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The Challenge of Maintaining the Rule of Law: Ensuring Legitimacy of Courts at National and Cross-National Levels

I. Introduction

In order to preserve the legitimacy of the justice system, the system must respect a number of fundamental values. These include judicial independence and impartiality, accessibility to the justice system, efficiency, fairness and public confidence in the courts. Implementing all these essential values is not an easy task; as will be demonstrated in this paper, the application of certain values might contradict and conflict with the application of others. In addition, fully implementing these judicial values might require the allocation of resources, and may even slow down the process of justice. Therefore, at times, a choice must be made between these values, after taking into account the variety of implications each one of the choices comprises.

In recent months and years, there have been some serious challenges to the justice system and to the culture of democracy. These challenges emerged as a result of attempts by a number of countries to restrict important aspects of the culture of democracy, including a free press, civil society organisations, as well as targeting the justice system and the administration of courts and judicial appointments. Specific attention should be given to developments that took place in Poland, Hungary and Romania, as well as in other jurisdictions.

The regrettable events in a number of jurisdictions, presenting threats to the rule of law and placing the culture of democracy at risk, require clarification and emphasis on two main aspects. The first aspect is the insistence on respect for the fundamental values of the justice system in general. The second is the emphasis placed on protecting the independence of the judiciary, particularly the collective judicial independence that was targeted by attempts of the executive branch to intervene and control in numerous countries. In light of all these developments, the paper will focus on these two aspects.

The fundamental values of the justice system include a variety of principles and procedural rules that ought to be preserved. The separation between the judiciary and other branches of government is a central element of checks and balances that assists in maintaining the court's impartiality. In addition to the principle of impartiality, a court that will implement principles of integrity, speed and utmost efficiency will necessarily provide a high quality of justice. The high quality of the judicative process is comprised of high judicial ethics and integrity, as well as of the insurance of certain rights, such as the right of appeal. Justice and fairness can also be indicated by the correction of errors on appeals in individual cases when needed, and by observing sound rules of law of the legal system. The efficiency of the judicial process and judi-

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cial administration includes the careful supervision over various aspects. Among them are: the cost of litigation, the time management of trials, the handlings of court delays and backlogs, and the management of case assignments. The accessibility to courts is also a valuable aspect of maintaining justice. Full access to the courts can be ensured by allowing economic access, geographical access, procedural access and substantive access. The principle of public confidence in the courts includes the preservation of the publicity of trials, a defined judicial immunity from injury and restraint, and good taste criticism of judicial decisions. Without maintaining these fundamental values, any court will lose its legitimacy, both within the court's state territory, and when its validity is examined overseas in cross-country litigation.

The essential values that this paper will focus on are the value of judicial independence, and a special aspect of judicial independence, i.e. the collective independence of the judiciary. Collective independence entails the responsibility of administering the courts and will be examined by analysing the various existing models of responsibility for court administration in diverse jurisdictions. Judicial independence is a central value of the justice system. Today, judicial systems around the world seem to be part of two parallel developments. The first, a crisis in the rule of law and attempts to destabilise and de-legitimise the system of justice, and the second is an increase in the court's administrative powers and an improvement in the quality of justice due to the empowerment of international tribunals dealing with human rights and international organisations watching and reporting human rights violations.

Regrettable developments regarding the undesirable involvement of the executive branch in the judicial branch in many systems exhibit the disadvantages of this prevalent substantial involvement. For maintaining democracy and the rule of law, it is essential that that the judicial branch will take more control over the administrative aspects of the legal system in order for judicial independence to be maintained, both collectively and individually. The exact model of administrative responsibility for courts depends on each jurisdiction. The United States has demonstrated a long and meaningful process of judicial independence and self-management, with significant lessons. Other countries too have exhibited a less strict mechanism of administrative control, by sharing or dividing the administrative power over the justice system, which eventually leaves both the executive branch and the judicial branch with joint administrative control.

The central argument of this paper is that the legitimacy of the courts is desired not only at a national level, but required internationally as well. This legitimacy can only be insured through the proper implementation of the fundamental values of the justice system. One of the main fundamental values is individual and collective judicial independence, which is so direly necessary for the maintenance of the rule of law and democracy.

II. Recent Challenges to the Rule of Law and the Culture of Democracy

In numerous cases, the Court of Justice of the European Union and the European Court of Human Rights have dealt with issues concerning judicial independence and challenges to the rule of law. In their decisions, the Courts stressed the importance of

the rule of law and emphasised the duty of the Member States to respect the rule of law in all its aspects, such as judicial independence and human rights.[1]

The developments in Hungary, Poland, Romania and Turkey have been the subject of much discussion and criticism following executive and legislative actions that adversely affect the culture of the democracy and the independence of the justice system.

In September 2018, the European Union Parliament voted to sanction Hungary for posing a "systemic threat" to European Union values and the rule of law, initiating punitive action under Article 7 for the first time, with 448 voting in favour of the motion, 197 against and 48 abstentions, in an act that can lead to Hungary's voting rights being suspended.[2]

Recent developments in Hungary can shed light on this decision and on the challenges that the rule of law is facing in Europe. In 2011, the Hungarian Parliament approved several Transitional Provisions and introduced a new criterion for the election of the new President of the Supreme Court, which eventually led to the early termination of office of the former President of the Hungarian Supreme Court, Mr *Baka*, who had held the position of the President of the Hungarian Supreme Court since 2009, was publicly outspoken concerning several constitutional and legislative reforms led by the government at that time and affecting the judiciary (specifically the new initiative to lower the mandatory retirement age for judges from 70 to 62). After his dismissal by the executive, *Baka* filed an application against Hungary with the ECtHR in 2012. The European Court of Human Rights issued its decision on the *Baka* case in 2016, in which it held that Hungary had violated the right of access to court of the former President of the Hungarian Supreme Court.[3] In the Court's view, the series of events leading to *Baka's* dismissal from his position point to an evident causal link between *Baka's* exercise of his freedom of expression and the termination of his mandate. The Court added that the premature termination harmed the independence of the judiciary and also mentioned that this measure had an undesirable chilling effect on

