

Preserving Judicial Independence in Dominant Party States

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1. That it is difficult to preserve judicial independence in dominant party states seems reasonably obvious

a. Distinguish between two types of dominant party states

(1) Sufficient seats to guarantee adoption of any legislation supported by party leadership

(2) Sufficient seats to guarantee adoption of any constitutional amendment supported by party leadership

(a) Obviously, that will depend on the amendment rule

b. Note the assumption of a unified party leadership

(1) Factionalized dominant parties may – on issues that divide the factions – be similar to multiparty systems without a dominant party

(2) But judicial dependence might not be an issue that divides the factions, though it could be

c. Might also want to distinguish between “ordinary” (nonconstitutional) and constitutional courts, with my comments confined to the latter

2. The main mechanisms by which judicial dependence is obtained are reasonably clear

a. Control over appointments is the primary one

(1) Simple examples – departures from nonstatutory norms of appointment (India and South Africa for Chief Justice)

(2) Typically the (initial) constitution will provide for some connections in the appointment process between the political branches (under single party domination), and the judiciary

(a) Nomination and confirmation

(b) Judicial nomination commissions with substantial representation of the political branches

(3) Some modifications and qualifications

(a) Some “legacy” appointments, but they dissipate over time

(b) Occasional “seizure” of control by judges (Israel, India)

(4) Responses by the dominant party

(a) Statutory modification of appointment process (Israel, because no constitution)

(b) Constitutional modification (India)

(c) Note that here’s where differences in degree of domination matter

(5) Learning by leaders of dominant party

(a) Historically, might have accepted judicial independence as probably not consequential

(b) But, with global rise of judicial power, dominant party leaders know that, to accomplish their programmatic ends, they have to get control over the judiciary (Hungary)

(1') Might revise design features at the stage of initial drafting (subject to questions about international legitimacy mentioned below)

b. Substantive statutory or constitutional amendments as regular response to disfavored judicial decisions

(1) This makes judicial independence pointless, or of minor and temporary significance (Singapore story, India to some extent)

(2) Discourages civil society efforts to use the judiciary as a bulwark against the dominant party (successful litigation in India as often compatible with party's preferences, blocked by corruption)

3. The primary mechanisms for defending judicial independence

a. Capitalizing on factional division within the dominant party by sending the message that a faction that loses in politics may succeed in the courts, and have enough power in the legislature to prevent amendment as a response to the success

b. Relying on civil society organizations for extraparty support

(1) This requires that the civil society organizations actually be important somehow to the dominant party's preservation of power (perhaps the Lawyers' Movement in Pakistan)

(a) Not all civil society organizations are important in that way

(b) Complex issues about international support for judicial independence

(1') Depends on how important international legitimacy is to the dominant party (Hungary)

c. Under some special circumstances, the judiciary can defend itself

(1) The limited scope of Issacharoff's arguments about fragile democracies

(2) Perceiving a party in the process of becoming dominant, but not yet there, the courts may take steps to thwart the completion of the process (various chamber-crossing decisions)

d. Note that I have not treated the value of judicial independence as such as a constraint on the dominant party

(1) Party leaders might sometimes have an independent normative commitment to judicial independence (Mandela on pardon power)

(2) That commitment will be placed under pressure when the courts do things that have the effect of obstructing the party's programs – as they inevitably will, if judicial independence is to be meaningful

(3) My focus is on the ways in which judicial independence can be preserved (or lost), given the existence of a dominant party – a concern for integrating political analysis of constitutional structures with ideas about normative constitutionalism

4. “Lessons” for South Africa

[to be completed, but probably dealing with at least the Scorpions story, and anticorruption efforts as reflecting factional division within a dominant party]