

## Independent Judiciary: Nature and Facets from the International Context

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### Abstract

*Independent judiciary is an essential social institution to guarantee the rights and liberty not only from the maltreatment of the individuals but also from the sovereign authority. It measures the dominant trademarks of a modern democratic society and the rule of law. Personal freedom in judicial decision making, institutional autonomy in the work of the judicature is a meter of the standards of the democratic state. The study of the independent judiciary has established attention for its rectangular role in society. Several UN and Non-UN documents have articulated independent judiciary and formulate standards for the smooth functioning of judiciary as autonomy and neutral body. This study generates broad concept about the nature of an independent judiciary from three different aspects of the international context. Firstly, the conventional and traditional notion of an independent judiciary that comprises the independence of individual judges and institutional autonomy of courts as an autonomous body. Secondly, the article includes structural and behavioral independence, then thirdly, the scholarship highlights the de facto and de jure independence in details. In the last point, the study consists of highlighting the independent judiciary in the various international and regional instruments revealing its prominence.*

**Keywords:** Independent judiciary, Structural independence, Behavioral independence, Institutional autonomy, *De facto* and *De jure* independence.

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## 1. Introduction

In the modern world, the government runs with three branches, i.e. the executive, legislature and the judiciary. Aristotle (384-322 BC) mentioned judiciary or court system is the third organ of the government (Barker & Stalley, 2009). As an essential organ of the State, judiciary clarifies and defines actual meaning of the law. It accomplishes functions from several facets. Primarily it applies the current regulations to settle clashes between individuals, private organizations, public bodies or between a government department and a private individual (Bari, 1993, p.1; Bari, 2011, p.1). Interpretation of the law belongs to the jurisdiction of the judicial authority as a tricky task. In other words, it has broad discretion to make law in the absence of clear indications of parliamentary legislation. Moreover, the judiciary has copiously played the role to ensure peoples live securely under the rule of law,<sup>1</sup> build a just and nondiscriminatory society by administering fair justice, confirming citizens' rights, punishing offender, and giving protection of an innocent individual from hurt and harm. Independent and impartial judiciary, therefore, is necessary to perform its all functions properly. In the matter of written constitution, typically, the higher court or the Supreme Court as guardian of the constitution then can be declared parliamentary legislation as illegal when it appears contradictory to the constitutional provisions. Alexander Hamilton states in Federalist No. 78: "... No legislative act ... contrary to the constitution, can be valid" (Hamilton, 2009, p. 237).

Independent judiciary is the *condicio sine qua non* for democracy, the rule of law and good governance. However, the idea of independent judiciary exists with a diversity of nature in the different legal systems. But, commonly, it works for the safeguarding of citizen's rights, promotion of the rule of law, and mechanism to the attainment of the appropriate remedy against injury to upholding the just society. Likewise, the judiciary can check over the corruption of executive, judiciary, bureaucrats, corporation or the institution. Moreover, to be capable of settling disputes fairly and impartially, mainly in which the government or his any agencies is one of the party, the court must be independent and free from a somewhat external force, pressure or influence (Shetreet, 1979, p. 57). Captivating such a position, as a result, international institutions and organizations including the UN are uninterruptedly trying to shape global standards of an independent judiciary. Like early history, where judges were removed for decisions that made despondency of the King, in the modern period judiciary also is not out of threat and pressure from various surfaces including political censure, executive grievance, and legislative control. The aim of this study to generate a wide range of conception and nature of independent judiciary that ultimately indispensable to the welfare country for upholding law and justice. The study is principally qualitative in nature with the analytical method. It depends on the analysis of reliable primary and secondary sources containing constitutional law, case law, the UN legal documents,

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<sup>1</sup> Universal Declaration on the Independence of Justice 1983, art. 2.01. (hereinafter Montreal Declaration); The Mt. Scopus International Standards of Judicial Independence 2008 consolidated 2015, sec. 1.2 (hereinafter Mt. Scopus Standards).

