

REBUILDING INDEPENDENT JUDICIAL SYSTEM TO ENHANCE THE TOOLS OF RULE OF LAW- SPECIAL FOCUS ON POST – CONFLICT COUNTRIES

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ABSTRACT

Collapse of the independent judicial systems is one the common characteristic in countries after conflicts. The collapse happens due to the tensions that are faced in their attempt to protect the interests of majorities and the war affected minorities. The independence of judiciary is an indispensable tool that can be used to protect tools of rule of law. The main idea of author is to discuss the role of tools of rule of law in rebuilding independent judicial systems in post-conflict environments. There is no definitive black letter answer to this question as it will be defined by other determinations such as the prevalent condition of a country at a particular time. This paper seeks to examine this specific issue of enhancing independent judicial system in Post-Conflict countries and tries to produce a sustainable solution. The relevant constitutional provisions and the comparative study would be dealt with in this theoretical research exercise. Our experience in the past decade has proved clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair independent administration of justice. Giving priority to the restoration of and respect for the rule of law and rebuilding independent judicial system explicitly mandating support for the rule of law will lead us to succeed in this issue.

Keywords: tools of rule of law, independent judicial system, post-conflict.

INTRODUCTION

State power can be divided into three, as legislative executive and Judicial. It's explicit that legislative and executive branches of a government are accountable to the people of the country through periodical elections held as a process of representative democracy. They are also accountable to the judiciary through judicial review. But, no one can inspect judiciary when it is exercising its powers and jurisdiction. In other words other institutions are accountable to judiciary and it is not accountable to any institutional body of a state. A fundamental component, perhaps the most important component of the rule of law is a free and independent judiciary. Independence of judiciary is a logical consequence of separation of powers. This will be meaningful only when judiciary is truly independent from the executive and the legislative.

This definition of independence of judiciary should not only indicate independence from the other organs of the state, but also the independence of the judges in the way they adjudicate cases. Judges should be independent in thought, independent of the parties with regards to the matters before them and they should be able to maintain the position of a neutral arbiter from whom we expect justice.

In a successful democratic state, the judiciary will be always independent. Therefore, Independent judiciaries are characterized as follows:

- (1) Judges are free to make impartial decisions without outside political interferences.
- (2) A judiciary acts as a check upon the executive and the legislature and
- (3) Judges are not arbitrarily removed or threatened. Promoting the independence of the judiciary and highlighting any improper pressure on judges, prosecutors and courts.
- (4) Advising on processes for the appointment and selection of judges, judicial tenure and judicial discipline.

Basically, the main idea enshrined here will be clear separation of powers which can allow the judiciary to act independently without arbitrary interference.

Therefore, integrity of a court depends upon the degree of protection from external political actors, and their decisions would be honored even if they involve the executive or legislative bodies. As former U.S. Supreme Court justice Sandra Day O'Connor stated:

“Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. Presidents, ministers, and legislators at times rush to find convenient solutions to the exigencies of the day. An independent

judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted”.

Importance Of Independence Of Judiciary In Post-Conflict Countries

Our experience in the past decade has proved clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair independent administration of justice. Independence of Judiciary plays a vital role in maintaining peace at the end of civil wars. The Judiciary is expected to be a neutral arbitrator between interests of majorities and the war affected minorities. Judiciary is expected to serve the security dilemmas faced aftermath conflicts, fair implementation of the laws, control of excess of executive and legislative power to create an atmosphere favourable to economic growth, and arbitrate between the interests of majorities and war affected minorities.

Also, the accessibility of the justice system and its treatment of cases in an equal footing are also considered as fundamental components important maintain in sustainable peace and democracy in a war affected country. In the post-conflict environment, the justice sector would have been totally destroyed. As a consequence the population is impoverished. For example, simple matters like traveling to a hearing, or obtaining legal advice or legal books become a major hurdle in accessing justice. In addition, there are very important questions of judicial bias in societies where different ethnic or confessional groups have fought each other. These issues require careful consideration of what infrastructure and modernization reforms will be sustainable, keeping in mind alternatives to the formal, high cost processes.

Only an independent judicial system can help to enhance legitimacy in a war affected community. It is the only institution which can legitimate the political system when the political systems and political institutions are corrupted in the aftermath of civil war. Therefore, Judiciary plays a very significant role in government and politics. It's better to emphasize again that judicial systems are responsible for developing and maintaining rule of law.

Another factor to be considered is that peace building cannot be gained in a unique way because, history, politics, geography, culture, sociology and legal systems of countries are different. The reasons behind wars are also different in context. But the difference is basically applicable towards Legislative and executive of respective countries. According to my opinion Judiciary should be in a unique nature in all war affected countries.