1 See ECtHR, Baka v Hungary, App. No. 20261/12, 23 June 2016; Case c-550/09 E and F [2010] ECR I-06213, at para. 44; Case c-456/13, *T & L Sugars and Sidul Açúcares v Commission* [2015] ECR 286, at para. 4; Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-08613, at para. 49; Case C-583/11 *P, Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECR I-nyr; Case C-72/15 *OJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2016] ECR; Case C-411/10 *N. S. v Secretary of State for the Home Department* [2011] ECR I-13905; Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR, at para. 94; Opinion C-2/13 *Enquêtes Douanières v Humeau Beaupréau SAS* [2014] ECR; Case C64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2017] ECR, opinion of Advocate General at Art. 19.

2 *Rebecca Staudenmaier*, EU Parliament Votes to Trigger Article 7 Sanctions Procedure against Hungary, DW – Made for Minds, 12 September 2018, https://www.dw.com/en/eu-parliament-votes-to-trigger-article-7-sanctions-procedure-against-hungary/a-45459720; *France 24*, Parliament Initiates Steps Under Article 7 Over Hungary's Systemic Threat to EU Values, France 24 News, 12 September 2018, https://www.france24.com/en/20180912-european-parliament-calls-punitive-action-against-hungary-over-rule-law.

3 The European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), Art. 6 and Art. 10; *Baka*, fn. 1.

judges from participating in the public debate on issues concerning the judiciary. The Court added that this measure is not acceptable in a democratic society.[4]

A crisis of the rule of law also occurred in Poland. The crisis started in 2015 with the election of the right-wing *PiS* government (Law and Justice party). Since coming into power, the party decided to restructure the justice system in Poland and initiated, reforms including radical modifications to the justice system. The most controversial new law the party initiated decreases the mandatory retirement age for Supreme Court judges from 70 to 65 years (and for female judges to 60 years). This new legislation effectively forces 27 of the 74 sitting judges to retire, including *Malgorzta Gersdorf*, the First President of the Supreme Court. Notably, all judges older than 65 wishing to continue to work after their "retirement" may file a request to the President of Poland. The measures taken by the Polish government to reform the court system were widely criticised, both by Polish judges and by external bodies, as undermining the independence of the judiciary.

The European Commission started to get involved in Poland's policy in 2015, and since then it has issued a number of recommendations and taken part in protracted negotiations with the Polish authorities. In December 2017, the Commission took the unprecedented step of triggering the Article 7 procedure. Article 7 of the EU Treaty, which has never yet been used, provides a mechanism for preventing breaches of EU values and deciding sanctions against the member state concerned, should they occur.

With respect to Poland, the EU Commission issued a lengthy announcement stating that the rule of law in Poland is at serious risk. Nevertheless, the Polish government has refused to change its controversial judicial reforms. To proceed with Article 7, and move towards suspending Poland's voting rights, the Commission needs the support of four-fifths of the Member States. In July 2018, the Commission launched an infringement procedure against Poland on the grounds that its Supreme Court reforms violate EU law. The Commission said that the Supreme Court law is "incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges."[5] As of September 2018, the first hearing has not yet been scheduled.[6]

Romania has also experienced a threat to its rule of law and its democracy, when a new cabinet, led by the Social Democratic Party (*PSD*), fuelled significant public disorder by attempting to pass emergency ordinances and limit judicial independence while undermining the country's anticorruption framework, immediately after taking office in January 2017. These attempts were received with massive public protests after making public two pieces of legislation that would have undermined the efficiency of the criminal justice system in the country. The first included amendments to the Criminal Code that decriminalised certain offences and limited the scope of others, as

4 *Baka*, fn. 1, para. 130.

5 The infringement case is unfolding separately from a different procedure, the so-called Rule of Law dialogue. This dialogue has been in place since January 2016, and could lead to the suspension of Poland's voting rights in the Council of the EU. The EU commission stated in August that the infringement does not stop this dialogue, "which is still the commission's preferred channel for resolving the systemic threat to the rule of law in Poland.".

6 *Peter Teffer*, EU Commission Steps Up Legal Case Against Poland, EU Observer, 14 August 2018, https://euobserver.com/political/142585.

well as controversial changes of the procedural rules. The second amendment, presented in the same month, included a generous pardon that would apply even to serious offences, such as corruption and violent crimes. Faced with this massive social apprise, the government withdrew the controversial amendments. Minister of Justice *Florin Lordache* resigned in February of that year. At the end of 2017, only watered-down versions of the laws remained pending in the Parliament. In August 2017, the new Minister of Justice, *Tudor Toader*, published a large judicial reform plan, similar to the January reform, in which some of the amendments pose a threat to judicial independence as a whole, and to functional independence in particular. These include changes to the institutional set-up of the judicial discipline and strong provisions regarding the liability of judges.[7]

In Turkey, worrying developments have taken place as well, in the context of executive branch assaults on the rule of law and the institutions designed to protect it. Over 4,500 judges and prosecutors have been discharged from their posts after the failed coup. Moreover, about 3,000 judges and prosecutors suffer in appalling prison conditions without an indictment still to this day. These events took place in the post-coup attacks on government critics. Other social fields were adversely affected by this new governmental policy. Mass trials against public servants, generals and media members were conducted, eventually leading to the pre-trial imprisonment of more than 50,000 people.[8] Since his re-election, President *Recep Tayyip Erdoğan* has appointed a Council of Judges and Prosecutors of which none of the members are elected by the judiciary itself. Furthermore, the executive branch has assumed significant influence over a number of key issues regarding the conduct of the judiciary, such as the process of selecting and recruiting judges, reassignments of judges against their will and disciplinary procedures. The Council of Europe's 49-member Group of States against Corruption (GRECO) has also expressed its concern over fundamental structural changes that have taken place in Turkey recently, putting at risk the independence of the judiciary from the executive branch and political powers.[9]