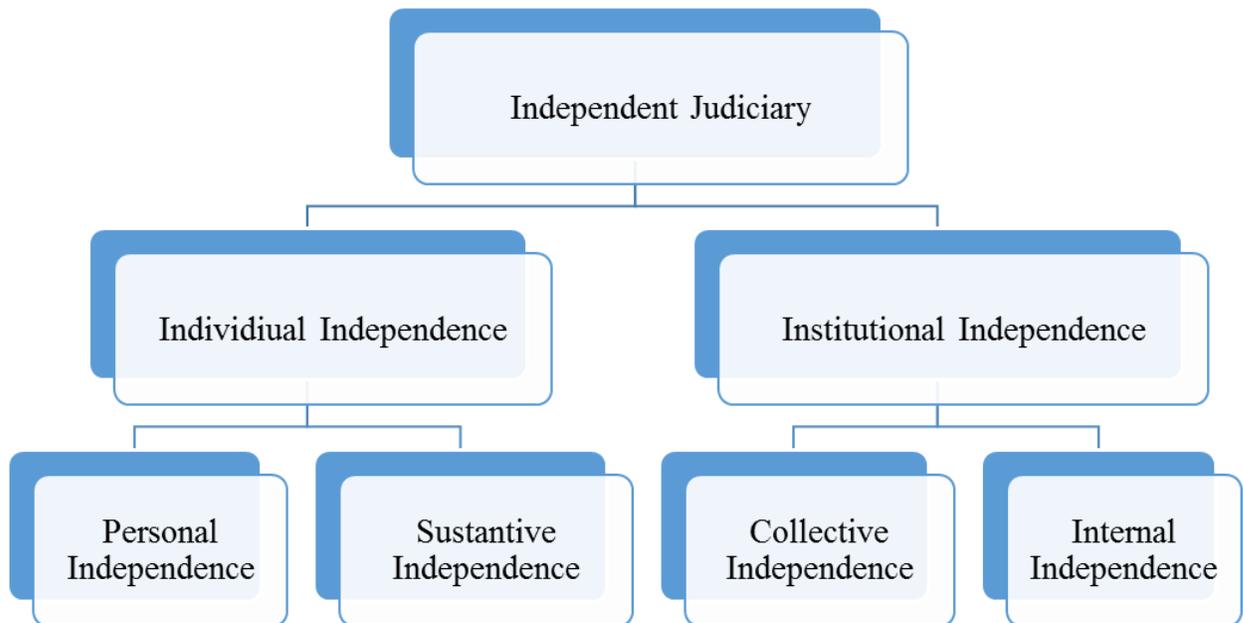
legal credentials of international organizations, national and international dependable journal articles, books, media reports, newspaper articles, and internet documents.

## **2. Nature of an Independent judiciary**

The independent judiciary is one of the fundamental values and basic pillar of the administration of justice in every country (Shetreet, 2012, p.18). Independence of the judicial system or independent and impartial judiciary is the foremost value and central principle of the administration of justice. The term or notion of independent judiciary is communal subject matter of research and discussion among legal scholars, constitutional commentators, lawyers, jurists, judges and political actors in various nations, particularly in the democratic society for plying various dimensional activities not limited to the guarantee the citizens' rights, promote the rule of law, maintain the constitutionalism and develop the economic growth. Also, in respect of written constitution judiciary could explore its functions from a different way to the people, and other organs of the government within certain limitations as a matter of check and balance. The sketching of an independent judiciary is hardly onerous, and it's a relative matter rather than the absolute notion that founded through a combination of many spectrums like the constitutional arrangement, legislative enactment, the selection process of judges either through merits priority or open-ended executive nomination with socio-political culture. Jerome Cohen remarks "Judicial independence is not something that simply exists or does not exist but the actual situation in all judiciaries are to some extent independent and to some extent subservient" (Cohen, 1969, p. 972). Judicial independence is a multifaceted concept (Shetreet, 2011, p. 3; Shetreet & Deschênes, 1985, p. 6), and "one of the least understood concepts" (Larkins, 1996, p. 607). It varies from country to a country subject to the government system, legal system, traditions and political estimation (Hailsham, 1978; Salzberger, 1993, p. 350). The notion of independence of the judiciary rests on the concept of separation of governmental organs: the executive, the legislature and the judiciary (Malleon, 1997, p. 659). Hence, an independent judiciary is a necessary component of the doctrine of the separation of power (Thompson, 1997), and *vice versa* separation of powers is an essential ingredient to ensure institutional independence of the judiciary (Kelso, 1993, p. 2210). The separation of power's doctrine as a basis of the independent judiciary; in the modern form, separation does not mean entire separation of the organs of government but maintain of a system of 'checks and balances' (Shetreet, 2011, p. 9).

Commonly, independent judiciary means judges' liberty to perform judicial functions without any explicit or implicit interference from the outside mainly from the executive branch of the government and judges' freedom from any internal influence. It necessitates that judiciary should not make subject to control by the executive branch of government and that judges should enjoy "protection from any threats, interference, or manipulation which may either force them to unjustly favor the government or subject themselves to a penalty for not doing so" (Larkins, 1996, p. 608). Green provides a wide-ranging definition of an independent judiciary. He defines: "The capacity of the courts to perform their constitutional function free from actual or apparent

interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control” (Green, 1985, p. 135). This definition accentuates that in the purpose of independent judiciary judges should perform judicial functions under constitutional responsibility out of any direct or indirect interfering by any branch of government, any institutions or any private individuals. Therefore, independent judiciary consists of two substantial aspects: the individual independence of the judges and the institutional independence of the judiciary as an autonomy body (Shetreet, 2011, p. 15; Akkas, 2002, p.14). In other words, the concept of independent judiciary maintains two elements: the independence of individual judges and the independence of the judiciary as an institution (Shetreet, 1985, p. 598; Ferejohn, 1999, p. 355). The scholars from many viewpoints have conferred the idea of an independent judiciary. Beyond the above core nature of the independent judiciary, there are another two notions offered concerning nature of the independent judicial system. Figure one shows the core nature of independent judiciary comprising of individual independence and institutional independence of the judiciary with their elements, and figure two displays the other two views of an independent judiciary.



