule of law,⁶ they often define and measure judicial independence by reference to formal rules. In both cases, it would appear that inadequate consideration is given to other features of the legal system in which the court is situated and within which it operates. The main problem is that it is not clear how judicial independence will actually work in a country that adopts rules designed to foster judicial independence. Are the rules likely to work as intended? If not, what might explain their failure? What factors in addition to formal rules might play a role in shaping the meaning and practice of judicial independence in a domestic legal system? By looking beyond the formal rules related to the judiciary in the legal systems of Malaysia and Pakistan, this book seeks to answer these questions and paint a more complete picture of judicial independence in these legal systems. While this is admittedly an outsider's view on judicial independence in Malaysia and Pakistan, the goal is to bridge a gap between these legal systems and a broader audience and provide a fresh perspective.⁷ Moreover, the comparative insights unearthed by the case studies stand to shed light on the idea of an independent judiciary more generally and refine our understanding of the dynamics of judicial independence.

⁵Arbour (2013) [emphasis added].

⁶See, e.g., Bingham (2011), pp. 91–92.

⁷See Lemmens (2012), pp. 321–322 who writes that “Excepting the researcher’s domestic order, the account will be that of an outsider. But that is of very little concern. The added value of an ‘insider’ representation is dubious anyway: what would be the gain to legal science if a Belgian scholar managed to describe the French legal system as a French scholar would? . . . [I]ts relevance lies in its potential to bridge the gap between the French legal system and a non-French audience. As an outsider, the Belgian scholar may be well placed to act as a translator or interpreter for an audience that, unlike the scholar, is unfamiliar (or not as familiar) with the foreign legal system. Second, this outsider perspective is relevant for domestic lawyers too. It may offer a fresh or unexpected outlook on their domestic legal system, which but for the outsider’s view (and mindset) they would have missed out on.” [Footnotes omitted.]

The second part of this chapter highlights the work of two groups of legal scholars in relation to judicial independence, with implications for the study. The third part looks at the work of two groups of judicial reformers, demonstrating the importance of judicial independence as a rule of law project. The fourth part sets out two contrasting theoretical frameworks, being the universal theory and the proposed pragmatic and context-sensitive theory. The fifth part provides a brief case study of judicial independence in England, showing the plausibility of the pragmatic and context-sensitive theory and providing a *tertium comparationis*, a comparative foundation, for the following case studies. Finally, the sixth part briefly describes the methodology of the study.

1.2 Legal Scholarship⁸

1.2.1 Introduction

Legal scholarship on the meaning of judicial independence is varied and extensive but can be divided into two general approaches. The first group of scholars has sought to develop a universally-applicable model of how an independent judiciary should work. Through this work the scholars prescribe what is needed to achieve judicial independence in terms of legal rules and other institutional arrangements. The second group of scholars sees judicial independence as an idea that is shaped by context, although it can have one or more core features that can be seen across different legal systems. This section selects key scholars in these groups to illustrate these different approaches and draws upon their scholarship to propose a refined understanding of judicial independence, termed the pragmatic and context-sensitive theory, that can be tested in the case studies of Malaysia and Pakistan.

1.2.2 Universal Scholars

Professor Shimon Shetreet stands out as the key advocate of a universal approach to judicial independence both through his work on creating minimum standards of judicial independence and his scholarship. In his co-edited 1985 volume *Judicial Independence: the Contemporary Debate*,⁹ which includes case studies of judicial independence in a number of countries, Shetreet sets out to define a ‘modern conception of judicial independence’ that includes institutional protections for judges both individually and collectively.¹⁰ While observing that law and practice

⁸This summary of the judicial independence scholarship appears in Neudorf (2015).

⁹Shetreet and Deschênes (1985).

¹⁰Shetreet (1985b), p. 393 and Shetreet (1985a), p. 590.

sometimes diverge, Shetreet seeks to transcend domestic differences by establishing a rationally constructed and normative understanding of judicial independence that can be seen as universally applicable.¹¹ In terms of devising universal judicial independence standards, Shetreet selects institutional arrangements that are “shared by a majority of legal systems” on the basis of their perceived importance to the administration of justice.¹² Shetreet takes a broad view of judicial independence. In order for courts to resolve disputes impartially and effectively, particularly in human rights cases, the judiciary must be free from any external pressure or influence.¹³ In his contribution to the 1985 volume, he describes what he sees as the essential elements of an independent judiciary, which were incorporated into the 1982 International Bar Association’s Minimum Standards of Judicial Independence¹⁴ (of which Shetreet acted as General Rapporteur). In addition, he was closely involved in the 1983 First World Conference on the Independence of Justice in Montreal that approved the Universal Declaration on the Independence of Justice,¹⁵ which led to the United Nations’ Basic Principles on the Independence of the Judiciary¹⁶ later endorsed by the international community, discussed in greater detail below.¹⁷

