

Paper Guarantees: Judicial Independence Between De Jure Promise and De Facto Practice

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Nauman Reayat, Rhona K. M. Smith, and Moohyung Cho (eds.), *Judicial Independence in Transitional Democracies*. Routledge, 2025.

I. Introduction

After the third wave of democratization and the end of the Cold War, various states have relinquished their authoritarian rule and begun to adopt democratic systems, institutions, norms, and principles.¹ Beyond free, fair, and contested elections, judicial effectiveness is considered to be the procedural element of democracy in many contexts. Independent courts stand out as one of the most pivotal institutions in this context, and in both academia and real-world politics, there is a strong and well-established consensus that judicial independence is essential for promoting democracy, the rule of law, and good governance.² Furthermore, an independent judicial body can invalidate the government's illegal decisions against individual rights, hold government officials accountable, and facilitate the enforcement of the constitution.

The book distinguishes between *de jure* and *de facto* judicial independence, which is very helpful for understanding it, as judicial independence requires consideration of both constitutional safeguards and the behavioral independence of the judiciary. The first objective of the book is to examine the factors that influence the establishment of *de jure* or *de facto* judicial independence in transitional democracies. Secondly, the book assesses the relationship between *de jure* and *de facto*

¹ Nauman Reayat, Rhona K. M. Smith, and Moohyung Cho, eds., *Judicial Independence in Transitional Democracies* (London: Routledge, 2025).

² Reayat, Smith, and Cho, *Judicial Independence*.

facto judicial independence in transitional democracies. The third objective of the book is to explain the threats and challenges to judicial independence in transitional democracies.

The book conceptualizes transitional democracies and defines them as political regimes situated between advanced democracies and closed dictatorships. According to the book, the transitional democracies have changing degrees of democratic features but fall short of consolidated democracy. The book treats both the unconsolidated democracies and certain types of autocracies that adopt nominally democratic institutions as transitional democracies. It highlights that various synonyms describe transitional democracies in political science research, and these include developing democracies, emerging democracies, hybrid regimes, anocracies, semi-democracies, illiberal democracies, competitive authoritarianism, and electoral authoritarianism. The book notes that each has its merits, but it does not distinguish its concept of transitional democracies from these similar concepts. Instead, the book treats them interchangeably with transitional democracies and recognizes their utility in capturing different aspects of transitional political systems.

The book provides a distinction between *de jure* judicial independence and *de facto* judicial independence. De jure judicial independence refers to the legal and institutional aspects of independence. This kind of independence is enshrined within national constitutions and contains two elements. The first element is the independence of the judiciary as an organization, meaning it is institutionally and organizationally independent from other branches of government. The second element is the independence of individual judges. This relates to whether judges have legal protections and can act as independent judicial decision-makers.³

³ Reayat, Smith, and Cho, *Judicial Independence*.

According to the book, the Comparative Constitutions Project in the United States refined the operationalization of *de jure* judicial independence by suggesting its six components, which include (a) statement of judicial independence, which means whether the constitution explicitly articulates judicial independence; (b) judicial tenure, if the judges are enjoying lifetime tenure; (c-d) selection and removal procedure, which means whether the constitution regulates the appointment, confirmation, and dismissal of judges; (e) limited removal conditions, if the constitution stipulates specific conditions for the removal of judges; and (f) salary insulation, if the constitution has enshrined insulation of judges' salaries from reduction.

De facto judicial independence refers to how judges and courts are actually independent of undue external pressure and influence, and, according to the book, it is generally understood in two ways. First, judges are behaviorally independent when their rulings are based strictly on a sincere and impartial assessment of the legal evidence. Second, judges and courts become independent when their rulings significantly constrain the actions of other government actors. This implies that the judiciary should be powerful enough to serve as a veto player by invalidating illegal and inappropriate actions of the executive and legislative branches.⁴

Overall, the volume contributes significantly to the scholarship on judicial independence by relating comparative case studies to interdisciplinary theoretical analysis. The differentiation between *de jure* and *de facto* judicial independence provides a vital systematic framework that enables readers to understand the reasons constitutional promises always fail to transform into genuine judicial independence in transitional democracies. However, while the book offers a comprehensive comparative assessment, certain features—especially the informal justice systems, socio-economic limitations, and fragile state environments—deserve special attention and

⁴ Reayat, Smith, and Cho, *Judicial Independence*, 4.

consideration. This review holds that these challenges do not reduce the book's value but identifies parts where its analysis could have been further improved in future editions.