*Figure 1: Core nature of Independent Judiciary*

### 3. Traditional Conception of Independent Judiciary (Individual Independence)

The general and traditional meaning of independent judiciary designates the ‘independence of individual judges’ from the government branches, chiefly from the executive branch of the government. In other words, traditional meaning of independent judiciary is that judges are free from any interfering to decide their decision by the political branches, particularly from the executive and free from personal anxiety because of exercise the judicial functions<sup>2</sup> (Bari, 1993, p. 2; Bari, 2011, p. 5). Harry Gibbs<sup>3</sup> mentions the traditional meaning of independent judiciary as: “no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions. So neither the parliament nor the executive, nor anyone else, should be able to bring the pressure of any kind to bear upon a judge in the performance of judicial duties” (Sturgess & Chubb, 1988, p.149). The idea of individual independence of judges means judges are freely able to perform judicial functions to decide the cases without fear of interfering or anticipation of penalty or reward (Ferejohn, 1999, p. 355). It involves that a judge shall be decided cases impartially in compliance with “assessment of the facts” and “understanding of the law” without any direct or indirect “restrictions, influences, inducements, pressures, threats or interferences” (Declaration, 1983, art. 2.02).<sup>4</sup> In performing the judicial functions by individual judges should be impartial and enjoy liberty from any direct or indirect control, influence or interference (Akkas, 2002, p.14). Actually, the first indispensable element of an independent judiciary is the independence of individual judges where judge ought to attain full liberty in exercising judicial functions and official responsibility out of any force or influence from any source. It is noted that interference to the individual judges’ independence is extensively recognized as severe transgression of the rule of law (Shetreet, 1985, p. 643). In respect of individual independence of judges must hold “both personal and substantive independence” that are required to keep safe judges from fears and pressure to their professional and personal safety that might affect their official functions or duties (Shetreet, 2011, p.15). Thus, the traditional meaning of the independent judiciary refers to the ‘independence of the individual

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<sup>2</sup> In 1959 The Congress of the International Commission of Jurists held in New Delhi recognized this approach about independent judiciary. See art. 1, Report of Committee IV, International Congress of Jurists, (New Delhi, January 1959).

<sup>3</sup> Sir Harry Talbot Gibbs (GCMG, AC, KBE, QC) 7 February 1917 – 25 June 2005, was 8th Chief Justice of the High Court of Australia during 1981 to 1987.

<sup>4</sup> The similar requisites to individual independence of judges mentioned in UN Basic Principles on the Independence of the Judiciary 1985, art. 2 (hereinafter UN Basic Principles) and Beijing Statement of Principles of the Independence of the Judiciary 1995, art. 3(a) (hereinafter Beijing Statement).

judges' comprising two elements: personal independence and the substantive independence of the judge.<sup>5</sup>

### **3.1 Personal Independence**

Personal independence of judge is the first and core values of the concept of an independent judiciary. It includes the tenure of judicial office is adequately secured until a compulsory retirement age, and the terms of services containing transfer, adequate remuneration, pensions privileges, travel allowance should not be under the control of the government, especially the executive (Shetreet, 2011, p.15; Shetreet, 1985, p. 598-599; Singh, 2000, p. 249). It directs that judge is not reliant on Government branches in any way that might influence him in reaching to verdicts in individual cases (Griffith, 1977, p. 29). Personal independence has defined as "that the terms and conditions of judicial service are adequately secured by law so as to ensure that individual judges are not subject to executive control."<sup>6</sup> The sufficient security of tenure of office of judge and terms and conditions of services are essential requisites to certify personal independence of judges that an individual judge might accomplish judicial duties without "fear or favor, affection or ill-will" (Malleon, 1997, p. 660). So, personal independence signifies that judge as a person his tenure of service and all other relevant terms of services should not be under control the executive branch of the government that may perhaps make an influence or pressure to decide ultimate judgment of the cases wait before him.