Over the past 2 decades Shetreet has continued to advocate a universal approach to judicial independence by organising a series of conferences that work on updating international judicial independence standards. For example, in 2007 he organised several meetings of academics and judges to draft revised minimum standards of judicial independence, styled the Mount Scopus International Standards on Judicial Independence.¹⁸ These standards were approved by a conference in Jerusalem the next year. According to Shetreet, new standards were required in light of the changing judicial role in the protection of human rights and economic development.¹⁹ The 2008 version of the Mount Scopus Standards sets out detailed institutional arrangements that expand upon the Basic Principles and other international instruments and regional standards. The Mount Scopus Standards begin by stating that an independent judiciary is an institution of the highest value in every society and an essential component of liberty and the rule of law.²⁰ Independent courts resolve disputes and administer the law impartially, promote human rights within the “proper limits of the judicial function”, and ensure that all people are

¹¹Shetreet (1985a), pp. 590–592.

¹²*Ibid*, pp. 591–592.

¹³*Ibid*, p. 591.

¹⁴International Bar Association (1982).

¹⁵World Conference on the Independence of Justice (1983).

¹⁶United Nations (1985).

¹⁷Shetreet (1985b), p. 395.

¹⁸International Association of Judicial Independence and World Peace (2008).

¹⁹Shetreet (2009), p. 276.

²⁰International Association of Judicial Independence and World Peace (2008), Art. 1.1.

able to live securely under the rule of law.²¹ The Mount Scopus Standards prescribe a series of judicial independence rules relating to judicial appointment and promotion, discipline and removal, tenure, compensation, transfers, case assignment, immunities, the use of executive pardons to commute a judicial sentence, reversals of judgments by the elected branches, public statements on the judiciary by the elected branches, the conduct of the judiciary, the use of special tribunals as an alternative to the ordinary courts, general guarantees of an ‘independent judiciary’, and the administration and operation of the courts.

Shetreet’s scholarship also highlights the role of international standards in shaping domestic courts. In a 2009 article, he identifies a three-part cycle of normative influence between the domestic and international planes.²² According to Shetreet, the cycle begins with an original domestic development that better protects the independence of the judiciary, such as early eighteenth century England when judges were first provided with tenure and fixed compensation. This new development will influence scholarly thinking on judicial institutions and eventually make its way into the international standards. International standards, in turn, influence the development of other domestic courts with “significant and dramatic” results.²³ According to Shetreet, this is true in England where protections for judicial independence originated. England was later influenced by international standards relating to the separation of powers. The Mount Scopus Standards are presented by Shetreet as one of the most important international standards that influenced domestic conceptions of an independent judiciary and which helped to create what he refers to as a culture of judicial independence.

More recently, in his 2012 co-edited volume *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*,²⁴ Shetreet focuses on the contributions of international standards to what he sees as a cultural achievement of judicial independence. Shetreet writes that judicial independence is an essential feature of the administration of justice in every country.²⁵ According to Shetreet, five components are necessary to create a culture of judicial independence: (1) creation of institutional structures; (2) establishment of constitutional infrastructure; (3) introduction of legislative provisions and constitutional safeguards; (4) creation of adjudicative arrangements and jurisprudence; and (5) maintenance of ethical traditions and a code of judicial conduct. Through a detailed discussion of the written rules and institutional arrangements that comprise these five components, Shetreet offers a universally applicable roadmap to achieving a culture of judicial independence.²⁶ While maintaining a broad conception of judicial independence, he emphasises the importance of judicial accountability and the

²¹*Ibid*, Art. 1.2.

²²Shetreet (2009).

²³*Ibid*, p. 275.

²⁴Shetreet and Forsyth (2012).

²⁵Shetreet (2012), p. 17.

²⁶*Ibid*, pp. 19–21.

proper relationship between the judiciary and the other branches of government, which should be marked by partnership and dialogue.²⁷ He cautions that after a culture of judicial independence is achieved at the domestic level, the independence of the courts may still be challenged by internal threats.²⁸ To adequately secure judicial independence, Shetreet endorses the constitutional entrenchment of a general, freestanding guarantee of an independent judiciary despite the more limited wording of the Mount Scopus Standards that permits the recognition of judicial independence either constitutionally or in ordinary law.²⁹

1.2.3 Contextual Scholars

While much of the judicial independence scholarship tends to advocate the author's view of an independent court (and what is needed to achieve it), some scholars have called for a more contextualised approach to the study of judicial independence, drawing upon studies of courts at the domestic level. These scholars generally engage with comparative studies of different legal systems and levels of court that demonstrate the importance of context. In her recent edited collection,³⁰ which includes numerous studies on judicial independence from countries around the world, Professor Anja Seibert-Fohr observes the "vast differences" of institutional arrangements related to the judiciary and approaches to judicial independence.³¹ Although distinctions among the countries studied might suggest that the legal principle of judicial independence is simply a rhetorical device, Seibert-Fohr finds that there are shared normative dimensions of judicial independence that emerge from a comparative analysis. According to Seibert-Fohr, the core of judicial independence is the protection of the right to due process.³² Considering universal standards of judicial independence, she writes:

