

Factors affecting the independence of the court in Vietnam today

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Received 29 March 2018; published 5 June 2018

Abstract: *In any country, court independence is an indispensable attribute. However, the independence of the court may be affected by factors related to its organization and operation. This paper focuses on the judicial independence, the independence of the courts, and factors may affect such independence in Vietnam today.*

Keywords: Court, Judicial Power, Independent Judiciary, Vietnam

1. Judicial independence and the independence of the court

According to the *Beijing Statement of Principles of the Independence of the Judiciary*, “Independence of the Judiciary required that: a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of judicial nature”^(*). Maintaining the independence

of the judiciary is necessary to achieve the objective and proper functioning of the judiciary in a free and respected rule-of-law-based society.

The court is the body exercising judicial power. If the court is not independent, the judicial power shall not be exercised independently. According to the *Basic Principles on the Independence of the*

^(*) As cited in *Beijing Statement of Principles of the Independence of the Judiciary* (adopted

by the Chief Justice of the Supreme Court of 20 countries, including Vietnam, on August 19 1995 at the 6th Conference of Chief Justices of Asia and the Pacific was held in Beijing. This Statement was amended at the 7th Conference in Manila, Philippines August 28 1997), Article 3, http://www.toaan.gov.vn/portal/pls/portal/!PORTAL.wwpob_page.show?_docname=6562798.HTM

Judiciary 1985^(*), the independence of the courts is manifested as:

“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 State Member to provide adequate resources to enable the judiciary to properly perform its functions”.

Hence, the independence of the courts is expressed in three main respects:

(i) The court must be institutionally independent, that is, it must have an organizational system and its own rules of procedure; (ii) The court must have its own internal administration; (iii) The court’s decision is not subject to the intervention of other bodies, in other words, the court is independent in relation to other authorities, bodies, agencies, and individuals outside the court, and there is an independence between the courts. Beside, the independence of the courts implies two meanings, in general judicial authorities are independent organizations, and each member of the trial (Judges, Jurors/ Assessors) is also independent as an element constituting independent trial activities.

(*) As cited in *Basic Principles on the Independence of the Judiciary 1985* (Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 6th to September 6th, 1985 and endorsed by General Assembly resolutions 40/32 of November 29th, 1985 and 40/146 of December 13th, 1985). Section: Independence of the judiciary, <https://thuvienphapluat.vn/van-ban/Linh-vuc-khac/Nguyen-tac-co-ban-ve-tinh-doc-lap-cua-toa-an-1985-275836.aspx>

In Vietnam, the 2013 Constitution stated that: “2. During a trial, the Judges and Assessors are independent and shall obey only the law. Bodies, agencies, or individuals are prohibited from interfering in a trial by Judges and Assessors” (As cited in National Assembly, 2013, Article 103, Clause 2).

2. Factors affecting the independence of the courts in Vietnam

In fact, because the organization and operation of the courts are often linked to other legislatures, executives and judicial bodies as well as between courts, thus the independence of the courts is influenced by certain factors. In Vietnam, there are factors that affect the independence of the courts in general and the independence of judges, people’s assessors in particular as follow:

The organization and the management of the court.

The mode of organizing the system of courts shall have strong impacts on the court’s independence because it reflects the relationship between the court and other competent authorities and within the court.

In the relationship between the courts and the executive authorities, the local governments with their role on local administration in such areas as land, construction, public order, etc. shall affect the governance activities of the local court. Although the organization and personnel of local courts are not be decided by local authorities, but regional committees have an important voice in organizing and staffing local agencies, including the court. The leaders

of executive bodies often are of leader positions in the Party’s organizations (eg. President of the People’s Committee of the district is usually as deputy secretary of the district committee or member of the district committee), meanwhile the court is under the leadership of the Party’s system. Thus, considering the organization in the Party’s system, the judge may be the “subordinate” of the executive branch’s leaders.

In fact, the process of solving administrative cases has indicated the local courts’ dependence on local authorities. Although administrative jurisdiction over these cases has been widened, the number of administrative complaints remains very low. In 2017, the number of administrative lawsuit is only 21,613 cases, representing 4.3% of total handed lawsuit about 499,918 cases (See: Supreme Court, 2017). A reason for this situation is that people are hesitant to file lawsuits against state administrative agencies because they do not really believe in the ability and effectiveness of administrative cases and the independence of the judge with the defendant (usually chairman of People’s Committees at all levels, heads of departments, agencies, etc.).

Thus, legally, the court is not dependent on the executive, but in fact, the court is not really independent of the executive.

The survey data in Figure 1 shows the high proportions of discussions on the solution to the case of the judges with the other members of the Trial Chamber and the magistrates for criminal, civil, commercial, marriage, family, labor and

administrative cases. The discussion with other legislative and judicial bodies is not so much but still exists in all types of lawsuit. This practice shows that there is a significant impact from internal and external bodies of the court on the judicial activity.

