



JUDICIAL INDEPENDENCE UNDER THREAT: BALANCING LAW AND POLITICAL CONTROL

*"JUSTITIA FIAT, RUAT COELUM—LET JUSTICE BE DONE, THOUGH
THE HEAVENS FALL."*

LORD MANSFIELD, CHIEF JUSTICE OF ENGLAND IN REX V. WILKES, 1768



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Judicial Power in Authoritarian Regimes

INTRODUCTION:

JUDGING & AUTHORITARIANISM

- ▶ *In authoritarian regimes, the role of a judge is often characterized by a complex and constrained position, marked by tension between judicial independence and the demands of political power.*
- ▶ *In such regimes, the judiciary may be co-opted or controlled by the state to legitimize the government's authority and suppress dissent.*
- ▶ *Judges may face significant pressures, such as political interference, coercion, or intimidation, which can lead to compromised judicial decisions favoring the ruling elite.*
- ▶ *In these environments, courts are often used as tools to maintain the regime's stability, suppress opposition, and enforce draconian laws that curtail civil liberties. Judges in authoritarian contexts may be forced to prioritize regime security over legal integrity, resulting in compromised due process and unequal application of justice.*

JUDGING & AUTHORITARIANISM

- ▶ *Despite these constraints, some judges may attempt to preserve a degree of independence, navigating the fine line between compliance and resistance.*
- ▶ *They might use judicial discretion to protect certain rights or issue rulings that are legally sound but politically sensitive.*
- ▶ *However, such acts of defiance can lead to severe consequences, including removal from office, harassment, or persecution. The role of a judge in authoritarian regimes is heavily influenced by political power dynamics, often undermining the principles of judicial independence, fairness, and justice.*
- ▶ *Nonetheless, individual judges may still strive to uphold the rule of law, though they do so at great personal and professional risk.*

REMEMBERING THE POLAR STAR

- ▶ What is at stake in the judgment process?
- ▶ In the judgment process, what is at stake can be understood on multiple levels—legal, social, and moral. At its core, the process determines the fate of individuals or entities, affecting their rights, freedoms, reputations, and sometimes even their lives. A judgment can mean the difference between guilt and innocence, freedom and incarceration, justice and injustice. The outcome often holds personal and emotional consequences, impacting the people directly involved and their families.

REMEMBERING THE POLAR STAR

- ▶ Beyond the personal level, the judgment process also speaks to the integrity of the judicial system.
- ▶ Fairness, transparency, and adherence to the law are essential to maintaining public trust in the courts.
- ▶ When a judgment is perceived as unjust or biased, the legitimacy of the legal system may be questioned, eroding confidence in institutions meant to uphold justice. Moreover, judgments often set precedents, shaping future interpretations of the law and influencing how society views right and wrong.

REMEMBERING THE POLAR STAR

- ▶ In broader societal terms, the judgment process has the power to shape norms, values, and behaviors. Legal rulings can challenge or reinforce social injustices, push for reforms, or uphold the status quo. For instance, landmark judgments on issues like human rights or environmental protection can lead to significant changes in societal attitudes and policies.
- ▶ Ultimately, at stake in the judgment process is not only the immediate resolution of a dispute but also the broader question of justice—whether the legal system serves as a force for fairness, equality, and the protection of fundamental rights.

JUDICIAL INDEPENDENCE

- ▶ Judicial independence is the normative foundation upon which the operations of the judiciary rest. A theoretical foundation for judicial independence is the idea of the separation of powers. This idea does not need total separation of the government's branches, according to contemporary view. Rather, it promotes a "checks and balances" mechanism between them.
- ▶ Judges' substantive and personal independence are distinguished by the Mt. Scopus on Judicial Independence. In order to prevent executive control over individual judges, personal independence guarantees that the terms and conditions of judicial service are guaranteed by law. Conversely, substantive independence guarantees that judges are constrained solely by the law and their conscience when performing their judicial tasks.

JUDICIAL INDEPENDENCE

- ▶ Judicial independence is not limited to personal or substantive elements. Judicial independence must be secured equally by fostering institutional independence. The evolution of the judiciary into a crucial social institution with a key constitutional function necessitates a broad understanding of judicial independence.
- ▶ Beyond the independence of individual judges, the concept of judicial independence must also encompass collective independence, which is the independence of the judiciary as a whole.