Independence of Judiciary may take variety of forms across different jurisdictions and systems of law. But the principle applied on it will be the same. Judges ought to be given freedom to decide each and every case upon facts and law not upon the imposition of some other person or institution especially government. Further, they have to be given the chance to protect the constitution from all other interferences. The basic idea behind all of these requirements is the maintenance of tools of rule of law. At the same time, rules which are going to apply should be equal for all. Laws must be clear in meaning and the public should have a clear knowledge of it. Rule of Law will be meaning less without the above mentioned two requirements and in the absence of rule of law, rule by law will govern the entire state. Rule by law will still allow governments to use their powers arbitrarily. In such a situation People will lose the confidence on the government and state powers.

The purpose of this paper is to analyse the role of Independent judiciary in enhancing tools of rule of law. As a fundamental and basic component of rule of law is independence of Judiciary. By effectively imposing tools of rule of law an independent judiciary can reinstall the confidence and trust in the political system. Independence of Judiciary is an essential factor to enhance democracy and rule of law in a democratic society in order to obtain peace keeping process.

International Standards

Several international Instruments have incorporated Independence of judiciary as a primary feature in their documents. Article 10 of Universal Declaration of Human Rights 1948 - (UDHR) establishes that that all persons are "entitled in full equality to a fair and public hearing by *an independent and impartial tribunal*" whenever criminal charges are laid against them. But originally in aspiration UDHR is a non-binding document and now converted into an important part of customary International Law.

International Covenant on Civil and Political Rights (1966) – (ICCPR) as a covenant which expanded the scope of rights included in UDHR in its Draft third Optional protocol establishes the Right to a fair trial which inherently includes Independent Judiciary.

Other than these principle documents two other significant international instruments also affirmed Independence of Judiciary. Those are Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). These mainly focus on fair trials. But it can be argued that fair trial will impliedly include independent judiciary.

In 1985 United Nations General Assembly adopted basic principles on the independence of Judiciary. It is expected that the member states and governments would follow the basic principles included in the document and also it is expected from the governments to secure and promote independence of Judiciary through their national legislation laws and legislative frame work. The basic principles can be listed as follows:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

The UN Basic Principles on the Independence of the Judiciary affirm the obligation on the State to guarantee the independence of the judiciary. Principle 4 requires States to protect the judiciary from inappropriate or unwarranted interference with the judicial process. Under Principle 2, the judiciary must be able to decide matters on the basis of facts and accordance with law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect.

The inclusion of independence of judiciary into several important international instruments clearly shows the attention given by the international community to the concept of the independence of the judiciary. This clearly represents that the Independent Judiciary is an essential factor in each and every democratic society which is looking for enhancement of rule of law. As mentioned above Independent judiciary is an important factor which can have a positive effect on peace building process in the aftermath of civil war.

DISCUSSION

Impartiality

In order to secure rule of law through Independence of Judiciary, fairness and stability is required among Judiciary towards war affected minorities. It is not enough for the judiciary, as an institution, to be independent - individual judges must be seen to be objective and impartial. This process of fairness and stability is missing in most of the post war countries. War affected minorities will be fed up because of this unhealthy separation of powers. Specifically it leads to a situation where a war can be started again. So it's the duty of Judiciary to build the confidence in the war affected minorities that the judiciary is impartial and away from unwanted control from other institutional structure of the country.

Though impartiality is also linked to independence, usually the judiciary and the judges may have their own individual bias with regards to matters that come before them. But in administration of justice impartiality is not a choice but a mandatory principle, which must be reflected right from the start of the case till judgement delivered.

Impartiality, while closely related to independence, is a separate and distinct concept. The Human Rights Committee sets out two requirements to assess impartiality:

1. Judges must allow their judgment to be not influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. and;
2. The tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial

As mentioned above the impartial procedure should be available to build the confidence in the minds of war affected minorities as well as majorities. The principles of independence and impartiality of the judiciary seem to be recognized universally.

International instruments have shown its desire towards independent judiciary which can provide a fair trial or impartial procedure. Specially, impartial judiciary falls under the ambit of Article 38 of International Court of Justice (ICJ) statute. In 1995 under Article 38 of ICJ statute Special Rapporteur of the Commission on Human Rights considered judicial independence and impartiality as a part of the "general principles of law recognised by civilised nations.

Although there is a consensus that judges and Judiciary should be impartial to maintain successful peace building process in post war society, judicial Independence and impartiality are so broad concepts that they can easily cover different views on their practical implications. To protect the peace gained through tireless effort could be saved only if impartial judiciary gets its meaning in practice. For example In West Bank Gaza Independence of Judiciary is critically constrained as a result of executive

unwillingness towards giving respect for an independent judiciary. Executive is showing unwillingness to respect and enforce judicial decisions. The Courts are unable to uphold the laws to properly protect the war affected minorities and to protect the rights of majorities.