II. De Facto Judicial Independence in Transitional Democracies

The first part of the book focuses on de facto judicial independence through six comparative chapters. The first two chapters examine Pakistan and Bangladesh, both of which achieved a certain degree of judicial independence but followed different trajectories. The author identifies three key conditions for maintaining judicial independence: support for the judiciary by the middle class induced by socio-economic development, internal division within the elites, and the presence of popular and strategic judicial leadership. The second chapter compares South Korea and the Philippines, arguing that political competition incentivizes incumbents to respect judicial independence only when supported by an institutionalized party system, while unstable political competition and low levels of party-system institutionalization hinder its development.

Chapter three examines the role and influence of the chief justice in Mexico, highlighting that configuration with other branches of government eroded the court's independence and impartiality, weakening its capacity to check the government and viewing how judicial independence may be jeopardized from within. Chapter four discusses the decline of judicial independence in Turkey after the transition to competitive authoritarianism in the 2010s, demonstrating how the executive politicized the judiciary by restructuring key institutions and introducing the presidential system after the 2017 constitutional amendments, thereby enlarging executive influence.

Chapter five reviews Slovakia's post-democratic judicial history, emphasizing that understanding judicial independence as judicial self-governance obscured its main purpose of judicial decision-making and that overemphasis can lead to a misconceived idea of judicial independence. Chapter six examines Cambodia, showing that although the Constitution embeds

commitments to de jure judicial independence, the reality reflects moves toward authoritarian rule by law, with judicial involvement in that process. The author argues that embedding a rights-based approach to judicial independence and the application of laws provides an opportunity to strengthen judicial independence and protect rights and freedoms.

Collectively, the comparative case studies in these chapters demonstrate that judicial independence is designed less by legal or constitutional design than by political incentives, judicial institutions' leadership, and larger democratic settings. I admit that the comparative method is one of the greatest strengths of this book, as it explains that no single institutional model warrants judicial independence across various transitional contexts.

III. Theoretical and Conceptual Discussions

The second part of the book is more concise and contains two chapters that discuss the theoretical and conceptual foundations of judicial independence from an interdisciplinary perspective. These chapters derive their theoretical insights from the vast literature in legal studies, political science, and philosophy, without fixating on de jure or de facto judicial independence, thereby adding rich shades to our understanding of judicial independence. In chapter seven, the book argues that the concepts of judicial independence and the rule of law are complicated and deeply context-dependent, making it difficult to reach a consensus on their ideal procedures.

The author examines how the factors that render judicial independence and the rule of law less conducive in developing democracies raise the question of whether developing democracies are predisposed to resist independent courts and how judicial reforms can address this problem. Judicial independence has two broad dimensions: first, the judiciary is expected to be separate and independent from the legislative and executive branches of government; second, judicial institutions should not be subject to improper pressure and influence from the other branches of

government or from the private sector, and judges are expected to be independent from individual litigants, the media, and powerful individuals and entities.⁵

The chapter also discusses the rule of law and points out that it presents serious challenges due to many different understandings of what the concept encompasses. The author describes the rule of law as a system whereby the law, rather than the edict of individuals, determines governance in a polity and that no one is above the law, with law consisting of a predetermined, fixed set of rules that do not depend on the whims or caprices of a ruler.⁶ The author highlights the relationship between democracy and judicial independence, underlining that democracy is not a prerequisite for judicial independence, although judicial independence tends to flourish better in democratic environments than in authoritarian regimes. The author further explains that “*if democracy is defined purely in terms of the right of a country’s inhabitants to choose their rulers, it is possible to identify jurisdictions where, despite the lack of such democracy, judicial independence has fared quite well,*” citing Hong Kong under British rule as a prime example.