Other legal amendments that were recently passed in Turkey provide the President with the authority to appoint half of the country's most senior judges, while the Par-

7 The Superior Council of Magistrates gave a negative vote on the proposals in September and approximately 4000 magistrates (out of a total of about 7000) signed a letter of protest asking the government to withdraw the proposal. Other judicial actors and civil society groups also demanded that this initiative be dropped; several streets protests took place. A slightly amended draft was pending in parliament at year's end, with the ruling coalition key figures demanding a fast track procedure. The Superior Council of Magistrates equally vetoed the new version of the amendments, but its opinion was merely consultative. *Freedom House*, Nations in Transit 2017: Romania Country Profile, Freedom House, accessed 15 September 2018, https://freedomhouse.org/report/nations-transit/2017/romania.

8 *Abdullah Ayasun*, Is Turkey's Judiciary Independent?, *The Global Post Turkey*, 12 March 2018, https://turkey.theglobepost.com/turkey-judiciary-independence-judges/.

9 *Platform for Peace and Justice*, Non-independence and Non-impartiality of the Turkish Judiciary, A Comprehensive Report on the Abolition of the Rule of Law, 2018, http://www.platformpj.org/wp-content/uploads/non-independence-1.pdf.

liament was granted the authority to appoint the other half. Therefore, on paper, a single party could appoint all the judges to the highest courts.[10]

Significant developments took place in the state of Israel as well. Israel underwent a period of legislative initiatives that seemed to damage the culture of democracy in the Israeli system of government, especially when judged by their cumulative impact. These executive actions and legislative initiatives touch upon many of the issues and aspects of legal and constitutional matters. These include the attempts to limit a criminal investigation into the Prime Minister during his term of office, legislation regarding police recommendations for criminal charges, a law regarding the reporting by non-governmental organisations, proposals to change the system of judicial review of legislation from an adjudicative model to a declaratory model giving a final word to the parliament in constitutionality issues, attempts to intervene in the seniority tradition in the Supreme Court of the appointment of the President, and an intense effort of the Justice Minister to influence judicial appointments in the court system, including the Supreme Court. The executive branch also ran a very aggressive attack on the police and on the chief inspector of the police and the state prosecutor, and meddled with the public broadcasting services by, among other things, closing down the public Israel broadcasting authority and establishing a new Broadcasting Corporation.[11]

The United States has also gone through a negative change concerning the maintenance of the legitimacy of its courts. Since *Donald J. Trump* came into his presidency in 2017, and even prior to his election, he had made many critical comments about the nation's federal judiciary. He had criticised federal judges for political bias and blamed them for future terrorist attacks.[12] *Trump* had also released numerous derogatory tweets and criticisms of the judiciary. For example, when he was running for president, he accused District Judge *Gonzalo Curiel* of not being able to be impartial in the case regarding *Trump* policies due to his "Mexican heritage". In June 2018, *Trump* undermined the principle of due process by calling for the immediate deportation of immigrants without appearing before a judge or having a court hearing.[13] President

10 *United States Department of State*, Turkey 2017 Human Rights Report, Bureau of Democracy, Human Rights and Labor Country Reports on Human Rights Practices for 2017, 2017, p. 14-15, https://www.state.gov/documents/organization/277471.pdf.

11 *Revital Hovel*, Israel's Chief Justice Warns Government in Landmark Speech: Judicial Branch 'Under Unprecedented Attack', Haaretz, 7 May 2018, https://www.haaretz.com/israel-news/israel-s-chief-justice-judicial-branch-under-attack-1.6062718; *Lahav Harkov*. Netanyahu, Levin Push for Dramatic Judiciary Restructuring, The Jerusalem Post, 15 April 2018, https://www.jpost.com/Israel-News/Top-Likud-minister-Well-even-go-to-election-to-limit-Supreme-Court-549850; *Moran Azulay* and *Shahar Hay*, Herzog: Netanyahu's Attacks on Judiciary A 'Clear and Present Danger to Democracy', Ynet, 5 January 2018, https://www.ynetnews.com/articles/0,7340,L-5247664,00.html; *Joshua Leifer*, Attempts to 'Bypass' Israel's High Court Will Create A 'Tyranny of the Majority', +972 Online Magazine, 17 April 2018, https://972mag.com/attempts-to-bypass-high-court-could-end-protection-for-israels-minorities/134765/.

12 *Stephen M. Orlofsky*, Judicial Independence in the Age of Trump, Blank Rome, June 2018, https://www.blankrome.com/publications/judicial-independence-age-trump.

13 *Kevin Jude* and *Keith Watters*, Trump's Attacks on Courts Undermine Judicial Independence, ABA Journal, 28 June 2018, http://www.abajournal.com/news/article/trumps_attacks_on_courts_undermines_judicial_independene.

Trump's lack of respect and understanding of the need for an independent judiciary raises serious concerns concerning the justice system and its legitimacy under his rule.

In view of all these troubling developments and challenges to the rule of law, democracy and judicial independence, it is important to emphasise the fundamental foundations of the justice system essential for democratic government and to examine possible in-depth remedies to some of these troubling developments concerning the de-legitimisation of courts and the attempts to weaken the Judiciary.

III. The Fundamental Values

It is important to open this paper by stating what the fundamental values of the justice system are and the principles that lie at the foundation of the administration of justice in the universally accepted legal tradition.[14] These values and principles derive from the utmost significant value of the judicial system, i.e. judicial independence and impartiality. In addition to judicial independence, the judicial values include fairness and a high quality of the adjudicative process, the insurance of access to justice and the maintenance of public confidence in the courts. Another value is the provision of constitutional protection of the fundamental values.