Another better example will be the Democratic Socialist Republic of Sri Lanka. Sri Lanka has been at war for decades. Conflicts have taken many forms from the pogrom against Tamils in 1983. Each of the three main ethnic communities Sinhalese, Tamils and Muslims have suffered from this widespread violence. So people of Sri Lanka are expecting the judiciary to enhance the peace in Sri Lanka in an impartial manner. But the 1978, Sri Lankan constitution has been designed in a way to enhance the supremacy of the executive and the legislature. As a result, after the war, the executive and legislature powers are exercised their powers in a way that can undermine the independence of judiciary. Recently the impeachment of the Chief Justice Shirani Bandaranayake made without considering the ruling of the courts elaborates this situation clearly.

If other institutions such as the Executive or the Legislature interfere with Judiciary, will create a situation where judiciary is not independent. In such instances the judiciary will fall into the hands of arbitrary rulers and it cannot give impartial judgements to maintain a sustainable peace.

As a part of impartial judiciary apart from external interference judges are required to be away from the matters which could affect the independence of judiciary. Judges often choose to avoid most forms of community involvement. A judge may undertake community or charitable work but cannot offer legal or investment advice. Judges cannot take part in politics, either as a party member, fundraiser or donor, and many choose to surrender their right to vote. While judges have been more willing in recent years to make public speeches or agree to attend media interviews, they refrain from expressing opinions on legal issues that could come before them in a future case. Judges are forbidden from being paid to do anything other than their judicial duties, but can accept appointments to serve on commissions, inquiries and other official investigations.

Dual Sovereignty

Insecurities preserved at the end of war/conflict are main factor to be addressed through all necessary means. The next important issue the author of this paper wishes to discuss is the problem of 'dual sovereignty' which is a factor that can affect the independence of judiciary and effectiveness of judiciary. Dual sovereignty is associated with many factors, such as military and political outcome of conflict, the role of third parties in conflict-management, the period of previous war, the main factor that caused the longevity of conflict, the structure of political institutions created in the aftermath of conflict, and the probability of political institutions to establish a new conflict.

Tilly defines dual sovereignty as follows:

"...appearance of contenders or coalition of contenders, advancing exclusive alternative claims to the control over the government" and "the incapacity or unwillingness of the government or its agents to suppress the challenger coalition" (Tilly, 1978)

According to Tilly, dual sovereignty is influenced by the previous victory of war. According to him it depends on whether the victory is based on military victory or a negotiated settlement. Existence of dual sovereignty in a post war society is a real threat for the security of that state. So whatever the victory achieved have to be protected in a sustainable manner. Governance after conflicts have to be carried out in a way which won't induce clear cut dual sovereignty which can cause a conflict again. Merely ending a conflict cannot create a peaceful society forever.

Peace gained after the violence should be preserved in a country. Failure of preservation of such peace will be a factor which increases the possibility for dual sovereignty. Likelihood of returning to another civil war or conflict will be a threat to the well-being of the people of the country. People will further lose the confidence on governmental decisions. This loss of confidence is the main reason for security dilemmas in post conflict societies. And security dilemmas and problem of dual sovereignty will be the main reason for failure of peace agreements. Hartzell sets out three main security concerns in the post conflict environment.

1. "that one's opponent may gain control of the coercive apparatus of the new state,
2. that one's opponent may gain an advantage in the allocation of political power within the new state, and Judicial Institutions
3. that one's opponent may gain an economic advantage within the new state."(Hartzell, 1999)

To address these security dilemmas the established institutions of state could be able to meet the challenges of dual sovereignty. Also, they could be able to facilitate peace by balancing power among war affected groups. In such a way judiciary is playing an important role in post conflict countries. The judiciary has to be independent for the purpose of reducing uncertainty among groups. It can be done by facilitating interactions among groups and by regulating human behaviour.

Criticisms On Decisions Of Judges

And my next argument will be on criticisms on decisions of judges. Naturally, valid criticisms of judges' decisions are perfectly legitimate and such criticism is to be welcomed in a democratic society. Where, however, a senior government official, acting in his official capacity, utilises public funds to launch a scathing attack on a judgment which he does not agree with, and which attack is aimed at vindicating his political master, such criticism assumes a very different significance (Jannie Eksteen,2007). Formal guarantees enshrined in the Constitutions of countries is although important, are however not enough by themselves to

create a vibrant tradition of judicial independence. The effectiveness of courts in achieving their constitutional role in our democracy is to a large measure, dependent on the respect which the population and government have for the courts. So, it's expected from population and government to give due respect to judiciary and judicial decisions. But the main problems in post-conflict countries are the dominant nature of executive and legislative bodies. Basically, executive and legislative bodies showing unwillingness to impose judicial decision that can affect their dictatorship they possessed through past few years. For example determinations heard by Supreme Court of respective countries have been rejected by executive and the legislature in arbitrary manner.

