JUDICIAL INDEPENDENCE*

Among the constitutional guarantees which sustain and fortify our civil liberties, perhaps the foremost is judicial independence. No separation of powers, no written constitution, no jurisdictional limitations, are adequate safeguards of civil rights unless the Rule of Law is enforced by courts endowed and equipped with all the attributes of real independence.

The Common Law of England could never have reached full growth and stature unless courts and judges had possessed the power and the indomitable will to resist improper influences. Judicial independence has won for itself the acquiescence of the people in the law-making function of the courts.

Formidable battles had to be fought to achieve this independence;[1] and it may be that battles still remain to be waged.

Many serious problems have not attained their final solution either in the English common law system or in continental legal system. This is true of substantive law as well as procedure; it is true also of the organization of courts, the subject with which this study is mainly concerned. The organization of courts is the result of historical development; and although prevention of pressure and influence upon courts was not always considered an absolute requirement, it is so considered today with the exception of totalitarian systems.[2] The different lines of approach to this problem by differing legal systems may be conveniently shown by considering such matters as the following: methods of appointing judges; promotion of judges; transfer of judges from one jurisdiction to another; termination of appointment; disciplinary action; quantum of salary; pensions for judges, their widows and dependants; and last, but certainly not least, powers constitutionally vested in judges to examine the legality and validity of statutory enactments or orders in council, and, by interpretation, to create laws.

If we take a wide and comprehensive view and survey the judicial institutions historically, we shall find that greatly different demands are placed upon judges by different states and nations, and even by the same states and nations in different periods. The degree of judicial independence differs exceedingly

* The present paper was prepared for the Comparative Law Section of the Canadian Bar Association.

[1] Students of English legal history do not need to be reminded of the quarrel between Sir Edward Coke and the King.

[2] Which systems have been wiped out since these lines have been written.

in different countries. Some states require their judges to make law; others require them only to apply the law laid down by other agencies. In the latter case, there are several modes of approach to be considered. Some legal systems do not give to judges the power even of interpreting the pre-ordained rules of law, for these pretend to "provide for all contingencies with such careful minuteness that no possible doubt can arise at any future time".[3] There are systems which require judges to interpret the provisions of a code,[4] others declare that "judges refusing to decide a case under the pretext of silence, obscurity, or insufficiency of the code, can be prosecuted as guilty of denying justice,"[5] and at the same time, expressly prohibit judges from laying down principles which extend beyond the case at bar, *i.e.*, principles which are designed to influence the decision of future cases.[6] Some systems give in effect a law-making power to the judges when orthodox "interpretation" fails.[7]

There are legal systems which are content with protecting judges against official pressure and improper influences from extra-legal sources only of the most obvious kind. There are others which protect judges from many insidious threats which, though difficult of analysis, are yet, to the socially minded, quite real and apparent.

Such insidious influences are hard to define; but any lawyer can feel and appreciate them. I would remind my readers that Thomas Hobbes said that it is a natural instinct of every living creature to expand its power as far as it can. Montesquieu went still further, saying that every man who has power is apt to abuse it.

The abuse of power is a natural instinct; and the most effective way of counteracting such natural impulses in the juridical field is to make courts really independent and powerful, to equip them with all the educational, financial, moral and idological requirements for meeting, so far as possible the claims and demands of a democratically organized, civilized society, and to enable them to use their wide powers for the welfare and not to the detriment of mankind.

[3] This was the professed basic idea of the civil code of Frederick the Great, of 1794.

[4] *Vide* Section 7 of the Austrian civil code of 1811.

[5] *Vide* Article 4 of the French civil code of 1804; and there is in fac a corresponding article in the French criminal code decreeing a fine of two hundred to five hundred francs for contraventions of that kind.

[6] *Vide* Article 5 of the French and Section 12 of the Austrian civil codes.

[7] *Vide* Section 1 of the Swiss civil code of 1909.

I wish now to review in some detail the postulates of judicial independence from the view point of comparative law.

I. *The methods of appointment and promotion of judges.*

Though there are many differences in details, all systems resolve themselves into two methods, one of which is to be found in the English legal system, and the other in the French system which is followed with slight modification in most continental jurisdiction.[8]

The English system appoints to judicial office men who have practised law for a considerable length of time. Normally these men have acquired their knowledge of law after a long apprenticeship in university, law school, and chambers, and by practical work as consultants and advocates.