Chapter eight discusses judicial independence from the perspectives of political and legal philosophy, linking it to the principle of separation of powers, which implies that an independent judiciary should credibly constrain the executive’s abuse of arbitrary power. The authors examine the role of powers in curbing unilateral executive power and present two approaches: the pure doctrine and the reconstructed view⁷. In the pure doctrine, the separation of powers is distinguished from related concepts such as the theory of a balanced constitution, mixed government, and checks and balances, emphasizing that it does not necessarily require the organs

⁵ Reayat, Smith, and Cho, *Judicial Independence*, 162.

⁶ Reayat, Smith, and Cho, *Judicial Independence*.

⁷ Reayat, Smith, and Cho, *Judicial Independence*.

to constrain their mutual exercise of power. The reconstructed view seeks to address the dissipations and shortcomings of the pure doctrine, arguing that although there must be a relationship between the organs of government and their functions, this relationship does not mean that each branch must carry out a single function and that responsible government comprises a multiplicity of functions.⁸

The theoretical discussions in this part support the realistic chapters by situating the issue of judicial independence within broader arguments about constitutionalism and democratic governance. Nevertheless, effective engagement with modern literature on fragile and post-conflict countries would have further strengthened the theoretical framework, given the growing significance of these contexts to the rule of law reform initiatives.

IV. De Jure Judicial Independence in Transitional Democracies

The last part of the book consists of five chapters about de jure judicial independence in different regions of transitional democracies. Chapter nine provides a comprehensive analysis of judicial independence in Africa and highlights that many challenges are still hindering the sustained realization of judicial independence, despite a wave of constitutional reforms during the 1990s. The reforms provided an opportunity for restructuring judiciaries in ways that expanded and formally entrenched judicial powers and independence in constitutions and paved the way for courts to act as enforcers of the law and defenders of constitutionalism.⁹

The author underlines two major features that marked the rejuvenated judiciaries: the enrichment of judicial independence in modern constitutions and the expansion of the powers of

⁸ Reayat, Smith, and Cho, *Judicial Independence*, 182.

⁹ Reayat, Smith, and Cho, *Judicial Independence*, 205.

constitutional courts¹⁰. However, in many francophone constitutions, judicial independence is formulated in a weak and contradictory manner, as they declare the judiciary independent while subjecting it to the President (e.g., Cameroon Constitution, Article 37(2)–(3)), raising doubts about its ability to operate without undue executive pressure. While Anglophone constitutions better define criteria and procedures, in both systems the executive plays a central role in judicial appointments.

The constitutional rights revolution of the 1990s expanded the jurisdiction of constitutional courts, including review of legislation, individual constitutional complaints, electoral disputes, and disputes concerning separation of powers. Despite these developments, Africa's judicial independence is under threat and has been troubled by weak regulatory frameworks, non-implementation of laws, and overbearing executive influence, while some judges defer to the executive, although examples such as the South African Constitutional Court demonstrate the potential for high-quality jurisprudence.

Chapter ten explains the best approach to understanding judicial independence in the Asia-Pacific region through a synthesized approach combining three indicators: the court's organization and oversight function, the judicial appointment system, and the influence of institutional and non-institutional forces, with attention to broader organizational and institutional factors. Chapter eleven identifies challenges in Iraq after 2003, focusing on constitutional disputes between the Higher Judicial Council and the Federal Supreme Court and showing that internal conflicts have undermined the legitimacy and autonomy of the judiciary. Chapters twelve and thirteen examine Chile and Colombia: in Chile, five decades (1973–2023) illustrate the transition from subservience to the regime to promoting judicial independence and include debates on drafting a new

¹⁰ Reayat, Smith, and Cho, *Judicial Independence*.

constitution guided by inter-American human rights standards; in Colombia, the 1991 constitutional reform is presented as facilitating peace-building by fostering dialogue, compromise, and consensus among groups with competing identities.