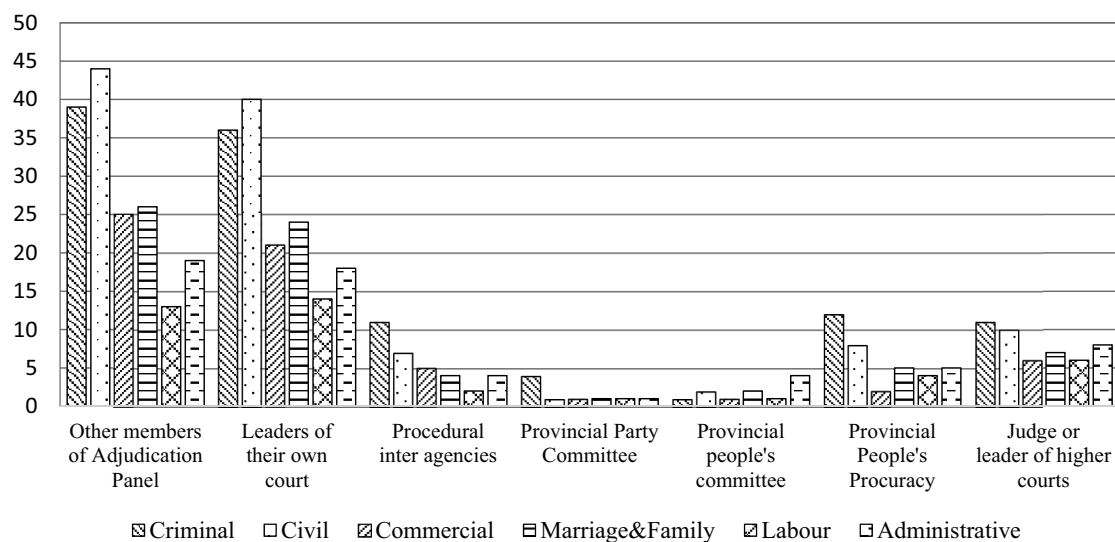
Beside, “Operation funds of the Supreme People’s Court, superior people’s courts, people’s courts of provinces,

National Assembly, 2014, Article 96, Clause 1). Thus, this issue may also lead to the dependence of the courts on the Government and Congress.

The relationship between the court levels.

In practice, the superior bases on the number of canceled or corrected judgment to consider the re-appointment of a judge, hence this issue shall create the subordination of the lower court

Figure 1: Provincial judges' consultation for settlement by case type



centrally run cities, rural districts, urban districts, towns, provincial cities and the equivalent shall be submitted by the Government to the National Assembly for decision after reaching agreement with the Supreme People’s Court. In case the Government and the Supreme People’s Court cannot reach agreement on estimated operation funds of people’s courts, the Chief Justice of the Supreme People’s Court shall propose the National Assembly to consider and decide on such funds” (As cited in

to the superiors. In order to avoid the corrected or rescinded case, it is possible that judges in lower courts seek directions from higher courts or “lobby” superiors to not edit or rescind their judgment.

Although the regulation on “request for direction” has been abolished but this phenomenon still exists. In other words, the independence of the courts in general and the judges in particular are still influenced by relationships between courts at all level.

Provisions on criminal burden of proof.

According to the law, in the procedure of handling criminal cases, the court with other procedure-conducting bodies shall be responsible for proving the crime. The independence of the courts at trial is more or less affected by the regulations. In accordance with these rules, the responsibilities to “prove criminal conducts” are directly put on the courts, People’s Procuracy and Investigative Agency. Since this is a responsibility, the court has to try to complete its mission. And because of the same responsibility, inadvertently, the court is put on the same side with the People’s Procuracy - the agency in charge of prosecution. This issue leads to the fact that the court shall tend to favor the procurator. The actual role of the court, as an independent body and without proven liabilities, is not only to conclude that the defendant’s guilty or innocent on the basis of evidences, records of other procedure-conducting bodies but also take into consideration whether these evidences are objective, lawful and adequate to convict the defendant. This means that the court must consider the arguments of both sides, the defendant’s proofs and the documents and evidence provided by the procurator.

The process of selection, appointment and tenure of the judge; working regulations for judges.

The independence of judges is also affected in the process of selection and assignment. A good process shall help to find out the best candidate and shall eliminate or reduce biased opinions caused by political or emotional motives.

As stipulated in the Law on Organization of the 2014 People’s Court, candidates for selecting judges of each level are chosen by Councils for the Selection of Judges under the Supreme People’s Court or Provincial Courts or the district-level People’s Courts.

Councils for the Selection of Primary-Level Judges, Intermediate-Level Judges and High-Level Judges shall be composed of the President of the Supreme People’s Court as its Chairperson, and one Deputy Chief Justice of the Supreme People’s Court, and representatives of the leaderships of the Ministry of National Defense and Ministry of Home Affairs as its members (As cited in National Assembly, 2014, Article 73, Clause 1). Therefore, this provision may lead to the fact that the Chief Justice may influence the judge. Furthermore, the Law on Organization of People’s Court 2014 has not provided a detailed description of the selection process from the nomination to consultation steps. In fact, judge candidates are nominated by leader of the court. This issue may make the appointed judges depend on the courts’ leaders. Concurrently, the requirement of written statement from the head of the department, opinions of other executives of the office where the candidate is working may also affect the independence of judges in their executives. Formally, this provision is considered open, democratic and unprejudiced, but the reverse side of this process shall easily create the situation for opportunism, avoid collisions of some judges, which may affect judicial independence.