The French system appoints to judicial office young men who have "served their time" as apprentices in the courts. They are required to spend a prescribed number of years (between three and five) as secretaries to judges and later as writers of the *protocol* (minutes) in collegial courts. In this way they acquaint themselves with the details and technique of court procedure; and, in assisting judges, they learn not merely legal science but the art of conducting trials and of dealing with litigants, witnesses and lawyers. They are required to spend a certain time in all of the several departments of justice, civil and criminal. They must become acquainted, practically, with the work of registry offices. They are permitted, and indeed encouraged, to spend at least one year of their apprenticeship with a firm of lawyers. The results of this sytem of training are, on the whole very good. I have had an opportunity to observe its operation in Czechoslovakia, Switzerland, France and Belgium. Judges trained under this regime are appreciative of its merits, and devote themselves to the task of fomenting in their students and disciples, and probable successors, a spirit of judicial independence, and a will and purpose to criticize, if this be necessary, the acts of the executive and administrative agencies of government.

Sir William E. Hart and William O. Hart[9] say with reference to A. V. Dicey's criticisms[10] that courts which are staffed

[8] *Vide* Ensor, R. C. K., Courts and Judges in France, Germany and England, (1933), Oxford University Press.

[9] Hart, E. William and Hart, William O., An Introduction to the Law of Local Government and Administration (1934) Butterworth and Co. London, p. 364.

[10] Dicey, A. V., Introduction to the Study of the Law of the Constitution, chapter XII.

by men who are themselves officials can hardly guarantee discipline, much less public liberty. The said authors suggest that courts of that kind would be "subservient respectors of persons with official positions", and they conclude that "to the English man of the last generation the continental organization seemed no less than monstrous."

This view, I propose, is rather anachronistic. It might have fitted to a certain degree the judicial organization of the ancien régime which saw a partial renaissance under Napoleon; but this faded out quickly, and took a contrary course from 1830 onwards.

The same authors refer, on the other hand, to more favourable opinions concerning the continental systems, which recognize that, in France, even the administrative courts are far from having been complacent tools of the executive,[11] and that in fact they are "powerful and highly respected judicial bodies which have built up for themselves a position of great independence and administer a far wider and more stringent control over all administrative acts and decisions than is possible for the English courts to obtain by the employment of the prerogative writs".[12] This induces the authors to say that "in France the administrative courts have become a bulwark of the citizen against official tyranny". If this is true of the administrative courts, it is obvious that it must be still more true of the ordinary law courts with which this study is primarily concerned.

The facts that continental judges are state officials, that their judgeship is a life-vocation, that they expect and look for promotion, and that appointment and promotion lie in the hands of a Minister of Justice are thought by some English writers to reveal a situation where executive influence prevails in a degree unknown in England, where there is no such thing as a "judicial profession", where judges, almost without exception, remain in the post to which they were first appointed, and where promotion is so rare as to be almost negligible.

Let us examine this question. R. C. K. Ensor admits, and even stresses the fact, that in England the practice of appointing to judicial office men of ripe age is due to chance rather than design. He says that the usual thing is for the Prime Minister to choose the highest in Bar rank of his political followers; and he goes on to say, "the appointments of the three great titled judges and of their humbler brother the President, of the seven

[11] *Vide* Hart and Hart, p. 365.
[12] *Vide* Hart and Hart, p. 366.

Law Lords, and of the five Lord Justices, are, by long established practice, in the hands of the Prime Minister; who is therefore, the supreme source of judicial promotion". Justices of the High Court and of the County Courts are appointed by or on the recommendation of the Lord Chancellor who in turn is appointed by the Prime Minister.

It is not easy for me to see where any great difference lies between these two systems. In the one system, a Minister of Justice appoints as a result of recommendation by the head of the courts; in the other, a Prime Minister in effect makes appointments from among his political followers. Ensor tells us how, in France, the heads of the highest judicial courts compile a panel for promotion, based on conventional rules establishing a scale of precedence.

