Judicial independence: independence from what exactly?

by Lev Tsitrin

Thomas Friedman of the *New York Times* has become exactly like me: he is obsessed with the judiciary. The trigger for our shared obsession is different, however: for Mr. Friedman it is the wish to smear Netanyahu's Israel with an "anti-liberalism" brush, accusing it of becoming a majoritarian tyranny that would oppress the minorities – gays, Arabs, Palestinians, while for me it is the Kafkaesque experience of judges replacing in their decisions my lawyers', and the government lawyer's argument with the utterly bogus argument of judges' own concoction that allowed them to decide the case against me and for the government, while without such brazen substitution

they would have had no choice but to decide the case for me, and against the government.

Column after a column (his latest being "*American Jews, You Have to Choose Sides on Israel*." Mr. Friedman froths at the mouth at Israel's impending "judicial putsch to crush the independence of the country's judiciary."

And to think of it, "judicial independence" is at the core of my grievance, too – except that unlike Mr. Friedman, insofar as I am concerned US judges are far too independent – they are independent of facts, law, and process (though I may be repeating myself here: the "process" – the Constitutionally-guaranteed "due process" is part of the "law" – if the Constitution that guarantees it is to be considered a "law.")

In other words, the very "judicial independence" that Mr. Friedman lauds as the signature demarcation line between democracy and autocracy, between liberalism and tyranny, I view as the clear hallmark of tyranny.

But let's first define what we are talking about. What should "judicial independence" entail? What should judges be "independent" from – and what has to bind their decisions, depriving them of free agency?

At present, US judges are not independent – they are not independent from their biases, from their politics, from their gut feelings. Judges are completely free agents, having given themselves, in Pierson v Ray, the right to act from the bench "maliciously and corruptly" – in other words, to decide cases arbitrarily. Ostensibly, court cases are still decided on the basis of the argument – but since judges are free to replace parties' argument with judges' (a process whereby judges become parties to the case, in clear violation of "due process" – except that "due process" has been superseded and subsumed by judges' self-given right to be "corrupt and malicious"), the argument is pliable, and can be forced into

any shape desired by the judge. (In Israel, judges use, to the same effect, the notion of "reasonableness" which allows them to decide cases based on their gut feeling of who is in the right – the justification which, to Mr. Friedman's horror and chagrin, would be axed by the suggested reform.)

How is arbitrary judging the hallmark of democracy? How is judicial process in which it is impossible to prove anything in court – since the court only considers proofs offered by judges and not by parties themselves (lest judges be forced to decide a case for a party the judge does not want to win) anything but tyrannical, the tyranny in question being the tyranny of judges, judiciary acting as a "despotic branch," as Jefferson put it?

It speaks volumes that American political experiment that was the culmination of the "Age of Reason" cannot function under a judiciary that follows "due process" rather than violates it, that the reason (the reason of the members of the public who come to the court to resolve their grievances, that is) gets suppressed, and the "judicial independence" becomes judicial license to act arbitrarily.

Judiciary is but a branch of government – and the government that is "independent" is, by definition tyrannical. Human history amply (and tragically) confirms this fact – the names of Hitler, Stalin, Mao, Khomeinei, Kim, Xi are sufficient illustrations of unrestrained, "independent" rule.

The reader will be right to object that the judiciary is not the only branch of US government, so judges' self-given license to act arbitrarily should be eliminated by other branches – the legislative and executive. In theory, this is true – but those two branches are not trimming the arbitrary powers of the judiciary. The fact that judges gave themselves the right to act from the bench "maliciously and corruptly" does not bother (let alone enrage) our legislators one bit – in fact, they don't want to know or hear about it (I tried,

many times, to tell them, but they won't listen.) The press is mum, too – Mr. Friedman will go into paroxysms of righteous indignation over any number of outrages, both foreign and domestic, but saying a word against "corrupt and malicious," arbitrary judging right here in the US – heaven forbid! So, what's the use of having three coequal and independent branches of government, plus a much-lauded "free press" when they are all in cahoots with "corrupt and malicious" judiciary, merely trying to put judges of their own political ilk on the bench, so as to get legal protection for their agendas – rather than taking politics out of judging?

And it is on the latter that the meaning of "judicial dependence" must hinge. For there to be such a thing, judging has to be independent from judges' politics; politics should not be a factor in judicial decision-making. It is only when the outcome of the case is independent from the identity of a judge – male of female, conservative or liberal, republican or democrat – will we achieve true "judicial independence." And this, in turn, will only be possible when judges are unable to inject and adjudicate their own argument, but have no choice but to adjudicate the argument given them for adjudication by the parties. Block judges from using their own, "*sua sponte*" argument – and "judicial independence" is assured, because when the decision hinges on parties' argument rather than judges', no external force will be able to sway it, and political views and allegiances of judges will become immaterial. It is only when judges certify the winning argument, rather than provide it, can we have independent judiciary. The judiciary we currently have in place – the judiciary that is independent of fact, law, logic,and procedure – is Kafkaesque rather than independent.

To Mr. Friedman and the *New York Times,* I'd make a simple suggestion: worry less about the independence of the Israeli judiciary and its impact on democracy, and worry more about our own, "corrupt and malicious" one – the judiciary that is

neither democratic, nor independent.

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