Judicial independence and the respect which the nation has for the courts may, of course, be undermined in many indirect and ordinary ways. In this regard Patricia M Wald, an American judge, in an article 'An independent judiciary and the Rule of Law: Five hard questions and Five soft answers,' expressed the view that ...' perhaps the most damaging of all are unwarranted legislative and executive attacks on Judges.' She observes that the political branches of government hold most of the cards in this domain of mobilising citizen opinion against judges. It would appear that there is in general a fine line to be drawn between valid criticism of a judgment, which is healthy, and an attack on the judge as an individual. This line should be carefully observed if the rule of law is to remain intact. This kind of criticism constitutes a far greater threat to the rule of law than the judgment could ever do (Jannie Eksteen, 2007).

Therefore, it's explicit that judicial branch serves a very important role in peace building and enhancing tools of rule of law. Larkins stated that the "judges cannot only mediate conflicts between political actors, but also prevent the arbitrary exercise of government power"(Larkins, 1996). It clearly shows that judges are the key actors to maintain sustainable peace in post conflict countries. Judiciary serves to constrain the power of other branches of government. In other way other branches of government cannot intervene into judiciary arbitrarily. Smithey and Ishmiya stated that judicial power serves to constrain the power of other branches of government (Smithey & Ishmiya, 2000). By interpreting laws and possessing the power to overturn ones deemed unconstitutional, the judiciary can maintain a system of checks and balances that promotes governmental stability. For a judiciary to be deemed independent, it must be impartial and insulated from the influence of politics. The inability to be easily removed from office, long-tenure, and fixed salaries help maintain these conditions by minimizing the influence of political expediency, giving judges the ability to focus on the law and other legal principles. Since security dilemmas are at the foundation of settlement failures, an independent judiciary may be able to resolve it in a stable manner. For example in Rwanda, Rugege stated that judicial independence is a pre requisite for a society to operate on the basis of rule of law (Rugege, 2005).

It's clear through my arguments that independent judiciary is a key factor to promote sustainable peace and to end the conditions of dual sovereignty. An independent judiciary can promote following features in post- conflict countries:

1. Promote Social and political stability.
2. End conditions of dual sovereignty.
3. Increase public access in political participation.
4. Address multitude issues of security dilemmas.

RECOMMANDATIONS AND CONCLUSION

Rule of law could be achieved through independent judiciary via regional and national mechanisms created by post-conflict societies. So author of this paper wishes to give some productive common recommendations which can be the solution for independence of judiciary in all post-conflict countries.

- Judicial units or internal judicial bodies must have adequate resources and total independence. Judicial misbehaviour must be punished quickly and fairly, otherwise everyone will lose faith in the judiciary.
- International assistance should pay particular attention to promote independence of judiciary. Ethics is important; all judiciaries have almost similar codes of ethics, which govern their conduct, with rules on how they should relate to litigants, incompatibilities and similar matters, in which a judicial officer is expected to behave. The proper observation of ethics is a key pillar to ensure the delivery of justice, given that a judicial officer will consider it unethical to condone or even perpetrate a miscarriage of justice. Ethics that are codified in legislation or incorporated in learned writings are the backbone of the judiciary. A judiciary that casts its ethics aside is an enemy of the people. The Rwandan judiciary today has a written code of ethics and the population has regained confidence in it (Johnston Busingye, 2006).
- Peace building should be impartial in the sense that strict equality under the law is guaranteed. However, it should not be neutral in the sense of ignoring groups and persons who continue to interrupt the peace and groups that are likely to strengthen it. In other words, equals must treat equally. This can be only achieved through independent judiciary that can promote impartial judgements.
- Security of tenure and remuneration has a very important role to play if the others above are to be realised. Judicial officers should be protected in their positions so that they are not easily dismissible like other public servants. It is this sense of security that contributes to the trust and confidence in the deliverance of justice. On the other hand, the judicial officers need to receive adequate pay in order that they are not manacled by the pursuit of basic needs for survival. Although little pay is no justification for corruption, an impecunious judicial officer remains a sitting target for corrupt parties (Johnston Busingye, 2006).

As mentioned above independent judiciary will be a neutral arbitrator between war affected minorities and majorities. In the aftermath of civil conflicts, an independent judiciary can act in a way to enforce rule of law by mitigating over access to power

and oppression by government. Also, independent judiciary can properly address grievance of war affected minorities and opposing groups. This can be achieved only by moderating political conditions through the impartial enforcement of rule of law.

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