The international norm should be seen in its functional role of promoting fair trial standards. Conceptualizing judicial independence as a functional principle which provides for an obligation of result rather than of means helps to identify it as an international norm which nevertheless gives room for diverse and context-specific implementation. Comparative law can play an important role in this exercise, not only to identify the common core in order to develop a truly international principle but also as a caveat not to corrupt the validity of the concept by reading notions into it which are not commonly agreed on.³³

²⁷*Ibid.*, pp. 51–53.

²⁸*Ibid.*, p. 19.

²⁹*Ibid.*, pp. 18–19 and International Association of Judicial Independence and World Peace (2008), Art. 2.21. See also Shetreet (2014).

³⁰Seibert-Fohr (2012a).

³¹Seibert-Fohr (2012b), p. 1279.

³²*Ibid.*, p. 1354.

³³*Ibid.*, p. 1281.

Seibert-Fohr argues against the application of universal judicial independence standards, writing that international benchmarks should not be applied to all countries as “[o]ne should not generalize by rigid specifications about which structural arrangements are consistent with judicial independence because this cannot often be determined in the abstract”.³⁴ Instead, she calls for a new conceptual framework for judicial independence and a more contextual approach to judicial reform initiatives that can be assisted through detailed comparative studies at the domestic level.

Similarly, Professors Stephen Burbank and Barry Friedman call for a more contextualised approach to understanding judicial independence following their survey of court studies in the United States.³⁵ As a starting point, Burbank and Friedman observe the tendency among those involved in the discussion of judicial independence to treat the principle as a monolith, in that judicial independence is a “concept having the same meaning everywhere and at all times.”³⁶ The authors criticise this approach by writing that judicial independence varies significantly even among courts in the United States. In terms of defining judicial independence, Burbank and Friedman argue that one needs to make clear what is expected from the court in terms of its role, the degree of decisional independence and accountability that are necessary to achieve that end, and the formal and informal arrangements that are capable of achieving that goal.³⁷ The authors also point out that the level of court and its function as a trial court or appellate court are important considerations in this analysis.³⁸ While it may be difficult to arrive at a general theory of judicial independence, the principle of an independent judiciary can be better understood through comparative studies of different courts and legal systems. Burbank and Friedman note that comparative studies tend to demonstrate that judicial independence cannot be measured exclusively by formal rules and there may be more than one way to bring about the same measure of judicial independence.³⁹

In the introduction to his edited collection of judicial independence studies,⁴⁰ Professor Peter Russell calls for a general theory of judicial independence. According to Russell, there is little clarity of the meaning of an independent judiciary despite it being viewed as an essential feature of liberal democracy.⁴¹ Russell sets out several requirements that he would expect of a theory of judicial independence, which includes the meaning of judicial independence, its purpose, and its key elements. In terms of its elements, Russell notes that a general theory

³⁴*Ibid*, pp. 1281, 1350.

³⁵Burbank and Friedman (2002a).

³⁶Burbank and Friedman (2002b), p. 17.

³⁷*Ibid*.

³⁸*Ibid*, pp. 17–22.

³⁹*Ibid*, p. 22.

⁴⁰Russell and O’Brien (2001).

⁴¹*Ibid*, p. 1.

cannot be expected to provide “definitive answers to the substantive normative and empirical questions that might be raised about judicial independence in various contexts.”⁴² Judicial independence raises normative issues that may never achieve a consensus for a number of reasons. First, the position one takes on judicial independence tends to reflect one’s preferred balance between judicial autonomy and democratic accountability.⁴³ Second, there is a lack of empirical evidence of how particular institutional arrangements affect judicial independence.⁴⁴ Nevertheless, Russell sees merit in the development of a contextualised theory of judicial independence that would serve as an organizing framework and reference point for further comparative research.⁴⁵

Judge Antoine Garapon also calls for a new approach to understanding judicial independence on the basis that international judicial independence standards do not generally work as expected.⁴⁶ Garapon writes that model institutions are typically too abstract to be implemented effectively. International standards related to the judiciary impose blue-prints of an idealised version of a judicial institution upon local culture and national circumstances.⁴⁷ He argues that one cannot understand a legal system without taking its culture into consideration as every system is founded upon a set of beliefs.⁴⁸ Instead, judicial independence must take a more collective approach that is focused on politics on the ground. Garapon engages in a comparative analysis of various legal systems to point out that judicial independence grows in relation to the importance of individualism in a society.⁴⁹ Reforms to enhance judicial independence deal with complex issues that must be considered within their local context.⁵⁰ Garapon recommends that reformers ask what is wrong with the courts in a particular system, which will lead them to local issues. The prevailing approach of reformers is to ask what is right, which leads to a problematic universal and general approach.⁵¹ Garapon concludes that there is not one model of an independent judicial institution. Instead, judicial independence must be understood at the local level. Culture is a starting point in this understanding, but does not necessarily offer a defence to a problematic judicial system. Instead, it invites a normative but context-sensitive approach to judicial independence.⁵²

⁴²*Ibid*, p. 4.