### **3.2 Substantive Independence**

Substantive independence also termed as decisional or functional independence, denotes "the freedom of judges to perform their judicial functions independently" (Shetreet, 2011, p.15). It refers to in respect of judicial decisions making, the exercise of the judicial functions and other official duties judges are individually subject to no other authority but the law and their conscience (Shetreet, 1979, p. 57; Shetreet, 1985, p. 630). International instruments identify "Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience."<sup>7</sup> Jurist *Taipale* mentions that judges in functioning justice only will be subservient to the law, and only the law can guidance the substances of the decisions, no other authority, even the state highest, is permissible to influence the judgments prepared by the judicial organ (Taipale, 1980, p.118). Substantive independence means judges' own independence to reach the decisions of the cases in line with the oath of the

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<sup>5</sup> Mount Scopus Standards 2008, sec. 2.2; International Bar Association's Minimum Standards of Judicial Independence 1982, art. 1(a) (hereinafter IBA Code); New Delhi Code of Minimum Standards of Judicial Independence 1982, art. 1(a) (hereinafter New Delhi Code).

<sup>6</sup> This meaning provides by the Mount Scopus Standards 2008, sec. 2.2.1; IBA Code 1982, art. 1(b); New Delhi Code 1982, art. 1(b).

<sup>7</sup> The IBA Code 1982, art. 1(c); Mount Scopus Standards 2008, sec. 2.2.2; New Delhi Code 1982, art. 1(c).

office, prescribed laws and ethics of justice without facing any internal or external threat, pressure or influence. Accordingly, an independent substantive judge is who “dispenses justice according to the law without regard to the policies and inclinations of the government of the day” (Stephen, 1985, p. 531). In accomplishment judicial functions judge carry out three types of duties: substantive, administrative and procedural. The substantive facet of the duty is related to the particular role of decision-making. It apprehensions “the determination of the finding of fact and the application of the relevant legal norms to the facts of the case” (Shetreet, 1985, p. 637). Under the concept of substantive independence judges should be enjoyed freedom, in performance of procedural; administrative and functional duties, from any direct or indirect interfering, indecorous pressures or influence (Shetreet, 1985, p. 630). It confirms the impartiality of judges, their capability to make judicial verdicts as per the merit of cases without any favor or fear (Geyh & Van Tassel, 1998, p. 31). Thus, like a kernel of independent judiciary, substantive independence implies judges’ own freedom to perform judicial functions and duties based on the assessment of the facts, the merit of the case, ethics of justice and understanding of law without fronting whatever any pressure, influence or inducement from anywhere.

#### **4. Modern Conception of Independent Judiciary (Institutional Independence)**

The contemporary idea of an independent judiciary does not restrict the individual independence of judges with personal and substantive freedom, but it must contain the collective independence of the judiciary as an autonomy institution. Similarly, the independent judiciary should not seem only judges free from “executive pressures or legislative interferences,” but then it must also comprise internal independence, that is, the judges’ independence from his judicial superiors or colleagues (Shetreet, 2011, p. 3). In another word, the contemporary notion of independent judiciary emphasizes to the individual independence of each member of the judiciary and the institutional independence of the judiciary as an organ of the government (Singh, 2000, p. 248; Russell, 2001, p. 6). Individual independence of judge is prerequisites to maintaining institutional independence. Without individual impartiality, freedom, and liberty, institutional independence as a body cannot shape. Individual independence makes strength the collective independence of the judge and makes confirm the internal independence among the colleagues. Therefore, institutional independence of the judiciary is necessary to confirm the independence of individual judges that makes a healthy environment in the institution among the judges to execute their judicial functions deprived of favor or fear. It is eminent that freedom and impartiality of individual judges are worthless without maintaining the independence of the judiciary as an institution containing the ‘powers and facilities’ that are essential to accomplish judicial functions (Green, 1985, p.135; Larkins, 1996, p. 611). Furthermore, a judge cannot be able to accomplish judicial tasks freely unless he holds authority in the institution over the human and other resources obligatory for performing legal duties (Millar & Baar, 1981, p. 54). Therefore, the contemporary concept of independent judiciary encompasses both individual independence of the

judge and institutional independence of the judiciary containing two elements: collective independence and internal independence.<sup>8</sup>

#### ***4.1 Collective Independence***

The judiciary is an essential social institution to promote the rule of law and to uphold justice for everyone. Hence, to development of such institution, the conception of the independent judiciary should not be restrained to the individual independence of judge, but it must also spread to the judicial independence as a body under the heading of collective independence (Shetreet, 2011, p.16). The notion of collective independence designates three-fold: substantive, administrative and procedural freedom that is a concern to the effective operation of the judiciary as a body. Financial substances included in the administration fold. It objects at practically the elimination of the control and dominant role of the executive or legislature regarding the different aspects of administrative and financial substances of the court. Moreover, collective independence stresses an ample immense active judicial contribution in the court administration with control over administrative staffs, assignment of cases, maintenance of court buildings, preparation and formulation of its budget and allocation of resources (Akkas, 2002, p.19). Interference of this feature (collective independence) of an independent judiciary has an inordinate impression on the independence of individual judges. If the judicial institution is subject of depending to the legislature, the executive or other institutions for its administrative and financial operation this might adversely impact on the performance of individual judges' judicial functions and official duties (Shetreet, 2011, p.16; Ferejohn, 1999, p. 355; Shetreet, 1985, p. 644).