The values of independence and impartiality are intertwined with the principle of the separation of the judiciary from other branches of government, as it is a central element of the checks and balances between the two state powers. A fear of intervention and interference from other branches of government in the process of justice should not affect the judiciary in its rulings. Judges that cannot perform their duties independently and have to take external factors into consideration are consequently likely to harm the quality of justice. Since we expect the judiciary to provide a high quality adjudicative process, which includes ensuring justice in the individual case, while developing and maintaining sound rules of law, we must protect the judges from any external pressure that might have a negative impact on their decision-making process and impartiality.

These principles were also stated by Justice *Berenzon* of the Israeli Supreme Court. *Berenzon* affirms that a man who begins a civil process against another man or against the authorities is entitled to expect the courts to behave with "decency, speed and the utmost efficiency."[15] In order for the justice system to act and rule properly, and to assure the required high quality of justice, it is necessary to allocate adequate resources to fund the judiciary and the employees of court system. It is also necessary

14 A few decades ago, I attempted to outline the fundamental values of the justice system in a public lecture delivered at the University of British Columbia, Vancouver Canada, in February 1978, chaired by Lord Hailsham (Lord Chancellor of England and Wales) which was later published at UBC Law Review. See *Shimon Shetreet*, The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts UBC L. Rev 13/1979, p. 52.

15 CA 520/71 *Goldberg v Belga* 1971 26(1) PD 456, 462.

to build a modern managing system that would speed the bureaucratic process of the court's ruling and allow the judges to focus solely on the cases they have at hand.[16]

Undoubtedly, the independence of the judiciary is a valuable element that ensures fairness in the justice system, especially nowadays when the judiciary is expected not only to resolve private disputes, but also to rule on the government's executive actions. Therefore, it is essential to promise the independence of the judiciary. The principle of judicial independence includes individual independence, institutional independence and internal independence. It is significant that each country maintains a culture of judicial independence in its territory and jurisdiction.[17] Today, more than ever, the economic market, both at a domestic level and at an international level, is turning to the courts for an effective remedy to private law disputes. Judges acting under external pressure or driven by the intention of promoting their own personal or political interests, would be biased and could not be trusted by the economic business community.

An additional and central value of the judicial system is accessibility to courts. The financial aspect of this principle will be discussed first. The courts' judicial services to the public ought to be provided at a reasonable cost. Moreover, the state must allocate means to unprivileged populations who are unable to pay the cost of legal aid and must increase people's awareness of their legal rights and the fact that they can turn to the court in order to defend their rights and obtain redress for wrongs.[18]

Adding to the financial aspect of this principle, the accessibility to the justice system is also comprised of geographical accessibility and procedural accessibility. Geographical accessibility dictates that the state must provide court centres to rural or remote areas, in addition to court centres in urban cities, and must provide small claims courts to adjudicate small cases for a modest cost. Procedural accessibility entails that the rules of procedure allow full opportunities for hearing and presenting of evidence.

However, we must not forget that increasing the accessibility of the courts, particularly through legal aid, also has its downsides. Court accessibility contributes to the large numbers of court cases and has led to a decline in the courts' efficiency. For instance, accessibility to courts has resulted in more defendants pleading "not guilty" to charges, and to the fact that criminal trials are taking more time.[19]

Another essential value of the justice system is maintaining public confidence in the courts. Only if the courts have the confidence of the people can they perform their

16 *Shimon Shetreet*, Who Should Bear the Cost of Delays and Deficiencies in the Judicial Process? 6/1975 Mishpatim, p. 584, 585.

17 *Shimon Shetreet*, Judicial Independence, Liberty, Democracy and International Economy, in Shimon Shetreet (ed.), Culture of Judicial Independence: Rule of Law and World Peace, Brill Nijhoff Publishing 2014, p. 14-47.

18 *Shetreet*, fn. 14, p. 52, 55.

19 *Lord Widgery*, the Lord Chief Justice of England commented to the Royal Commission on Legal Services in 1977: 'I find it really inescapable that the increasing length of these trials is in some way connected with the greater freedom of the purse', in: *Shimon Shetreet*, Fundamental Values of the justice system EBL Rev. 23/2012, p. 61, 64. In Israel, the Public Defender Law of 1995 expands the grounds under which people qualify for representation in a number of criteria.

responsibilities as a conflict resolution institution of society.[20] It should be noted that an important measure for achieving a fair and just process is a public hearing in court. A public hearing is a central pillar of the judicial process, as it ensures fairness and increases public confidence in the justice system. A public hearing makes the courts' ruling and management transparent, and thus makes the whole legal process easier for the public to watch and criticise. This principle is also reflected in the requirement that the judges will state the reasons for their decisions. This duty contributes to the evolution of the analytical and legal reasoning of the judges and assists in constructing a culture of a publicly open and just legal process.[21]

These fundamental values are necessary not only for individual citizens litigating a case, but also for the state. It is not only the citizen who has a desire for such a mechanism to resolve disputes, but the state itself also has a vital interest in its existence in order to ensure public order and public safety.[22]

Balancing Between Fairness and Efficiency in the Justice System

Even though the fundamental values of the justice system are interrelated, there might also be situations in which these values contradict and conflict each other. For instance, rapid and speedy court deliberations increase public confidence in the courts and lower the costs of judicial services. At the same time, this efficiency might require interference with the courts' independence, as these speedy processes would demand the exercise of more control over the judges. In addition, making the courts more accessible at public expense increases the court caseloads, stalls proceedings and creates court congestion, and thus harms its efficiency. This tension between some of the fundamental values, which also relate to the administration of the justice system, may call for difficult choices between conflicting values.[23]

A challenging phenomenon in this respect is referred to in legal literature as "Dinosaur Cases". Dinosaur Cases are cases that involve many parties, their trial protocols can be tens of thousands of pages long and hearing them might take years. The question arises whether it is just (or even possible) to discuss these cases. *The Insurance Cartel* case in Israel is an excellent example in this regard,[24] as its judgement consists of 836 pages and the Court Protocol, the exhibits and the parties' arguments

20 *Shimon Shetreet*, On Adjudication: Justice on Trial, Hemmed Books – Yedioth Aharonoth Publishing 2004, p. 181.

