JUDICIAL BRANCH INDEPENDENCE VERSUS JUDICIAL BRANCH CONTROL [*]

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Abstract
In this article the author maintains that transferring responsibilities to the judicial branch without ensuring the appropriate balance of power may lead to closed and self-absorbed judicial systems, granting more power to the system than to the judges, and barely providing benefits for those who seek justice. He proposes that the transfer of powers or the process of endowing judicial systems with greater independence goes hand-in-hand with measures that allow for making the judicial systems more open to public scrutiny. More concretely, he proposes policies to decentralize and "flatten" the judicial organization in order to better define its functions and make its work more public. Finally, he affirms the advantages of maintaining the sector's policies in the hands of those who directly retain the popular sovereignty, without jeopardizing the participatory spaces that should be built into their design or hindering the performance of the members of the judicial system.

I. INTRODUCTION

Achieving greater judicial independence is one of the fundamental aims of the intense reform process that have been implemented in recent years in almost every judicial system in the region. There is now widespread awareness that judicial independence is essential for both effective Rule of Law and economic and social development.

The reform process has been a deliberate one that tends to be driven by forces that lie outside of the judicial system itself. Emphasis has been placed on avoiding political interference with the decisions made therein, and institutional strategies have therefore favored the transfer of powers from executive or legislative branches to the judicial in a variety of areas including budgetary and administrative matters and judicial appointments, to name just a few.

While this process has increased judicial systems' importance within national institutional structures, some concerns have arisen with respect to the undesired consequences of these processes.

Let's identify a few:

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1. The powers that have been transferred have reinforced the extremely hierarchical nature of many judicial systems (particularly those that are based on continental European models). In a number of countries, faculties governing the judicial career and judicial branch management were concentrated for the most part at the Supreme Court level when they were transferred from outside of the judicial branch.

The understanding in those cases was that the judicial branch had to become more autonomous within the government structure. Judicial branch independence is not, however, necessarily synonymous for judges' independence. Indeed, independence itself has no intrinsic value, but acts as a precondition for the individual impartiality of each adjudicator, which is really the most relevant issue.

As a result, the reforms implemented in these countries have frequently implied substituting external pressure on judges to rule in a certain way for a more internal pressure from their superiors.

An initial question arises here is: How do we make sure that judges really become independent and that the judicial system as an institution is not the only beneficiary of these reforms?

2. Greater independence and autonomy in judicial systems limits the capacity for public monitoring and control over their functioning. Judicial branches have tended to be structured as corporate institutions with a strong defensive attitude by which all things external are threats. This issue is important from two viewpoints:

a.- Judicial system efficiency: Judicial branch personnel tend to see their work as embodying transcendent aims or principles. As a result, they feel that this work must not be subject to cost-benefit analyses and other such evaluative processes. However, this argument fails to recognize the opportunity cost of public resources used in the judicial system as compared to other potential uses for these same resources. This is particularly relevant when we speak of a sector that generally disavows or refuses to consider modern public administration criteria. In effect, the generally high cost of reforms has led many to feel that inefficient but cheap judicial branches have been exchanged for institutions that are almost as inefficient but much more expensive. One of the reasons for this belief is the lack of association between the increase in resources used (which are mainly use to raise salaries) and expectations of greater productivity.

b.- The social values that the judicial branch should embody: Judicial independence should not remove judges from society's political and ethical debates, which are particularly acute in countries that are undergoing political transitions. Nor should independence imply isolating judges from the world (so that they are not influenced by politics, the press, or stakeholder groups). Rather, the judicial branch should participate in these debates –given that the main role of this branch is to interpret and apply the Constitution and laws that should embody these values- and interact with all stakeholders, however powerful these may be, but without being co-opted by any of them. Relegating judges to the sidelines of public debate does not mean that their own values or criteria will cease to exist. It simply that that they will be able to apply them out of the public eye and will most likely hide

them behind a supposedly antiseptic application of the law. As mentioned above, conditions of broad judicial branch autonomy and independence could lead to closed, inward-looking corporations that imbue their components with a conservative and self-defensive organizational culture.

One need only recall how easily some of the most consolidated judicial branches on the continent adapted to the dictatorial regimes of the ´70s and ´80s, which only had to acquire a certain formal validity in order to convince judges to accept their actions without a great deal of opposition. This was largely due to the fact that the courts were expressly excluded from earlier democratization processes, and did not see themselves as forming part of the democratic institutional framework. The judicial branch was perceived instead as a technical division that could exercise its function (to resolve disputes) independent of the political system in which it operated.

Furthermore, experience shows that judges' increased participation in debates regarding public issues does not necessarily lead to their involvement in party politics.

The second question is therefore: How can we ensure that judicial independence benefits those being judged and not judges personally?

A satisfactory answer to both questions comes from experience, which indicates that reforms that increase judicial autonomy and independence should be accompanied by other changes that avoid, or at least counteract, the negative effects of such independence.