The international instruments highlight that the central responsibility for the administration of courts should be conferred in the judiciary.<sup>9</sup> In the matter of assignment of cases, Montreal Declaration mentions that "The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court."<sup>10</sup> UN Basic Principles describes that "the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."<sup>11</sup> In the same way, the

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<sup>8</sup> The law and legal scholars widely recognize the concept of personal independence and substantive independence of individual judges. But the idea of collective independence and internal independence under the institutional independence of the judiciary as a body firstly recognized by the IBA Code 1982 then elaborated by the various international instruments i.e. the Montreal Universal Declaration on the Independence of Justice 1983, Beijing Statement 1995, and the Bangalore Principles of Judicial Conduct 2006 (hereinafter Bangalore Principles).

<sup>9</sup> Montreal Declaration 1983, art. 2.40; Beijing Statement 1995, art. 36.

<sup>10</sup> Montreal Declaration 1983, art. 2.43.

<sup>11</sup> UN Basic Principles 1985, art. 14.

Beijing Statement delivers “the assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.”<sup>12</sup> Regarding the judicial budgets, the legislature and the executive may have played a collaborative role, but the judiciary should have sufficient role to estimate the budget requirements to perform court functions. In this aspect, the Montreal Declaration shapes that “judicial budgets shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the competent authority.”<sup>13</sup> By the same token, the Beijing Statement offers “the budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.”<sup>14</sup> In the aspects of other courts administration, international instruments emphasize that the state should take the highest priority to provide enough resources for running smooth judicial activities. In this context, the Montreal Declaration states “it shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.”<sup>15</sup> The Beijing Statement offers that “the appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the Judiciary is represented and has an effective role.”<sup>16</sup> The Mount Scopus Standards denote to this aspect “Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.”<sup>17</sup> Further provides “The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.”<sup>18</sup>

#### ***4.2 Internal Independence***

The matter of internal independence connects among the judicial colleagues within the judicial institution. Internal independence directs to the judges’ independence from somewhat of pressure,

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<sup>12</sup> Beijing Statement 1995, art. 35.

<sup>13</sup> Montreal Declaration 1983, art. 2.42.

<sup>14</sup> Beijing Statement 1995, art. 37.

<sup>15</sup> Montreal Declaration 1983, art. 2.41.

<sup>16</sup> Beijing Statement 1995, art. 36.

<sup>17</sup> Mount Scopus Standards 2008, sec. 2.12.

<sup>18</sup> *Ibid.* at sec. 2.13.

influence or suggestion from judicial colleagues and superiors in reaching individual case decisions. It stresses that a particular judge would enjoy liberty from undue influences not only from external objects of the judiciary but also from within. In connection with adjudicative functions, internal independence involves that judge be free from pressures or directives of judicial lords or those who hold responsibility in the court's administration such as the chief justice or the head of the division in the court (Shetreet, 2011, p.16-17). It indicates that undue influence and pressure to judges or infringement of independence not only arise from outside but it may also arrive from inside of the judiciary, i.e., from colleagues or in particular by senior judges using their administrative powers and control (Russell, 2001, p. 7). Consequently, it is not satisfactory to a comprehensive independent judiciary that judge only be free from the interfering of the legislative or executive but also in deciding the case independence is necessary from his judicial fellow or colleagues and seniors holding court administrative powers.

International instruments have expressly recognized the significance of internal judicial independence.<sup>19</sup> Accordingly, this concept has acknowledged more elaboration and highlighted prominently in the following documents. The Montreal Declaration delivers: "In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his [or her] judgment freely."<sup>20</sup> In the same way, the Beijing Statement offers: "In the decision-making process, any hierarchical organization of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment."<sup>21</sup> These instruments recognize that internal independence may violate from any hierarchical organization or any difference in rank or grade of the judiciary, that means influence or pressure may come from superior judges or courts (Akkas, 2002, p.17). It is claimed that internal independence is appropriate only to the procedural and substantive phases of adjudication (Cappelletti, 1983, p. 8). For the reason that, in a general rule, a judge cannot enjoy internal independence with keeping position against supervision or leadership by the judge who is accountable for the administration of courts (Shetreet, 2011, p.17). The procedural duty includes the examination of the witness, recording the confession of the offender, taking evidence and disposal of interlocutory matter that is essential portions to reach an appropriate decision. Any

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<sup>19</sup> IBA Code utters that "in the decision-making process, a judge must be independent vis-a-vis his judicial colleagues and superiors", IBA Code 1982, art. 46; Bangalore Principles states "in performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently", Bangalore Principles 2006, princ. 1.4.