Finally, the book concludes with challenges, opportunities, and recommendations for judicial independence in transitional democracies. Six key challenges are acknowledged: the definition and scope of judicial independence; past historical trajectories; the absence of political will and undue executive influence; non-competitive elections; the erosion of public trust; and judicial independence without appropriate accountability. The authors argue that the progress in legal, social, economic, and political conditions provides opportunities, including democratization and improved consensus on the significance of the judiciary. The recommendations suggested by the book include the establishment of formal institutions and copying good practices and judiciary-specific actions such as improving the professionalism of judges, checking the powers of the chief justices, and improving dialogue among judges in transitional democracies.

The analysis of *de jure* judicial independence in this part demonstrates that constitutional guarantees alone are insufficient to ensure judicial independence in fragile political contexts where political situations are still fragile or where executive domination over the judiciary exists. The comparative examples discussed in this part strengthen the argument that meaningful judicial independence depends on both legal safeguards and enabling political settings, which is the main argument of the book.

V. Personal Assessment and Critical Reflections

Even though the book offers a strong comparative and interdisciplinary assessment of judicial independence in transitional democracies, certain arguments are more solid than others. One of the most significant contributions of the book is its differentiation between *de facto* and *de jure* judicial

independence. The authors explained that legal protections alone are not enough to secure effective judicial independence when politicians, other branches of government, and other powerful actors remain committed to endangering and influencing judicial behavior in practice. The distinction is mainly applicable in transitional democracies where legal frameworks, particularly constitutions, protect judicial independence, but justice providers (courts) remain vulnerable to external pressures, corruption, and lack of enforcement of judicial decisions.

The book includes numerous comparative case studies. These case studies show that judicial independence improves differently depending on various factors, including the country's political history, leadership behavior, institutional culture, and stage of democratic consolidation. The discussions of Turkey and Cambodia effectively demonstrate how existing regimes may keep formal legal protections while concurrently undermining judicial independence in so many ways, including judicial restructuring, government control over the judiciary, and other forms of political pressure. The remarks of Mexico's chief justice also highlight that threats and challenges against judicial independence may not come only from external actors but also from within the judiciary. I entirely agree with this view; many legal studies and research tend to focus mostly on government interference with the judiciary and pay less attention to the judiciary's internal challenges.

Some arguments in the book could benefit from further improvement. The book primarily emphasized the significance of political struggle and institutional setup and provides fairly little consideration to other aspects, including socio-economic inequalities, corruption, insecurity, and various informal power networks that influence the behavior of the judiciary in developing countries and democracies. As it is known, in many fragile and post-conflict contexts, judicial independence is mainly obstructed not only by legal gaps and weaknesses but also by limited resources, ethnic or clan politics, insecurity, and absence of people's trust in justice institutions.

Another limitation of the book is the absence of a deep discussion on informal justice mechanisms and customary-based justice. The customary justice system and other forms of dispute resolution mechanisms remain influential in many African and developing countries.

From my perspective, the book makes a significant contribution to the rule of law as it challenges the common hypothesis that constitutional protections alone can reinforce judicial independence. The book convincingly explains that judicial independence cannot be realized without political commitment, a robust institutional culture, proper accountability mechanisms, and broader democratic development. This insight can help legal practitioners and other policymakers who support judiciaries in fragile and post-conflict contexts. This is particularly valuable because it provides lessons on the limitations of legal reforms in countries such as Somalia, where its judiciary continues to develop within a complex political and legal context.

Finally, the book thrives in explaining that the concept of judicial independence is not only a legal concept but also an institutional and political process influenced by historical trajectories, elite incentives, and other social facts. Despite a few limitations, the book provides a valuable and timely contribution to the rule of law and judicial independence in transitional democracies.