It must be kept in mind that Ministers of Justice in European countries are normally chosen from among members of the Bar. So far as I can recall, the list of Ministers of Justice in Czechoslovakia during the Republic's independent existence was made up of six barristers and two professors of law. It is not without interest to note that one of these professors was a member of the German national minority within the state, and was a teacher in the German university at Prague; but these facts were considered to be no reason, as against his merits, for refusing to entrust him with this high office.[13]

The Czechoslovak constitution reserves to the President of the Republic the appointment of persons to certain of the highest judicial posts, while the appointment of the other judges was the task of the Minister of Justice acting upon the recommendation of the courts of justice. The Minister of Justice, as a lawyer, moved by the sentiments of his profession, might be presumed to be less swayed by political considerations than a Prime Minister or head of a government would be. In Czechoslovakia, as in the Austro-Hungarian monarchy which was its predecessor, judges were excluded by statute from political activities, and, which is at least equally important, systematic education, custom, and the "ethics of the profession" kept them effectively protected against improper influence.

II. *The nature of the judicial system and the power of the executive to transfer judges from one jurisdiction to another or to terminate their service.*

[13] It is well known how the Germans paid for the generous treatment accorded to them by the Czechoslovak Republic.

Ensor states that, in France, judges are constantly being transferred from one area to another. That may be true in France; but it is not a matter for criticism generally against the continental system. In Czechoslovakia judges are appointed with a permanent tenure: they cannot be transferred against their will, except in the natural event of transferring the court as a whole from one place to another for purposes of reorganization; the service of judges cannot be terminated, nor can judges be sent into retirement, before reaching the age limit, except as a result of the judgment of disciplinary court; and against such judgment appeals are allowed, and review may be invoked upon complaint to the Supreme Administrative Court.[14]

The Czechoslovak constitution guarantees to courts and judges full judicial independence, and imposes upon them only obedience to parliamentary enactments, subject to their right to examine whether such enactments were properly made public in the ways required by the constitution; but judges are expressly authorized to examine into the legality and validity of government orders and decrees, and to disregard them if they are found to lack proper validation.

III. *The right of courts to create law.*

Obviously the degree of independence enjoyed by the courts depends greatly upon the amount of discretion vested in them in respect of a "law-making power." Most continental legal systems rest upon a basis of statutory law in the codes, where judges must content themselves with an interpretation; but these systems generally accord to certain higher courts the right of creating legal rules where the code is silent.[15] Such is the rule in France, Czechoslovakia, Switzerland, Italy, Austria and Hungary.

IV. *Financial provision for judges and their dependants.*

Ensor, in an admirable analysis, points out the great discrepancy between salaries of judges in England and France. This discrepancy applies generally to continental systems. Ensor discusses the reasons for this discrepancy, and he is careful to point out that the low salary scale in the continental system does not impair the purity of the courts. He says "a study of continental conditions knocks out the theory that the high

[14] *Vide* The present author's paper: Discretionary Powers in Administrative Law, submitted to the annual meeting of the Canadian Bar Association in August 1944.

[15] *Vide* The present author's article: The Codification of Law, (1943) University of Toronto Law Journal, p. 148.

salaries of the English judges are to be justified as necessary to secure purity." He explains that high salaries are needed only to induce leading barristers to go on the bench. English judges, because of the higher salaries, are able to provide for themselves in advanced age, and for their widows and children. Even before coming to the bench they had an opportunity to build up financial reserves.

The situation in Canada is again different. Judges' salaries are very moderate; and the problem of pensions, therefore, is of importance. I was surprised to learn from the Report of the Committee on Judges' Pensions, submitted to the annual meeting of the Canadian Bar Association in 1944, that judges' widows and children have no legal claim to pension. I wish, therefore, to refer, by way of comparison, to the method of dealing with judges' widows and childern in Czechoslovakia. Czechoslovakian judges received a pension after ten years of service amounting to forty percent of their salary; and this was increased for every further year of service by 2.4 percent, so that, after thirty-five years of service, the pension was equal to the full amount of salary. Judges' widows had a claim for life (or until re-marriage) to two-thirds of the amount their husbands would have received by way of pension. The amount thus calculated never exceeded fifty percent of the last salary a judge had received before his death; but it never amounted to less than forty percent. Children were entitled to receive, for the period of their dependancy, each of them a sum equal to one-fifth of the amount allowed to a widow.[16]

V. *Political and other affiliations.*

In Czechoslovakia, strict rules prohibited judges from acquiring any political affiliations, or taking part, whether actively or passively in any political meetings. This prohibition extended to any participation in other associations and movements, even non-political, which could, from a moral or ethical viewpoint, be considered as incompatible with the high standard required from judges. It is hardly necessary to add that similar rules forbade judges to engage in any way, directly or indirectly, in trade or commercial affairs.