<sup>20</sup> Montreal Declaration 1983, art. 2.03.

<sup>21</sup> Beijing Statement 1995, art. 6.

endeavor to influence with the procedural and substantive duties concerning the genuine decision-making tasks by associated judges is danger and great concern to the internal independence of judges (Akkas, 2002, p.17-18). However, all interfering or influences from the higher court are not considered a violation of the freedom of the internal independence of judges.

It is a reminder that there are conflicting opinions vis-à-vis supervision of the higher courts on the definition of the internal independence particularly its replicated in the doctrine of precedent approach (Shetreet, 2011, p.17). From the one side, civil law countries, such as Germany; China, recognize the idea of internal judicial independence as spreading to judges' independence to disregard precedent concerning the superior court verdicts (Shetreet, 2011, p.17). On the other side, common law countries perceive the subordinate lower courts must follow the decisions of higher courts and sometimes by the same court. The directions and supervisions from superior judges to the lower courts judges don't measure as prejudicial or violation of the personal independence of the judge. For instance, in Bangladesh, the Constitution grasps the application of the principle of precedent.<sup>22</sup> An appellate court enjoys the power of remand of cases. In this aspect, the appellate court may give direction relating to the issue to be tried or may provide such other instructions are necessary to do justice.<sup>23</sup> Furthermore, the Supreme Court has the power to inspect the decisions of the subordinate courts. In this context, the HCD has inherent power to deliver such order as may be desired to authorize any direction under the Criminal Procedure Code or to prevent abuse of the procedure of any court or else to protect the ends of justice.<sup>24</sup> Also, the HCD of the Supreme Court has the power to withdraw any case from subordinate courts to itself upon the satisfaction that matters involve the question of constitutional interpretation or problem of general public importance. And, then decide the case by itself, or send to the that lower court wherefrom the case was quiet or assignment to any other subordinate court after defining the question.<sup>25</sup>

## **5. Others nature of the Independent Judiciary**

The conception of an independent judiciary is widely debated concern not just only in the legal scholarship but also the field of administrative and political science scholarship. Likewise, the economist and world largest monetary institution (world bank) have also been considered its

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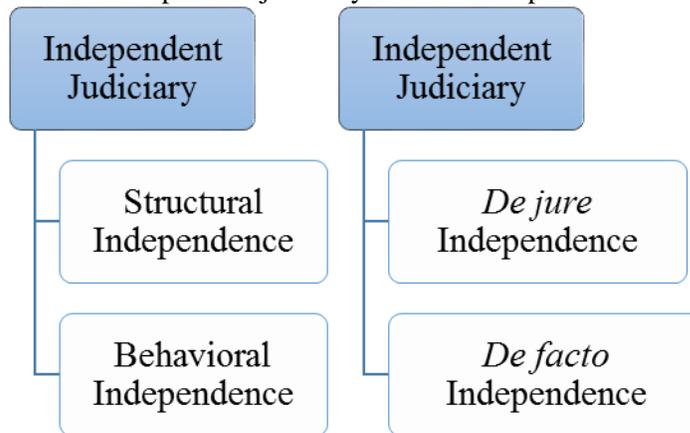
<sup>22</sup> Art. 111 of the Constitution of the People's Republic of Bangladesh 1972 (hereinafter 'The Constitution') states: "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."

<sup>23</sup> The Code of Civil Procedure 1908, sec. 107, order 41 rule 23.

<sup>24</sup> The Code of Criminal Procedure 1898, sec. 561A.

<sup>25</sup> The Constitution 1972, art. 110.

significance and have taken several projects and grants, particularly in client countries, for improving the procedural quality, efficiency and effectiveness of judicial system.<sup>26</sup> Figure two displays the nature of the independent judiciary from other aspects.



**Figure 2:** Others nature of Independent Judiciary

Another aspect concerning the nature of an independent judiciary has categorized as ‘*structural independence*’ and ‘*behavioral independence*.’ The structural independence signifies the system of government in which all divisions of government are autonomous by the constitutional arrangement under the principle of separation of power. Many countries have arranged the structure of their government based on that principle, but the nature of the principle varies across countries with two copiously mismatched forms of that principle existing in the world (Dam, 2007, p.106-107). The American concept of the separation of powers establishes three autonomous bodies of the government under the U.S. Constitution. It also habitually denoted as a scheme of ‘checks and balances.’ Under this system, judges apply the law, but when the law is conflicting to the constitution, the courts apply the constitution not the act passed by the Congress. This power has used under the authority of judicial review which was decided by the

<sup>26</sup> The World Bank sponsors primarily in client countries to progress judicial quality and procedural standards. For more authorization, see among others report, “*World Development Report 1997: The State in a Changing World*”; “*Helping Countries Combat Corruption: The Role of the World Bank*” (1997); “*World Development Report 2002: Building Institutions for Markets*”; “*World development report 2005: a better investment climate for everyone*” and “*Initiatives in Justice Reform 1992-2012*”, The Office of the Publisher, The World Bank. See comprehensive information about projects and grants of the World Bank at [www.worldbank.org](http://www.worldbank.org). Further details regarding justice reform projects can find on the Law and Justice Institutions page at <http://go.worldbank.org/SK9CKPG830>.