II. HOW DO WE ENSURE THAT JUDGES THEMSELVES, AND NOT ONLY THE JUDICIAL SYSTEM AS AN INSTITUTION, HAVE INDEPENDENCE?

In order to ensure that judges themselves are endowed with independence and that the judicial institution itself is not the only beneficiary of these changes or, to put it in current jargon, in order to guarantee judges' external and internal independence, institutional arrangements must be designed to "flatten" the judicial structure. This will allow us to avoid the extreme subordination of judges that is common to many judicial systems. The following section presents ideas for accomplishing this.

First, the judicial organization must be structurally decentralized. In many countries the local courts (*juzgados*) and the lower instance courts in particular are organized into small units according to geographic divisions. The isolated nature and small size of these courts makes necessary a centralized management structure that can provide them with all of the court services that they need, from the most domestic aspects to the most substantive. In recent years reform initiatives with larger courts (such as those implemented in Chile, Costa Rica, Panama, and Peru) have demonstrated that it is possible for a group of judges to share a common administrative staff. This system takes advantage of existing economies of scale in order to decentralize many management responsibilities and place them under the direct supervision of the judges themselves while providing judges with an adequate organizational structure.

This type of organization is not only efficient in terms of court management (in fact, it allows for professional court administrators to take over most daily operational duties), but also affects substantive aspects of the court. Many of the toughest instruments for distinguishing stronger judicial systems from weaker ones are not, as many believe, a product of jurisdictional faculties, but related to administrative attributions and particularly by the stronger courts' ability to allocate resources and shape the judicial career. (In fact, experiences in the countries mentioned above indicate that judges have a much harder time accepting administrative changes than changes that affect their substantive responsibilities.)

In any case, despite the decentralization process, some functions that are not easily divided among different courts will remain at the central level. These include policy setting or general management criteria, provision of information systems and management of judicial investment (in many Latin American countries these functions have been concentrated in the Judicial Council).

· Regarding the judicial career, it is possible to separate the judges' seniority from the instances in which they sit. For example, in countries such as Spain a senior judge may sit in a first instance court if he or she so desires. When judges are no longer required to move up as cases do through the judicial hierarchy it is possible to remove the fear of falling out of favor with the hierarchy as a result of the judicial decisions that one makes.

· In the same sense, but at a strictly procedural level, limiting appeals of judicial sentences may also temper the verticality of the judicial structure. We refer to limiting appeals within legal systems based on continental law, where a judge's superior can review both the form and substance of the case. By creating oral courts with a panel of judges or juries for criminal matters, judicial reforms have installed annulment as the only form of appeal (this happened with the recent criminal procedure reform in Chile, for example), thus removing more senior judges' ability to rescind judgments and change the presentation of facts heard by those with less seniority (although difficult for many to believe, it is here that power is generally exercised, and not in the faculty to interpret the law in a specific way).

III. HOW CAN WE ENSURE THAT JUDICIAL INDEPENDENCE BENEFITS DEFENDANTS AND NOT JUDGES PERSONALLY?

It is possible to conceive of complementary institutional arrangements that grant judges more authority, autonomy and, of course, independence, but also make them more accountable and subject to control. Some ideas to accomplish this are examined below:

· A logical first step is to eliminate the mantle of secrecy that typically envelopes judgeships. This implies making public trials and other judicial procedures (which is one of the most common reforms carried out in Latin America, where criminal matters in almost all countries are now heard publicly, though only Uruguay has made civil matters public). It also ensures an essential element of public monitoring of judicial decisions: that it be well-founded and allow observers to follow and reproduce the reasoning that led to a certain outcome regardless of whether or not they agree with a judge's opinion (in this sense the reforms mentioned have not been so successful). Another factor, which may seem obvious

but is still only aspired to in many countries, is the publication of judicial sentences through bulletins or copies made available to the public.

· An additional measure would be to redefine judges' responsibilities in order to allow them to concentrate wholly on the task of adjudication. In many countries judges still carry out all kinds of functions, including playing the role of the prosecutor in inquisitive systems. One of the most effective judicial control measures is implementing the presentation of opposing arguments before an impartial judge who is only responsible for making jurisdictional decisions. This is not possible in systems in which the judge takes the part of or substitutes for one of the parties. This is the most complex aspect of the criminal procedure reforms currently underway in many Latin America countries.