21 *Shetreet*, fn. 20, p. 181-182.

22 HCJ 188/77 *Coptic Mutran v Government of Israel* 33(1) PD 225, 237-8.

23 *Shetreet,* fn. 14, p. 55-56.

24 CrimA 417/97 *State of Israel v. Phoenix Insurance Company et al* (18.12.2001). The Israeli District Court Judge, Judge *David Cheshin*, expressed great concern for the vast amount of arguments made while discussing the case and noted that he would not rule on every claim raised but only on the materially relevant points. As was written in his judgment: "in the days, nights, weeks and months that it took me to read, absorb and consider the vast amount of material that filled my chambers and my court room as 'water covers the sea' there were moments where it seemed to me that the Defence was attempting to drown the court in a flood of their claims.".

comprise more than 40,000 pages.[25] Professor *Neil Andrews* referred to this issue of "information overload" and discussed how the vast number of rules and regulations and their availability for the public may lead to an increase in the number of cases debated in court.

The European Union adopted the Lisbon Treaty in 2009, which basically integrated human rights values into a previously economy-based union:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union law.[26]

A certain indication of the core values of the European justice system can be found in Article 6(1) of the European Convention on Human Rights, which deals both with the position of the judge and the tribunal that adjudicates, as well as the rights accorded to litigants.[27] Article 6(1) of the Convention stipulates that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law.' Noticeably, the text of Article 6(1) deals with procedural fairness. A number of procedural rights are included in the phrase "fair hearing", such as the right to be present at an adversarial hearing; the right to equality of arms; the right to a fair presentation of the evidence; the right to cross examine opponents' witnesses, and the right to a reasoned judgment. Additional procedural rights, which are included in this phrase, can also be the public announcement of decisions and hearing within a reasonable time. Article 6(1) also states that everyone is entitled to be tried before an independent and impartial tribunal established by law, while other treaties emphasise that the tribunal has been previously established by law.[28]

Other scholars organize the core values differently. *Andrews*, for example, suggested four basic principles of the justice system. These include access to legal advice and dispute resolution systems; equality and fairness between parties; a focused and speedy process and adjudicators of integrity. A different way of formulating the judicial core values was presented by the UNIDROIT/ALI Project (2000-2006), now known as the Principles of Transnational Civil Procedure. The principles were formulated by the working group of our esteemed colleagues *Rolf Sturner*, *Geoff Hzard* and *Michele Taruffo* which were the General Reporters. Our distinguished colleague, *Neil Andrews*, who served as the English representative, rightly suggested that these principles range from quasi-constitutional declarations of fundamental procedural guaran-

25 *Shetreet*, fn. 20, p. 180.

26 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (entered into force 1 December 2009) O.J. C 306/01 (Lisbon Treaty), Art. 6.

27 The Human Rights Act 1998 (UK), which took effect in October 2000, rendered the European Convention on Human Rights directly applicable in English courts.

28 *ECHR*, fn. 3, Art. 6.

tees to guidelines concerning the style and course of procedure or points of important detail.[29]

The goal of the justice system is expeditious justice, not speedy justice. However, one of the challenging practices of the justice system is the compelling reality of delays. Generally, the normal time of a case depends on the circumstances of each court. Unacceptable delays can be defined as an abnormal or extraordinary amount of elapsed time between the relevant reference points: filing and trial, readiness and trial, filing and final disposition, readiness and final disposition. A central challenge related to the delays of the courts is the caseload crisis of the courts, which results in more delays and congestion.

Increasing volumes of cases, longer trials, soaring costs and increasing crime all lead to a higher caseload in the court system. Additional factors that influence the increase in the caseload of the courts are inefficient case-flow management, a shortage of judges, inefficient use of judge time and cumbersome judicial procedure, poor court management, insufficient financing and inadequate facilities.[30] In addition, people have become more aware of their legal rights than in the past.[31] Although some countries are starting to reduce their legal backlog, many other countries still face a continuous influx of new cases every year.

The potential risk to the quality of the justice system increases when the caseload of the courts increases. Inevitably, delays blur the truth. The lapses in time make it more complicated to present reliable evidence and weaken witness's memory. The delays also result in a loss of public confidence in the judicial process. They raise the costs of litigation and may cause litigants to abandon some of their claims or to compromise for a lower settlement that might be unjust outside of court. Congestion and delay also affect the quality of justice in an individual case due to their impact on the judges themselves. In order for a judge to rule properly and justly in a case, the judge must have a reasonable amount of time to devote to it. When the court is overloaded with cases, judges are pressured to dispose of cases as quickly as possible under unreasonable time constraints.[32]

A further challenge is the fact that some of the attempts to lower the caseload of the courts might raise constitutional concerns. For instance, legislation that limits court services, proposals to improve the efficiency of the justice system by using prejudgement interest or finality clauses excluding further review by the courts or by higher levels of the court system all present potential constitutional problems. Although these proposals aim to alleviate court congestion, they might create an adverse effect by raising a constitutional dilemma that the courts are obliged to respond to, consequently leading to creating a greater delay than before.

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29 *Neil Andrews*, Judging the Independence and Integrity of Foreign Courts, in: Shimon Shetreet (ed.), Culture of Judicial Independence: Rule of Law and World Peace, Brill Nijhoff Publishing 2014.

30 *The Committee on Personal Injuries Litigation*, Report of the Committee on Personal Injuries Litigation, Cmd. 3691/1968, July 1968, paras. 46-62.