Supreme Court in the remarkable case of *Marbury v. Madison*.<sup>27</sup> The British concept emphasizes the legislature is sovereign<sup>28</sup> and sole voice to speak for people. Under this structure, there is no judicial review to set aside the parliamentary law, judges apply statutes enacted by the legislature, and the judiciary is not able to perform as an independent voice. In this context, the separation of powers intended that the authority to legislate is only in the Assembly (Dam, 2007, p.107). As per long-lasting English doctrine, “Parliament has the right to make or unmake any law whatever,” and “No person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament” (Wade, 1961, p. xxxiv–xxxv). As Blackstone remarks about the competence of Parliament: “The power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, with any bounds. . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves. . . . It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament” (Blackstone, 2001). The core differentiates issue between two forms is preserving judicial review, wherein the judiciary enjoys the authority for clarifying legislation and administrative actions or regulation delivered by a government official or regulatory body concerning unconstitutionality under the judicial review. In reality, the power of judicial review seems as an inherent power of the supreme court, constitutional court or higher court of the country when the constitution has written and adopted the particular formal procedure of voting provisions or referendum in the matter of the amendment of the constitution. The behavioral independence denoting the judges will not be emotional and bias and will be able to resist political forces and to repel the enticements of corruption to adopt genuinely autonomous decisions (Dam, 2007, p.107, 112). Scholars<sup>29</sup> organize independent judiciary into ‘*de jure* independence’ and ‘*de facto* independence’. Feld & Voigt (2003) & (2004) brands the term judicial independence (JI) in their cross-country research on the independent judiciary and economic growth. Later Melton & Ginsburg (2014) have discoursed the relationship between *de jure* and *de facto* judicial

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<sup>27</sup> 5 U.S. 137 (1803).

<sup>28</sup> See among others cases, *A v Home Secretary* (No 2) [2005] UKHL 71; *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508; [1920] UKHL 1; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, [1982] 2 WLR 918 and *R (Jackson) v Attorney General* [2005] UKHL 56.

<sup>29</sup> See for details, J. Mark Ramseyer (1994) “The Puzzling (In)Dependence of Courts: A Comparative Approach” 23 *Journal of Legal Studies* 721–47; Matthew C. Stephenson (2003) “‘When the Devil Turns.’: The Political Foundation of Independent Judicial Review” 32 *Journal of Legal Studies* 59–86; Lars P. Feld, and Stefan Voigt (2003) “Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators” 19 *European Journal of Political Economy* 497–527; Lars P. Feld, and Stefan Voigt (2004) “Making Judges Independent—Some Proposals Regarding the Judiciary” Working Paper No. 1260, *Center for Economic Studies and Ifo Institute* (CESifo), Munich.

independence. The *de jure* independence used to consider of prescribed legal rules to defend judges. Melton and Ginsburg mention “the promise of judicial independence” gets more credibility by the constitutional provisions. They indicate three reasons in favor of their view. First, provisions “serve to insulate the judiciary from other actors by reducing the number of weapons at the disposal of the judiciary’s potential enemies.” Second, they increase “the cost of interfering with judges, in part because it informs other actors about potential threats to the judiciary.” Third, they raise “the likelihood that other actors will coordinate to defend the judiciary’s independence when it is threatened” (Melton & Ginsburg, 2014, p.191-192). In measuring *de jure* independence, features redirect institutional engagements connected to the courts, the judicial appointment process, judicial terms and tenure, judicial compensation, court accessibility, case allocation, judicial review of ordinary legislation, and publication of legal decisions (Feld & Voigt, 2003; Feld & Voigt, 2004). Melton and Ginsburg have branded six components of *de jure* judicial independence: i) statement of judicial independence; ii) judicial tenure; iii) selection procedure; iv) removal procedure; v) limited removal conditions; and vi) salary insulation (Melton & Ginsburg, 2014, p.195-196). The *de facto* independence connected to the real experience of courts and judges in their functions. In determining *de facto* independence, factors considered the definite term length of supreme court judges, changes in the number of judges on the supreme court over time, judicial compensation in actual terms, changes to procedural rules of the supreme court, and the inclination of the executive and legislature to appliance judgments of the supreme court (Feld & Voigt, 2003; Feld & Voigt, 2004). In brief, the conception of independent judiciary includes the following indispensable components: fairness, impartiality and free from bias in court proceedings, independence from political or government factors, independence from judicial authorities, colleagues and organs, liberty from non-judicial organs, and internal freedom of judges.