[16] The author is very much indebted to His Excellency Dr. F. Pavlasek, Minister of the Czechoslovakian Republic, Ottawa, and to J. Gardavsky, Esquire, Consul General for the Czechoslovak Republic in Montreal, for the valuable assistance given to him by placing at his disposal statute books, legal literature and other valuable information completing and rectifying the basic materials used in preparing this paper.

All of these restrictions applied from the very moment that the young graduate entered upon his court-apprenticeship. They were considered to be naturally and essentially incumbent upon those who sought judicial office.

I venture to suggest that there was much in the system that recommended it as contrasted with the system where barristers of many years active practice, and many political, commercial and financial ties, are promoted suddenly to the bench, and may find it difficult to forget, as it were in a moment, the deep rooted habits and customs of many years.[17]

SUMMARY

If one reads the opinions of some English writers on the continental judicial system, one is tempted to conclude that it is really "no less than monstrous",[18]. Fortunately there are other English writers who take a more generous view. On the whole, however, the continental system is considered to be much inferior to its English rival.

There is a good deal of misconception and misinformation in this matter. Not enough has been done in the way of comparative research; and the methods employed have not been completely reliable. There is, too, the inveterate habit of lawyers—a conservative class—to prefer the system in which they themselves have been raised.

Of the arguments which have been raised against the continental system, two only are worthy of really serious consideration. These are, first, that continental judges are civil servants, and second, that the system of promotion makes such judges easily accessible to government influence.

In my opinion, neither of these points is in the nature of a sound objection.

Is it at all certain that the English system differs greatly from the continental system in respect of the first point? The English judges are not regarded as being part of the civil service—but are they not, like their continental brethren, appointed by the government and are they not paid out of public funds?

The question of promotion appears to be a matter in which the English system has a decided advantage. Yet, looked at closely, it loses some of its apparent significance. In most European countries, there is an age limit, varying between sixty

[17] *Vide* Ensor, p. 82.
[18] *Vide* Notes (9) and (10).
[19] The Formative Era of American Law (1938) Boston.

and sixty-five years, at which judges have to retire and leave the way open for the younger generation. The number of judicial posts is virtually without fluctuation; and so it is not unduly difficult to estimate approximately how many apprentices shall be admitted yearly, making due allowance for the possibility of premature retirements, etc. The proper handling of the problem of promotions is greatly facilitated by a general system of keeping systematic records of the qualification of judges. These records, kept by the chief officers of the several courts, are, next to seniority, the strongest factor influencing promotion. For qualifications there are several tests, one of them being the proportion in which judgments given by the judge in question have been approved or reversed on appeal.

It should not be forgotten that the state is at least as much interested in getting a good judge as the judge is interested in climbing up the ladder of preferment.

Continental judges are secured in their tenure of office—while, e.g., a County court judge in England may find himself removed from office by a Lord Chancellor. Again, continental judges, though not really well paid, are secured under a good pension scheme for themselves on retirement and for their wives and families.

What is the lesson to be learned from investigation of the sort that I have here, rather diffidently, attempted? Simply this—that we must try to learn more about each other by the methods of comparative research in a spirit of scientific impartiality.

Roscoe Pound[19] tells us that "the history of any legal system is largely the history of borrowing of legal materials from other legal systems", and that "except as an act of omnipotence, creation is not the making of something out of nothing." He adds, "the creative process consists in going outside of the authoritative legal materials of the time and the place. . . . and selecting something which is then combined with, or added to the existing materials and is then gradually given form as legal precept or legal institution."

Every legal scientist who is acquainted with more than one legal system will cordially subscribe to those statements.

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