31 *Shirley M. Hufstedler*, New Blocks for Old Pyramid: Reshaping the Judicial System S. Cal. L. Rev. 44/1971, p. 901.

32 See *A.A.S. Zuckerman*, Lord Woolf's Access to Justice: Plus Ca Change Modern Law Review 59/1996, p. 773.

Procedural law has a central role in bringing the values of the justice system to life. However, as pointed out by *Marcel Storme* in his keynote address in Moscow,[33] in many instances there is a gap between the theory and practice of procedural law, leading to a lack of justice in the justice system. There are many reasons for this gap, one of which is the judicial actors involved: legislatures, lawyers, judges, and litigants.

Legislatures contribute to this gap in the theory of procedural justice and its practice by legislating complex rules that seek to regulate every aspect of everyday life, while at the same time trying to meet the demands of widely diverging interests. This attempt to answer changing political and social needs have a damaging effect on the quality of the legislation, which in turn has an adverse effect on the judicial process. The interpretation and application of these complex laws is difficult, and therefore can eventually damage the process of justice.

Lawyers sometimes use procedural law to delay proceedings, and even cause them to fail, while on the other hand there are lawyers who use judicial procedures to hurry the course of a trial. Some argue that too many lawyers lead to too many court proceedings, which leads to delays and increased caseloads. In Israel alone, a state with a population of 8,345,000 as of May 2015,[34] there were 73,726 registered lawyers, according to the records of the Israeli Bar Association. That is equal to 1 lawyer for every 113 citizens of Israel. To compare that figure with the United States, the American Bar Association lists 1,300,705 registered lawyers in the nation. [35] This translates to 1 lawyer for every 247 citizens.

Judges too are involved in creating the gap between the theoretical procedural justice and its practice, since some of them would prefer to write their decisions in the form of a scholarly paper rather than a concise decision, as a number of judges seem to think they have to use their decisions to shape society, while others use the formalism of the judicial procedures to prolong legal proceedings. Nonetheless, at times it is the parties themselves who bear responsibility for the delay in the court proceedings

In the conflict between efficiency and justice, my preference is very clear: quality justice should prevail. Normally justice and efficiency enhance each other, but if they should conflict, justice must prevail. To borrow a phrase from an American case, "the Constitution recognizes higher values than speed and efficiency."[36] Justice should be the guiding principle of the judge when administering the law and conducting trials. Justice, as a superb value, should also dictate the policy direction to the legislator and

33 *Marcel Storme*, Moscow 2012 Conference – A Major Turning Point in International Association of Procedural Law History (2013) 1 *rLJ* 91.

34 According to the Central Bureau of Statistics, '67th Independence Day – 8.3 million residents in the State of Israel', 21 April 2016 (in Hebrew), http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201511099.

35 *American Bar Association*, National Lawyer Population Survey: Historical Trend in Total National Lawyer Population 1878-2015, 2015, accessed 12 September 2018, http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2015.authcheckdam.pdf.

36 *Stanley v Illinois* (1972) 405 U.S. 645, 656.

law reformer seeking to improve the administration of the justice system.[37] We should beware of the tendency to place greater emphasis on efficiency as a result of the increasing pressures and increasing crime. Expedition should not be done at the expense of justice, as non-expeditious justice is preferable to expeditious injustice.[38]

Even those who have different view as to this set of priorities must not introduce measures aimed at expediting justice, unless they have given very serious and prior assessment of the implications and dimensions of such measures on the justice system, judicial independence and on access to justice. In a 2014 ruling by the Israeli Supreme Court, Chief Justice *Chayut* argued:

> The concern towards the functionality of the judicial branch that my colleague Justice *Arbel* raised in her opinion, as well as my brethren, Justices *Hendel* and *Rubinstein* in their opinion, are very disturbing and merit attention. It is especially disturbing to me the concern over the emphasis on the efficiency of the judicial branch and the publication of cases pending before individual judges may "breath down the necks" of the judges and may push them to accelerate the hearings and the judgement at the expense of their quality. After all, Judges are not a "production line" for verdicts. My colleague noted this and stated: 'the judge cannot exercise his duty qualitatively, and to its fullest when in one hand he holds a hammer and in the other a stopwatch…' Indeed, it is important to remember that efficiency is not everything, and as such evaluating the activity of the judicial branch, based on 'production and productivity', may distance the judicial discourse from its essence – doing justice. Regarding this are words written by the scholar, Professor *Shimon Shetreet* more than 30 years ago that still hold true today: since the purpose of the judicial process and the justice system is ensuring justice, we must take care to not examine it by production and productivity, and to apply to it haphazardly the terms of efficiency from various areas and management.[39]

IV. Collective Independence and Administrative Independence

Both national and international developments contribute to the culture of judicial independence. National law has a conceptual and normative impact on international law and vice versa. This culture began in 1701 in England, which enacted the Act of Settlement and conceived the concept of judicial independence on a national scale. It was not long before this national concept echoed beyond the boundaries of England and influenced the international community. Consequently, the principles of judicial independence were formulated globally. Today we can see that the international law of judicial independence influences the laws of nations domestically, bringing about dramatic and important results.

When discussing the independence of the judiciary, it is important to stress that judicial independence not only entails the personal independence of each individual judge, but it also includes the independence of the judiciary as a social institution, a corporate body. Evidently, any interference with the independence of individual jud-

37 *Shetreet*, fn. 14, p. 79.

38 *Shimon Shetreet,* The Limits of Expeditious Justice, in: R. Holland (ed.), Expeditious Justice, Carswell Co. Canada and Canadian Institute for Administration of Justice 58/1979.