## **6. Highlighting Independent Judiciary in the International Instruments**

The importance of an independent judiciary has been highlighted both in international and regional instruments. In 1701 the base of the development of the idea of an independent judiciary was established in England by the Act of Settlement. In 1776 the absence of independence of the judiciary was itemized by the American revolutionaries as one of the grounds of their revolution in the declaration of independence. In the modern time, the charter of the United Nations emphasizes to achieve international co-operation, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction.<sup>30</sup> The safeguarding of human rights and fundamental freedoms are only possible through confirming justice through fair trial under the independent and unbiased judiciary. Later, the United Nations (U.N.) adopts the Universal Declaration of Human Rights (UDHR) in 1948, and the concept of an independent

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<sup>30</sup> The Charter of the United Nations 1945, chap. 1, art. 1(3).

judiciary has recognized as a vital principle for the protection of human rights. The UDHR provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.”<sup>31</sup> The European Convention on Human Rights (ECHR) delivers, everyone has right to a fair and public hearing by an independent and impartial tribunal in the purpose of his civil rights or any criminal charge against him.<sup>32</sup> A similar provision has espoused in the International Covenant on Civil and Political Rights (ICCPR) in 1966 adopted by the UN General Assembly. The (ICCPR) offers, “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>33</sup> The American Convention on Human Rights 1969 also emphasizes regard competent, independent and impartial court or tribunal for hearing and determination of rights and obligations of a civil, criminal, labor, fiscal, or any other nature.<sup>34</sup> The unique international human rights document to children, Convention on the Rights of the Child 1989 (CRC), also accentuates about competent, independent and impartial judicial body for fair hearing according to the law without delay. The CRC declares “...to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance....”<sup>35</sup> Moreover, outside these above mentioned international instruments, the International Commission of Jurists has arranged various congress in various places concerning the rule of law, the protection of fundamental rights and freedoms in which extensively articulated to the independent judiciary.<sup>36</sup>

## 7. Conclusion

James Madison, one of the US Constitution’s principal builders, uttered the government entails three pillars: executive, legislative, and judiciary; “that these three great departments of power

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<sup>31</sup> Universal Declaration of Human Rights (UDHR) 1948, art. 10.

<sup>32</sup> The European Convention on Human Rights (ECHR) 1950, art. 6(1).

<sup>33</sup> International Covenant on Civil and Political Rights (ICCPR) 1966, art. 14.

<sup>34</sup> The American Convention on Human Rights 1969, art. 8.

<sup>35</sup> Convention on the Rights of the Child (CRC) 1989, art. 40(2) b.

<sup>36</sup> The extraordinary congress about the independence of judges is the International Commission of Jurist Conference, Caracas, Venezuela, 1989. The latest 19th World Congress of the International Commission of Jurists held in Tunisia on 23-24 March 2019. See more others declaration of congress or conferences of International Commission of Jurists at <https://www.icj.org/about/congresses/>.

should be separate and distinct, and that each branch work as a check and balance, one to the other” (Madison, 2009, p.102). John M. Walker Jr., Circuit Judge; US Court of Appeals for the Second Circuit, articulated the judiciary’s place as the third co-equal, co-ordinate, but independent branch of government (Walker Jr, 1996, p. 48). Therefore, similar to other divisions of government, the judiciary is considered as an important social institution to ensuring secure living of people in society through its impartial and independent role. Hence, the study of an independent judiciary is increasing progressively in national jurisdiction as it is an indispensable for liberty and democracy (Shetreet, 2011, p. 3). Although, the notion of independence is differing from country to country on the basis of historical, social and political ideology. Independent judiciary contains not only at the individual level but also in the institutional level that is critical for promoting procedural impartiality, fairness, efficiency, access to justice, and economic growth. At the international level, there are several instruments regarding standards of an independent judiciary that might enhance the judicial credibility, integrity, neutrality, and promote public confidence in the adjudication system. Thus, to guarantee administering justice by judicature independently and impartially, the state should maintain minimum international standards of the independent judiciary through legal enactment in the constitution or statutory law. Simultaneously, in the modern period judiciary is not free from the unaccepted threat of political criticism not only in the low income or developing country but also in the many developed nations. To be successful judicature, hence, it must enjoy liberty; impartiality; should maintain international standards in the event of administering justice, and must be rid of from threat; political censure or pressure; undue influence or interfering to deciding verdict based on specific law and fact.

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