JUDICIAL INDEPENDENCE

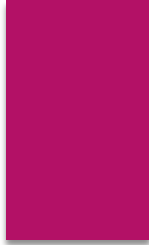
- ▶ As everyone knows, interference with a judge's independence can lead to grave abuses of the rule of law. There exists a relationship between internal and institutional independence.
- ▶ Internal and institutional independence are closely connected ideas. It's common to view internal independence as a larger-scale version of communal independence. It stands for an organization's ability to operate as a whole without interference from the judiciary, both internal and external.
- ▶ When we talk about internal independence in the judiciary, we mean that each component of the system functions independently, ensuring that decisions are only made in an

JUDICIAL INDEPENDENCE

- ▶ Being a judge in an authoritarian state has its challenges, even with the normative appeal of judicial independence as a fundamental constitutional principle.
- ▶ Ensuring the court can function as a check on the powers of the executive and legislative branches, protecting individual liberties and maintaining the rule of law, is the goal of judicial independence. But this ideal is frequently seriously undermined in authoritarian environments by the powerful influence of the ruling class and political elites.

JUDICIAL INDEPENDENCE

- ▶ Such regimes usually subject their judges to pressure, both direct and indirect, to render decisions that further the political goals of the regime. These expectations might entail supporting legislation that stifles criticism, targets opposition figures, or represses dissent.
- ▶ Courts become instruments of the government, using the legal system to further its goals.



THE JUDICIAL PARADOX: BALANCING LAW AND POLITICAL CONTROL

- ▶ The phrase "The Judicial Paradox: Balancing Law and Political Control" refers to the inherent tension that arises when judges must navigate the dual forces of legal principles and political pressures. On one side, the law demands impartiality, adherence to established legal frameworks, and the protection of individual rights. On the other side, political control—especially in regimes with authoritarian tendencies—imposes expectations for rulings that serve the interests of those in power.
- ▶ This paradox emerges when judges are asked to uphold the law in theory while being constrained by political realities in practice. In democratic systems, judicial independence serves as a counterweight to political influence, enabling courts to function as neutral arbiters. However, in regimes where political power overrides legal autonomy, judges often find themselves in precarious positions. They must interpret laws that may have been designed to suppress dissent, all while maintaining a facade of justice.

THE JUDICIAL PARADOX: BALANCING LAW AND POLITICAL CONTROL

- ▶ At the heart of this paradox is the judge's struggle to balance integrity with survival. Judges are expected to apply the law consistently and fairly, but in environments where political control is dominant, defying the regime can result in professional consequences such as dismissal, threats, or even imprisonment. In contrast, yielding to political pressure undermines the very essence of judicial impartiality and the rule of law.
- ▶ In this context, the judicial paradox illustrates the constant tug-of-war between two opposing forces: the desire to uphold justice and the practical necessity of navigating political realities. Courts that succumb to political control risk becoming instruments of oppression, while those that resist may jeopardize their own stability. This paradox often manifests in the difficulty of protecting rights in regimes where the judiciary is expected to legitimize political decisions rather than challenge them.

THE JUDICIAL PARADOX: BALANCING LAW AND POLITICAL CONTROL

- ▶ Ultimately, this balancing act is an ongoing struggle in regimes where the judiciary is not entirely free from political control.
- ▶ We all pretend to be part of democracies.
- ▶ In a democracy, individuals are granted the power to rule by participating in a competitive process to obtain the support of the electorate. This system of institutions is used to make political decisions. A realignment of politics and law to guarantee that the government respects citizens' rights, abstains from misusing its authority, and stays answerable to the people seems like a very desirable goal in theory.

THE JUDICIAL PARADOX: BALANCING LAW AND POLITICAL CONTROL

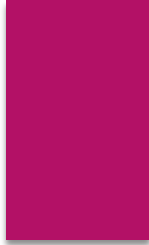
- ▶ Justice, symbolized by the scales, is represented by the scales, whereas the idea of strength as force or might is sometimes depicted by the sword. Justice emphasizes what ought to be done rather than what is feasible. Power must be restrained and directed toward deeds that produce morally just consequences in order to attain justice.
- ▶ Law, viewed as a morally guiding system, governs the use of political power and directs it in the direction of the general welfare. The proverb "where law ends, tyranny begins" emphasizes the significance of legislation in limiting unbridled authority in this way. Judges frequently have a difficult time striking a balance between the conflicting demands of politics and the law. Their innate dual position as legal interpreters is the source of this tension.

THE JUDICIAL PARADOX: BALANCING LAW AND POLITICAL CONTROL

- ▶ How then can judges maintain a principled balance while undertaking their roles as judicial officers in a difficult political environment?
- ▶ Judges must perform their judicial functions with integrity in the face of a politically charged environment. In order to do this, they must continue to be unwavering in their support of the rule of law and legal reasoning, making sure that their choices are founded only on accepted legal principles and unaffected by outside political forces. Judges can protect themselves from unwarranted political interference and preserve the integrity of the judiciary by firmly basing their decisions in solid legal arguments and precedents.