39 AdminA 3908/11 *State of Israel and Court Administration v The Marker Haaretz* (22.9.2014).

ges is a major setback in the rule of law. Nonetheless, the interference with the independence of the judiciary as a body may also affect the sense of independence of the individual judges when performing their official duties. Any judicial institution that wishes to inspire a sense of independence in its judges is also responsible for spreading a sense of shared institutional responsibility. When this collective independence and responsibility is fragile, it results in weakening the sense of independence of the individual judges.

The administrative independence of the judiciary is an essential indicator of the existence of collective judicial independence. Administrative independence is comprised of, to name a few, preparing court budgets, maintaining court buildings, supervising and monitoring administrative personnel etc. There are two levels of administrative independence of the judiciary: the court level, and the central level. Both need to be examined to assess the administrative independence of any judiciary.

While scholars and legislatures usually focus their attention on the high level judiciary, which is the level most relevant to the rule of law and human rights, it should be noted that the issue of judicial independence is equally important to the citizen whose matter is adjudicated before one of these levels as it is to the person whose case is heard before a supreme court. Lower court judges, tribunal judges, and administrative judges, as well as other judicial officers also play an important role in the administration of justice. Indeed, it seems that the development of the culture of judicial independence is moving in this direction.[40]

1. Models of Responsibility for Court Administration

Further to our discussion of judicial independence, the issue of collective independence relates very significantly to the model of responsibility for court administration. There are a number of central models of responsibility that one can find when examining responsibility for court administration in various judicial systems. The first is exclusive judicial responsibility. This, in turn, may be classified into two sub-models: a) the individual model, vesting the responsibility in one individual judge, as in New York, or b) the collective model, vesting the responsibility in a collegial judicial body, as in the federal judiciary in the United States, or as in Italy and Portugal.

The second central model of responsibility is exclusive executive responsibility on court administration, as can be seen in Norway and Austria. This model has a subvariation, which is basically moderated executive responsibility, where the actual administration is carried out by a judge who is accountable in this function to the executive, as is the Israeli model of responsibility.

The third model of responsibility is a shared executive-judicial model. This model can be divided into four sub-models: a) joint responsibility of the executive and the judiciary for the administration of the entire court system; b) horizontal division of responsibility, in which the administration of the higher court is normally responsible for the judiciary, and the executive branch is entrusted with the administration of the lower courts. Such is the case, for instance, in Germany, where the Constitutional

40 *Suratt* v *Attorney-General of Trinidad and Tobago* [2007] UKPC 55 (UK).

Court enjoys a much wider administrative independence than other courts. In Canada, the Supreme Court has a wide administrative autonomy while all the lower courts are administratively controlled by the executive branch; c) the vertical division of responsibility, i.e. certain matters are under the responsibility of the judicial branch, while other matters are under the responsibility of the executive branch and, d) the responsibility for court administration is vested in a collegial body where the executive and the judiciary branches are represented; and e) another model of shared judicial executive responsibility is that the responsibility indeed rests with the executive branch for all or part of the court system, but the executive is under a duty to consult the judiciary branch in exercising its responsibility over the court system.

The fourth model of responsibility is a multi-branch responsibility model, in which a collegial body representing all three branches of government (as in Brazil), and at times representing other organs, such as lawyers, carries responsibility over court administration. A fifth model can also be identified in this respect, whereby the responsibility for court administration is vested in a completely separate independent organ of the state (Sweden).

The establishment of boards or commissions composed of representatives of the executive and the judiciary (and possibly, the legislature, the legal profession and the public, in general) can sometimes affect the judicial participation in the responsibility of court administration. These boards should be classified as a system of shared administrative responsibility for the courts. Such boards can be found in several countries, and in some countries their establishment is being debated.[41]

Many countries still keep the ultimate responsibility for court management in the hands of the executive branch but conceal it by using a judge who mediates between the executive and the judiciary (the moderated executive responsibility model). Such is the case in Israel, where the executive branch has complete control at the central level of court administration and a more limited control at the court level. The actual conduct of court administration is vested in the hands of the Director of Courts, who is responsible to the Minister of Justice. In practice, the executive's control over judicial administration in Israel is applied through a well-established tradition and long-standing practice of executive consultation with the judiciary.

Other mediating mechanisms between the judicial brand and the executive branch exist in Canada, where the office of the Commissioner of Judicial Affairs is responsible for dealing with judicial affairs at the Federal Ministry of Justice. This "judicial" partition mechanism between the two branches is significant, both because of the importance of this appearance of independence and because of the actual protection offered to the judges from executive branch control through this intermediary institution, as is the case in the Israeli system and the Courts' Director, or in the Canadian Federal Commissioner for Judicial Affairs.

41 *Shimon Shetreet* (with *J. Deschenes*, as consulting editor), Judicial Independence: The Contemporary Debate (Martinus Nijhoff 1985). See also *Lorne Neudorf*, The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan (Springer 1918).

One of the many manifestations of administrative responsibility on courts is expressed by the maintenance of court buildings, court personnel and for the preparation and approval of court budgets. The last issue will be examined in detail next.

2. Responsibility for Court Budgets

The widest role of the judiciary in the preparation of the court budget is exercised under the exclusive judicial model of responsibility for court administration. In the United States, the courts prepare their own budget at the federal level. The judicial branch brings its budgets directly before Congress. A modified form of the United States' model of judicial responsibility for court budgets, namely with the submission of the budget by judges to the legislature, exists in British Columbia and Canada. The procedure of preparing budgets in Ghana also limits the executive branch's role, at least outwardly. The financial controller of the judicial service prepares the budget and is later approved by the Judicial Council. This budget is presented to the Parliament independently and not as a part of the executive budget. The Ghanaian model is very similar in substance to the American model, as long as the Judicial Council is genuinely an autonomous judicial body that grants full responsibility for court budgets to the judiciary.

Recently, an interesting model of exclusive judicial control over court budgets appeared. The model thereby allocates a certain percentage of the total state budget, which is then formulated in detail and later administered by the judiciary branch. This is the practice in Costa Rica, where the court is granted five per cent of the national budget.

