

Judicial Independence

1. The Courts are an important enforcement mechanism for the Constitution.

A country can have a beautifully written constitution that does it no good at all, if there is no effective mechanism for enforcing it. All governments – even good and democratic governments – sometimes violate the constitution. Human rights are particularly vulnerable because it is sometimes in the interest of both the legislature and the executive to violate someone’s right. They may do so out of ignorance (i.e. they don’t realize that they are violating it) or out of fear (i.e. in a national emergency when feelings are running very high) or simply because they have decided that something else is more important (i.e. their own self-interest or the will of their constituents.) In such cases, the constitution must provide for an independent entity, which has both the power and the responsibility to enforce the constitution, including individual rights. Courts are not the only possibility (and, indeed, it is a good idea to include other mechanisms as well, such as an ombudsman’s office), but courts are one important institution for enforcing the constitution.

2. In order to be effective enforcers of the Constitution, Courts must be independent of the other branches of government.

The courts must play a “watchdog” role in enforcing the constitution: they should be guarding the Constitution against abuse by the government. In order to play this role effectively, the courts must be independent of the other branches. If judges are subject to the power of the executive or legislative branch – for example, by being able to be removed from office at the whim of the President or having their pay reduced by the legislature – then they will be unable to stand up to those branches and resist violations of the Constitution. Only a judiciary that is protected from influence or control by the other branches can be an effective guardian of the Constitution.

3. Independence of the Judiciary requires a particular appointment process, secure tenure and restrictions on removal, secure pay, and autonomy over administration.

In order to be truly independent of the other branches of government, courts and judges require certain specific protections.

- First, judges must be appointed through a process that limits the ability of politicians to choose cronies, such as their friends or family members or clients. The goal is to have a judiciary made up of people chosen because of their qualifications and ability, with a strong sense of professional ethics and responsibility. One of the best ways to achieve this goal is to create an appointment process in which an independent professional lawyers or bar association is in charge of creating the list of candidates for judicial positions. The professional association must be independent of the government, of course. If it is independent, then it will have the incentive to create and maintain high standards of professional competence and ethics in order to increase the prestige of its profession. The names on the list will be those of people respected within the profession for their knowledge and judgment. The executive can then be

required to pick one of the people on the list for any judicial position that comes open. It is also possible to have a panel of current judges make the list of candidates for a future position.

- Second, the judges, once appointed, must have a secure tenure. This tenure may be for life or for a particular period of time, but it should be long enough that the judges have the chance to become skilled at their work and do not worry about their next job for quite a while (e.g. appointment for 10-20 years would be an option.) Their tenure can also be defined in terms of the judge's age, e.g., appointment until age 70. The important point is to ensure a substantial and clearly defined period of job security for the judge. In addition, the Constitution needs to ensure that a judge cannot be removed before the end of his or her term unless there is proof that he or she engaged in serious professional misconduct. The standard for removal and the process of removal (i.e., who gets to decide whether the standard is met: a higher court? the legislature?) should be specified in the Constitution. The goal is to create a substantial period of security, during which the judge cannot lose his or her job without proof of misconduct. The result is that the judge can decide cases without fear of being forced out because of the decisions.
- Third, the judge's salary for the period of his or her term should be secure. The legislature or executive should be allowed to change the compensation of judges only when they meet two conditions: (1) the changes are made across the boards (that is, they will apply to all judges at a certain level, not just to a particular person) and (2) the changes are purely prospective (that is, they will apply to new appointees to the positions affected, not to people who already hold those positions.) These protections assure that the political branches cannot take revenge on a judge for a decision they dislike by reducing his or her pay.
- Fourth, the judicial branch needs to have control over its internal, administrative affairs. Such affairs include how cases are assigned to individual judges, how money allocated to judicial administration is spent, how administrators are hired and fired, and so on. If the legislature or executive could control details like these, then they would be able to make life much more difficult for judges they dislike. They would also be able to influence decisions through their manipulation of administrative personnel and assignments. For example, judges often employ judicial research assistants. If the executive can decide who will hold these positions -- helping with legal research and drafting of opinions -- it can fill the court administration with people who will push the legislature's agenda and possibly influence the outcome of cases. Only if the courts have control of their own internal administration can they be truly independent of the other branches.

An independent judiciary is an important check on abuses of power by the legislature and executive. But the judiciary can play this role only if it is secure in the ways described above. The Constitution can assure the judiciary's ability to act as a check on the other parts of government (see the paper on **Checks and Balances**) and to protect human rights by creating the necessary security and independence for the judiciary.