THE JUDICIAL PARADOX: BALANCING LAW AND POLITICAL CONTROL

- ▶ The foundation of this equilibrium is judicial independence. Judges have an obligation to uphold their independence from political heavyweights, ruling classes, and other groups attempting to sway their decisions in favor of their own interests. To do this, one must have a strong sense of professional ethics and a profound measure of judicial courage.



The Towering Judge

- ▶ It has been noted that without a judiciary capable of administering justice fairly and courageously, any legal protections offered to litigants hold little worth. Throughout history, numerous accounts have emphasized the essential qualities to seek in a judge.
- ▶ Socrates emphasized that a judge should possess four key attributes: they must listen with courtesy, respond with wisdom, reflect with careful judgment, and make decisions with impartiality.
- ▶ In recent times, former President of the United Kingdom Lord Neuberger of Abbotsbury highlighted the fundamental qualities required of a puisne judge during a trial, including control, authority, courtesy, fairness, the ability to clarify complex matters, and effective communication.()

The Towering Judge

- ▶ Six principles contained in the Bangalore Principles of Judicial Conduct drafted for the international Judicial Group on Strengthening Judicial Integrity in November 2002, point to desirable qualities that would reflect in a good judge- **Judicial independence**, **impartiality**, and **integrity** are essential, along with **maintaining both propriety and the appearance of propriety**. Equally important are **ensuring fair treatment for all who come before the courts**, and **demonstrating competence and diligence in judicial duties**.
- ▶ Everyone can intuit the “towering” judges in their own jurisdiction. Who exactly then is a towering judge, a special judge?

The Towering Judge

- ▶ Courage is a vital quality for a judge, especially when delivering justice in difficult circumstances. It enables judges to remain steadfast in upholding the law and protecting judicial independence, even in the face of political pressure, public opinion, or threats to personal safety.
- ▶ In challenging times, a courageous judge prioritizes fairness and integrity, making decisions based on the rule of law rather than succumbing to external influences or fear. This attribute ensures the judiciary remains a pillar of democracy and justice, defending the rights of individuals and maintaining the balance of power

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The Towering Judge

- ▶ A towering judge should be courageous. One of the most crucial qualities of a judge is courage. A courageous judge is able to maintain law's logic and criteria of equity, which fortifies the cardinal principle that law should structure and check the way in which power is exercised.
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The Towering Judge

- ▶ No matter the type of state, judicial bravery is a universal virtue. When lawmakers or governments pass laws or undertake other acts that violate the constitution but are justified by fear or bias, the judiciary is called upon to step in and correct the situation.
- ▶ Respecting the law is not activism, nor is judicial restraint an option. This is the "path on the left," or the liberal interpretation of the judge's role, to use the same metaphor: it is more value-oriented.

The Towering Judge

- ▶ The implacability of a judicial courage even in times of political pressure is ably captured by Lord Atkins, in his famous dissent in the case of *Liversidge v Anderson*, when he stated that,

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. ... In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I"

The Towering Judge

- ▶ A judge that is towering also bears certain capacity attributes; **the political**, **the institutional**, and **the jurisprudential**.
- ▶ A politically towering judges are those who advance a specific ideological, moral, or political agenda aimed at bringing about change. Examples include President Barak and Chief Justices Bhagwati, Warren, (and Mutunga-emphasis added), who advocated for liberal reforms and the protection of rights.
- ▶ In contrast, other judges pursued agendas influenced by specific situations, such as Judge Eugenio Valenzuela in Chile, who aimed to help remove an authoritarian regime, or President Laszlo Sólyom in Hungary, who focused on integrating his country into the European Union.

The Towering Judge

- ▶ Institutional towering judges have a significant and enduring impact through the legal institutions they establish, improve, and safeguard. Judges such as Chief Justices Anthony Kennedy and Arthur Chaskalson, as well as President Sólyom, played key roles in drafting the constitutions that they later interpreted in their respective apex courts.
- ▶ It has been suggested that Chief Justice Chaskalson's participation in the drafting process of the South African Constitution bolstered political backing for the Constitutional Court of South Africa, whereas President Sólyom actively advocated for the court he played a role in establishing.
- ▶ President Aharon Barak also stands out in this context as he launched a constitutional revolution in Israel, founded on two new Basic Laws, and solidified this change through his rulings. Some judges developed new institutional frameworks that broadened their court's jurisdiction. For example, Justice Manuel Jose Cepeda Espinosa played a crucial role in establishing the tutela system in Colombia, while Chief Justice Prafullachandra Natwarlal Bhagwati was a key advocate for public interest litigation in India.

