Empowered and Independent Courts

Peter Koelling

Judicial independence has long been considered a critical element in the development of rule of law and the establishment of the political freedoms necessary in a democracy. During the campaign for ratification of the U.S. Constitution, Alexander Hamilton argued, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” The concept of separate and limited powers cannot be implemented without three autonomous institutions to defend the boundaries of authority. Judicial independence can only arise in the context of an empowered judiciary.

An independent and empowered court is a necessary cause for the creation and in order to sustain a liberal republican democracy. There are three aspects to a liberal republican democracy. There is democracy itself. Democracy is the political right of citizens to participate in the collective decisions of a society, particularly to determine its governmental

Peter Koelling is the Director/Chief Counsel of the American Bar Association’s Judicial Division. He holds a PhD from Northern Illinois University; a JD with distinction from St. Mary’s University, School of Law; and a BA from Trinity University. He was a law clerk for the Texas Supreme Court and has worked in court administration at the trial and state levels in Texas, Washington, and Colorado.

leadership. Second is liberalism, which is a limitation on pure democratic control and insists on protecting certain rights and freedoms of the citizens. The third aspect is republicanism, the concept that no person is above the law; the law applies to all, even governmental leaders. In this sense republicanism envelops the concept of rule of law. Therefore the purpose of an empowered and independent judicial branch is to allow the courts to fulfill three important functions within a society: protection of the political rights of the people, protection of their civil freedoms and liberties, and establishing rule of law. The less independent the courts, the weaker the political rights of the people, the fewer civil liberties and the lower the adherence to the principle of rule of law.

Judicial independence and empowerment is a political state and exists in a political context. It is based in the public’s trust and confidence in the courts. If courts are to protect rights and liberties and establish the rule of law, they must do so with general public support and across a broad network of interests. If the public does not support the need for an empowered and independent judicial branch it cannot be achieved. Even in the face of traditions or constitutional structures, without the political support of the general public, traditions and structures can easily be ignored. Therefore, to achieve judicial independence and empowerment courts must have political support. This support is necessary in order to protect civil and political liberties of a society and to make counter-majoritarian decisions. It is necessary in order to restrain other branches of government and the power of elites within society. With political support courts provide the necessary constraint on the powers of government and on majoritarian rule to create the rule of law and protect civil freedoms and political rights. Justice is the tool used to create this support.

A judicial branch with independence is an empowered court. It was the intent of the framers to establish courts with independent authority. However, most thinking about judicial independence has been limited to the concept of insulating judges from governmental, political, and societal pressures. As I discuss in this chapter, insulation is an element of judicial independence but it alone will not establish the independence of the judicial branch. Over the years scholars have conflated the concept of the insulation of the court from outside influences with the concept of judicial independence. This approach fails to recognize the breath of

judicial independence and the necessity that courts be empowered through the political support of the people to act independently. It is a misunderstanding of the concept and its implication. Illustrative of this is Ramseyer and Rasmusen in their study of judicial independence in Japan.\(^3\) They limited the concept of judicial independence to individual judges and the effect on their careers when they ruled contrary to the government in power. They ignored the institutional authority of the courts and all other elements of judicial independence. William Prillaman uses a broader concept that includes separation of powers and independence from other governmental branches in his study of Latin America, but it is still limited to the notion of political insulation.\(^4\) While insulation is indeed a critically important component, it is not the only necessary aspect of judicial independence. Much of the difficulty and the resulting lack of clarity with many of the studies addressing judicial independence is that when they attempt to deal with the broader issues that must be considered, these ideas are forced into the narrow concept of social and political insulation. The ideas become muddled and confused. Therefore it is not surprising that Lewis Kornhauser wrote, “[T]he concept of judicial independence does not further the development of normative theories of adjudication, does not advance understanding of the functioning of extant judicial systems, and does not aid in the design (or improvement) of judicial institutions.”\(^5\) If the notion of judicial independence relates only to the concept of insulation then his statement could be taken as true, but true independence is the power to act independently and to assert to the proper power of the judicial branch. The approach to judicial independence must be much broader and incorporate not just the concept of insulation but also accountability, utility, efficiency, qualifications, representation, authority, and restraint. By doing so, it will be able to overcome Kornhauser’s objections. Rather than attempting to tilt at windmills and to change how this term is being misused, I instead use the terms “independent” and “empowered” to indicate the broader concept; however, I think it actually redundant.

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Courts exist to provide justice. Justice can only be achieved when adjudicative decisions are based on a fair and impartial determination of the facts and a reasonable and consistent application of the law. If the purpose of judicial independence and empowerment is the reasonable and consistent application of the law, then as judicial independence increases so will the application of rule of law. Rule of law has broad application to society. In the context of civil disputes, courts should settle disputes according to the law and the facts, not according to the power or status of the parties. In the context of criminal law, the application of justice ensures the protection of the rights of the innocent and the fair, impartial, and consistent use of punishment. Fairness in all cases requires the application of due process. Justice also requires access to an impartial tribunal. Impartiality insists upon a judicial officer insulated from governmental, political, economic, and societal pressures.

Justice also serves to prevent government from intruding on the rights of individual citizens. Courts use their adjudicative power as a check upon the powers of government and to challenge the authority of the other branches of government. Not all governance structures offer checks and balances. Although a prominent purpose in the American constitutional structure, it is not always present or considered necessary in other forms of government. However, even absent a structural system of checks and balances, judicial independence and empowerment gives the judiciary the ability to protect the political and civil liberties of the people as established under law. Justice is served when the rights of individuals are protected even in the face of pressure from political, social, or economic centers of power. Protection of rights and freedoms and establishment of the rule of law and all that they imply is the purpose of judicial independence and empowerment. Knowing this purpose also allows for the operationalization of the effect of judicial empowerment and an efficient method of comparison across cases.

What are the factors necessary to establish an empowered and independent judiciary? My original research had led me to understand that there were eight separate factors that created judicial independence. The first, of course, was insulation of the judiciary from the other branches of government and outside pressure. Second was accountability, the other side of the coin of insulation; these two clearly related factors may seem to be opposed, but they are not mutually exclusive. Next was the utility of the courts or their effectiveness from the standpoint of parties and