The tenure of the Judge is also among factors that affect the judicial independence of the judge. If the term is short, they must pay more attention to the re-appointment. Article 74 of the Law on Organization of the People's Courts of 2014 provides that: "The initial term of office of judges is 5 years. For judges who are reappointed or appointed to another judge rank, the subsequent term of office is 10 years". This provision is considered as an important reform in reducing pressure for judges compare with the terms of tenure and re-appointment after each 5 years as before. However, it is also argued that the provisions of current tenure was derived from a view to control activities and accountability of judges, and not a consideration of the factor ensuring independence of judges (Quan Ngoc Thao, 2016).

The working conditions of judges such as salary, reward, discipline, dismissal, etc can also affect judicial independence. According to the current regulations, the Supreme People's Court applies five payrolls, in which the Chief Judge applies the payroll for the leading officials of the State, stipulating two salary grades; Judges, examiner and court clerks use professional salary payrolls for the court and procuracy. Other officers and public employees who do not hold any judicial title shall be applied the professional salary scale as public servants of administrative agencies. Officials and public employees holding leading posts in the Supreme People's Court are entitled to allowances of 0.2 to 1.3. The responsibility allowances

for judges, judges and court clerks are 15% to 30%. According to statistics of July 2017, the average salary at the Supreme People's Court is VND5.85 million per month and at the Judicial Academy is VND3.6 million per month (Thai Vu, 2017). The salary of the lower court, with the largest number of staff, especially the district court, is even lower. Judges' work is a particular type, for this reason they need a salary that is sufficient to meet decent living expenses, so they can work ethically and preserve morality, just as required by the law. Low wages can make judges vulnerable, being lured or corrupt when conducting legal proceedings.

The dismissal of judges should also be taken into account. Judges will be automatically dismissed when they retire, quit or move to another job. Or, judges may be relieved from duty due to their poor health, family circumstances or other reasons which are likely to render them unable to fulfill their assigned duties. (As cited in National Assembly, 2014, Article 81). Besides, the rules governing the dismissal of judges are generally applicable and may lead to the arbitrary application of competent authorities. In addition, judges are civil servants so the regulations on commendation and disciplining of civil servants are also applied to judges. This issue may result in the Judge's dependence on the court leader.

The impartiality, objectivity and integrity of the Judge.

Judges are not impartial and objective means that judges are not independent of their own conscience. Judicial

independence can be abused by individual motives then to become partial and bias in judges. Hence, judges can stand independent in hearing cases but remain corrupt and accept bribes.

Compensation and accountability in the judicial activities of judges.

Under provisions of Constitution of 2013 and the Law on Compensation of the State on the compensation liability in the criminal procedure, the court shall be responsible for compensation and the judges and the assessors shall be responsible for the reimbursement. Such provision shall raise the “psychological” burden on the court and the magistrates with the fear of being judged as “intentionally” or “negligent” in their execution. The independence of the court and judges are affected by these provisions because these officers, for that matter, may seek the “direction” of the superior court or of the collective leadership when dealing with complex cases.

Regulations related to people’s jurors.

The purpose of the participation of assessors in criminal trials is to ensure the principle of maintain people’s representatives in judge activities. However, assessors are only involved in the “hearing case” but not taking part in the “preparation process”, furthermore the actual experience and skills of the assessors are limited, thus assessors can not understand all content and key issues of the case in terms of the circumstance and the applied laws’ provisions. This will make more difficult for the assessors to

be independent with the judge and the participation of assessors in the jury is “formal” rather than the representative of people’s aspiration.

Besides, because assessors are not subject to any administrative liability relating to the quality of trials, even for the wrongful judgments if detected, unlike judges the handling of the responsibility of assessors may be difficult. Thus assessors can be influenced or be affected in their judgment.

3. Conclusion

In summary, the independence of the courts is the constitutional principle, the core of judicial power in the rule of law, plays an important role in ensuring the supremacy of the law, to balance and control state powers and to protect human rights. However, in order for the courts to be truly independent, there should be mechanisms to minimize the impact of factors that affect the independence of the courts in adjudication □

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(continued from page 9)

In the short and medium terms, it is important to remove the difficulties for domestic firms and to link them with the FDI sector, as well as to promote hi-tech investments in both agriculture and mechanic industry for lessening the dependence of growth on manufacturing sector. Those suggestions would be applicable as long as, on one hand, enterprises need to make effort themselves and, on the other hand, the Government's support is available in solving difficulties related to capital access, market issues, and new technology application for enterprises □

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