The Towering Judge

- ▶ Additionally, towering judges like Justice Cepeda in Colombia leveraged their influence to safeguard judicial independence amid political pressure.
- ▶ The final category includes judges who are well-known for making a jurisprudential or intellectual impact on the court. They achieve this through the strength of their legal reasoning, the quality of their opinions, or the sheer volume of their contributions, as well as by rallying their colleagues to significantly influence the law in a specific direction. In this category, some towering judges serve as intellectual leaders, while others act as social leaders.

The Towering Judge

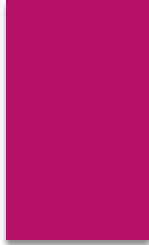
- ▶ For example, Justice William J. Brennan was the intellectual leader of the Warren Court, known for authoring significant judgments and shaping key doctrines, whereas Chief Justice Earl Warren served as the social leader, fostering cohesion within the court and mentoring fellow justices.
- ▶ Chief Justices Chan Sek Keong SC and Bhagwati, along with President Barak, exemplify the former, while Chief Justice Chaskalson represents the latter. Additionally, some justices, like Sir Anthony Mason, (Chief Justice Andrew Nyirenda and Deputy Chief Dikgang Moseneke-emphasis mine) offered a balanced combination of both types of leadership

The Towering Judge

- ▶ Former Deputy Chief Justice of South Africa, Dikgang Moseneke echoes the virtue of courage by stating that people who are determined to change the world, in his opinion, need to have courage rooted in their moral convictions, what he calls the courage of principle. Three basic and related behavioral patterns are implied by courage of principle. First, there is vision. For the second, pursuing and realizing the vision calls for specific actions. The willingness to bear the costs associated with pursuing the goal rigorously is the third.
- ▶ Each judge therefore ought to boldly stand by constitutional principles as collective visions, no matter the cost, considering that, in my opinion, they must be the most current and persuasive expression of our collective convictions resulting from our diverse paths of state construction. Judges must make decisions even if they are aware that it will not be well received by the public or the authorities.

The Towering Judge

- ▶ These good Judges reminds us all to be passionate, committed and resilient in defence of the Constitution and the Rule of Law. They remind us of that time tested Orwellian phrase, 'Every calling is great when greatly pursued.'



Conclusion

- ▶ The role of a judge in authoritarian states is complex and often fraught with challenges that significantly impact the judiciary's ability to function independently and uphold the rule of law. In such environments, judges are frequently caught between their ethical obligations to administer justice impartially and the pressures exerted by authoritarian regimes that seek to manipulate the judiciary for political ends. This dynamic not only undermines the integrity of the judicial system but also erodes public confidence in the legal framework as a means of safeguarding rights and freedoms.

Conclusion

- ▶ Judges in authoritarian contexts often find themselves navigating a precarious balance: they may aspire to uphold constitutional principles and protect individual rights while facing the risk of retribution from powerful political entities. Some may succumb to these pressures, leading to a judiciary that lacks independence and becomes a tool of oppression.
- ▶ Conversely, there are instances where judges take a stand against authoritarianism, using their positions to challenge unjust laws and advocate for justice, thereby playing a crucial role in the struggle for democracy and human rights.

Conclusion

- ▶ The resilience and actions of judges in such contexts are critical to the broader fight for judicial independence and accountability. It underscores the importance of judicial independence, not only as a legal principle but as a necessary condition for the protection of rights and the promotion of democracy.
- ▶ As history has shown, the courage of individual judges can inspire collective movements for reform and contribute to the eventual establishment of a more robust and independent judiciary. Therefore, fostering an environment that supports judicial independence, protects judges from political interference, and promotes a culture of accountability is essential for strengthening the rule of law in authoritarian states.

Conclusion

- ▶ Ultimately, the role of a judge in these settings is not merely a legal function but a profound moral responsibility that carries significant implications for society at large. As we reflect on the challenges and possibilities for judges in authoritarian regimes, it becomes clear that their actions and decisions can either reinforce the status quo or pave the way for transformative change.
- ▶ As the global landscape continues to evolve, the experiences of judges in authoritarian contexts offer valuable insights into the resilience of the judiciary and its potential to effect meaningful change, even in the face of overwhelming adversity. Strengthening judicial independence and supporting judges committed to upholding the rule of law are vital steps toward fostering a more just and equitable society



THE END

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