· In countries with a civil law tradition it is imperative to establish closer links between judges and their decisions to ensure that judicial prerogatives benefit society. In limiting the reach of sentences to the concrete case in which they apply, judges lose sight of the general aim of their role, which goes beyond the concrete dispute that initiates the action. Indeed, the fact that judges are public servants can only be justified to the extent that they are capable of generating global information that is useful to citizens. When they are predictable, sentences benefit not only the litigating parties but the community as a whole, as citizens can be certain of the sense and reach of governing legal norms and adjust their behavior accordingly. The lack of precedents undervalues the judicial role: Where judges see their role as exclusively one of adjudicating particular cases, the social consequences their rulings should have are merely abstractions. For the present discussion, the most detrimental aspect of this occurs where judges change their sentences case by case– although they may have similarities-without being held by previous decisions. When we add to this the common absence of well-founded reasoning in judicial sentences, we see judges' ability to rule on issues without any significant limitations, and according to their perceptions in each case. This, obviously, can become a source of arbitrariness and may impede judicial control. In civil law countries steps have already been taken to address this issue: in recognizing the universal value of certain types of sentences to resolve standard problems (such as in Uruguay), or paying special attention to those that tend to result in contradictory sentences (as in Ecuador), or those that resolve issues of constitutionality (as in Colombia). Nevertheless, more steps can certainly be made in this area.

· At the management level there should ideally be an efficient mechanism for ensuring that judicial powers –and economic resources – are used to benefit defendants. In this regard we mention only the need for some form of management control to assess the system's overall performance and that of judges individually. This data, along with a given system's statistical and budgetary information, must be open and available to public scrutiny. Indeed, the entire process of formulating and approving the judicial branch budget should also be an open one, providing room for discussion of how the branch performs its role and prioritizes the use of its resources.

· One particularly problematic aspect for judicial system control is their monopolistic nature: How do we know if they are really doing their job well? To whom should they be compared? It may be useful to encourage the development of new forms of judicial protection in these areas. Alternative dispute resolution mechanisms (such as mediation or

arbitration) do not only have direct benefits as non-confrontational methods that resolve cases quickly. They also have the advantage of providing mechanisms for comparing judges' performance in both substantive areas and more subjective ones, such as how the system treats users, for example. But even in those areas where alternative mechanisms cannot be introduced and where the State alone must exercise of authority (such as in the criminal area), it is possible to set up a type *benchmarking* system that allows the courts to be compared to entities with similar powers if there are sufficiently efficient performance control systems as mentioned above.

· Finally, in regard to the judicial career, although measures to make selection more objective (through exams, weighting professional background, etc.) are effective at reducing discretional aspects, it is not reasonable to imagine judicial appointment as a purely mathematical exercise. The final decision whether or not to accept a judge for a certain position, especially when it involves making an appointment involving a position that endows the person who holds it with a great deal of responsibility, cannot be limited to an assessment of the candidate's knowledge and experience. More subjective elements, such as the candidate's judgment and values, must necessarily form part of the process. Placing these decisions in the judicial ambit should not mean that they are once more removed from public scrutiny. The candidates' names must be made known and citizens must be given an opportunity to comment on them and participate in the hearings in which they clearly state their position on issues that are crucial for the exercise of the office in question. Interviews that currently tend to be conducted behind closed doors should be open to the community. (Argentina has taken significant steps in this direction, thanks to the active participation of civil society organizations and the press in selecting candidates for the bench).

Experience indicates that the existence of independent and responsible judicial branches depends to a great extent on the quality of its members: they must feel that they hold their position because of their own merit and must also be aware that society is monitoring their conduct and decisions.

IV. FINAL CONSIDERATIONS

Judicial branches have often been granted increased powers and autonomy without being required to produce anything in return, and at times this transfer of powers has created institutions that are more resistant to public control. In order to maintain an adequate system of checks and balances, and taking into account that this government branch is not generally subject to public opinion at the ballot box, it is indispensable that the transfer of powers by accompanied by demands for greater openness and citizen control in the ways we have described.

Certainly, we wonder whether it is possible to find the perfect balance between freedom and responsibility through well-formulated interventions. Countries with consolidated judicial systems—those with more or less satisfactory responses to the questions we have posed above—have only been able to implement these systems after carrying out lengthy institutional development processes in which judicial branch power and independence has

been “built from within” little by little. Indeed, the independence or “power” of the judicial branch originates more from its social legitimacy than from the letter of any law or Constitution.

Despite the fact that these processes are long and complex and legal modifications alone will not achieve the desired results (the dominant legal culture or reigning judicial institutional are generally more determining factors), we must not undervalue their consequences in a sector that is essentially “legalistic,” such as the one in question.

It is important to acknowledge that public policy instruments are more complex than laws, in that they must reflect institutional and political strategies, giving rise to opportunities for negotiation, dissemination, and implementation that involve diverse social actors and include an array of instruments that range from budgetary to management to training and beyond.

It is also important that the formulation of public judicial policy through normal democratic pathways never be renounced. In many cases, transferring power to judicial systems and granting greater independence has left all or most major decisions regarding the system itself in the hands of judges. Once again, I insist that neither public control nor the popular sovereignty over the judicial system should be waived and that public institutional policies, to the extent that they are not aimed at altering specific judicial rulings, do not harm judicial independence in any way.