⁴³*Ibid*, p. 5.

⁴⁴*Ibid*.

⁴⁵*Ibid*, pp. 5–6.

⁴⁶Garapon (2009), p. 37.

⁴⁷*Ibid*, p. 38.

⁴⁸*Ibid*.

⁴⁹*Ibid*, p. 43.

⁵⁰*Ibid*, pp. 44–45.

⁵¹*Ibid*, p. 48.

⁵²*Ibid*, p. 51.

1.2.4 Implications for the Study

The universal approach and the legal rules and international standards it advocates are useful in terms of identifying certain features of judicial systems but it is not entirely clear that the adoption of these rules and standards will create an ‘independent judiciary’ in all cases. While model standards have influenced domestic laws in important ways, as demonstrated by Shetreet, contextual scholars adopt a more reflective perspective in pointing out that judicial independence takes shape in different ways because of different local circumstances. In other words, what is understood as an independent judiciary might be considerably different among countries or even among levels of court. Importantly, all scholars highlight a bidirectional connection between the role of the judge and the meaning and practice of judicial independence. It appears that the main difference between the universal and contextual scholars is that the universal approach is unapologetically normative as it seeks to encourage the development of a particular *kind* of court performing certain functions, often those related to the promotion of human rights and economic interests. By contrast, contextual scholars appear more open to a range of judicial roles across legal systems.

This study seeks to build upon the work of the contextual scholars by proposing a refined understanding of judicial independence and evaluating it through comparative case studies of Malaysia and Pakistan. This refined understanding does not seek to advance a universally applicable role of the judge and his or her independence, which is difficult to determine in the abstract as pointed out by Seibert-Fohr and Garapon. It follows Garapon’s suggestion to look at realities on the ground that can play a role in shaping courts. It also seeks to explore a more pragmatic dimension of judicial independence in relation to the judicial function highlighted by Burbank and Friedman. While this refined understanding might not be able to answer all questions relating to judicial independence, it should be able to achieve the goal set out by Russell of providing an organizing framework and a starting point for further studies in different countries.

1.3 Judicial Reformers

1.3.1 Introduction

As part of the global rule of law promotion industry, a number of ‘judicial reformers’ encourage domestic governments to entrench judicial independence standards in their domestic laws. New states, economically developing countries, and countries undergoing a political transition to democracy are often targets of these reform efforts. This part sets out and critically evaluates the activities of these reformers, who can be grouped into two categories. First, development banks and donor agencies see independent courts as the means to economic growth by

supporting markets for trade and encouraging a flow of investment. Second, human rights advocates see independent courts as a necessary condition to the enforcement of human rights, which brings the power of the state to bear against the individual. The reform activities of each group are set out and critically evaluated, with implications drawn for the study.

1.3.2 Development Banks and Donor Agencies

1.3.2.1 Activity

Development banks and donor agencies promote judicial independence on the basis that independent courts act as reliable institutions to enforce property rights in uncertain economic and social environments or in the context of a political transition. From the perspective of development banks, the resolution of civil disputes by independent courts offers a beacon of stability to investors and market participants, which stimulates economic growth and raises the standard of living for the local population. Independence is important because judges who are protected from government interference in making their decisions are perceived as fair and trustworthy, which reassures economic actors and increases confidence in the enforceability of court judgments. In much the same way, government-sponsored donor agencies see the enforcement of property rights and contracts by an independent judiciary as securing their investments and aid projects, thereby reducing the risk of failure.

The idea that an independent judiciary will enforce property rights is drawn from the experience of what courts are seen to do in more developed market economies. For example, in its 2002 report, entitled “Guidance for Promoting Judicial Independence and Impartiality”,⁵³ the United States Agency for International Development (“USAID”) notes that:

In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.⁵⁴

In its report, USAID details its approach to reforming judicial institutions in emerging democracies. The report emphasises the importance of building a reform strategy. According to USAID, judicial reformers should first gather the support of local individuals and groups who seek change.⁵⁵ Consideration must also be given

⁵³Office of Democracy and Governance (2002).

⁵⁴*Ibid.*, p. 6.

⁵⁵*Ibid.*, pp. 9–10.

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