Many countries oppose the American model, which grants full judicial responsibility for court budgets, for several reasons. Among them are claims it demands that the judiciary go and ask for funds from the legislature; and that it would create a new breed of administrative judges, which is not necessarily desired. Conversely, the proponents of the model claim that judges know best about the needs of the courts over which they preside. Those needs include the budgets for proper court management.

Nonetheless, it appears that the American model has much merit, and that it commends itself from the point of view of judicial independence. As Chief Justice *Deschenes* wrote in his report on independent judicial administration: "the tradition of non-involvement has all the weight of inertia behind it, but there is no reason in principle why the Canadian judiciary could not undertake to manage the existing court staff and budget, and even take an active part in preparing its estimates and presenting them before Parliament." However, this basic premise does not meet with universal consensus, as the American model is not followed, as mentioned, except for a few cases. The executive branch still has full responsibility for court budgets in most countries. A line can be drawn between those nations in which the budget of the courts is prepared by court personnel, or the judicial officer, such as the Courts Director in Israel, but is then administered by the executive, and those nations in which the budget is prepared completely by the executive branch. Countries falling into the first category are Israel, Sweden, Belgium, Norway, Finland, Uganda, Portugal and

Austria, and among the countries which the category of complete executive control describe their system best are Uruguay, Bangladesh, Italy, South Africa and Greece.

In Australia, Canada and Germany, the shared model of responsibility for court administration is maintained. The division of responsibility for court budgets and administration in all three countries is horizontal: the judiciary is responsible for the highest court of the land, and the executive is responsible for other courts. The nature and scope of judicial control over the highest court's budget differs in each country; Australia accords the lesser role to the judiciary, Canada a greater role, and Germany accords complete autonomy to the highest court of the land.

In Australia, there is a difference between the High Court and all the other courts of the land. The Registrar of the Court prepares the court budget. In the lower courts, a specific amount is supplied along the lines of the budget submitted, while in the High Court a lump sum figure is budgeted for the expenses of the judges responsible. The difference is that in other courts, budgets are an integral part of the budget of the Department of Justice.

The Supreme Court in Canada, by comparison, is endowed with a much greater administrative responsibility for court budgets and other administrative matters. Under the Supreme Court Act (sec. 15-17), court budgets are indeed "under the supervision of the Chief Justice of Canada" and "subject to [his] discretion", whereas the Registrar of the Supreme Court manages the staff, controls the library and publishes the judgments of the court. Nevertheless, it should be acknowledged that under sections 45 and 46 of the Judges Act, it is "under the Minister of Justice of Canada" that the Registrar carries out his other duties, which are namely the administration of judges' salaries, pensions, allowances, etc. and the preparation of budgetary submissions, while ensuring that all the Supreme Court's reasonable requirements are met in matters of staff, premises, equipment, and other supplies and services. The administration of the court is solely in the hands of the Minister of Justice at both the federal and provincial levels in all courts in Canada except for the Supreme Court. Therefore, in the Supreme Court, there is a situation of partial independence that does not exist in the other courts in Canada.

The Supreme Courts in Germany (*Bundesgerichtshof*: ordinary civil and criminal jurisdiction; *Bundesverwaltungsgericht*: administrative law; Bundesfinanzhof: finance and tax law; *Bundesarbeitsgericht*: labour law; *Bundessozialgericht*: social security and public welfare law) are federal organs. Their budget is normally part of the budget of the Federal Ministry of Justice, with the exception of the *Bundesarbeitsgericht* and the *Bundessozialgericht*, for which the Federal Ministry for Labour, Family and Social Affairs is responsible.

In Germany, the executive branch has complete control over the process of determining the annual budget of the courts. The court's role is very limited or even non-existent. The annual budget estimates of the courts are prepared by the relevant ministry and are later discussed and approved by the cabinet before being presented to the Parliament and adopted (sometimes with certain modifications). The budgets are passed as part of the Budget Law (*Haushaltsgesetz*) for the year. The financial resources thus allocated to the ministry are administered by the ministry itself, subject to the control of the Federal Audit Office (*Bundesrechnungshof*). In lower courts, which are

state (Land) organs, the budgeting patterns are very similar, and involve the relevant state ministry and state parliament.

In this respect, the Federal Constitutional Court (*Bundesverfassungsgericht*) is the exception to the general model of executive control over court budgets, since the proposed budget estimates of the *Bundesverfassungsgericht* are prepared by the Court itself and presented to the Ministry of Finance directly as a separate plan, like the budget plan of a federal ministry. The preparations of the budget are under the responsibility of the Minister of Finance. The Minister of Finance sets up the final budget plan for Cabinet approval, and then submits it to the Parliament. The proposed budget plan of the *Bundesverfassungsgericht*[42] is presented to the German Cabinet by the Finance Minister, together with any changes he introduced in the original budget submitted by the Court. If the Cabinet decides to submit to the Parliament the budget as amended by the minister, it has to annex to it the budget submitted by the Court.

Lamentable cases of threats to cut courts' budgets due to constitutional decisions handed down by the courts can be found in several jurisdictions. For instance, legislation that makes funding for the state courts limited only to courts that have not invalidated a measure restricting the power of the state supreme court was signed by the governor in Kansas.[43] In a different case, several members of the Oklahoma legislature introduced a resolution to impeach the justices of the state supreme court who declared unconstitutional a display of the Ten Commandments on the grounds of the state capitol building as it violates the state constitution.[44] These cases might stress the specific importance of the involvement of the judiciary in budget-related issues and powers as part of court management.

The Parliament of Kenya was also recently suspected of using budget cuts for the judiciary in order punish them for the decisions made by the courts. In 2015, the MPs in Kenya threatened to undertake budgetary cuts after a ruling of the court that the Constituency Development Fund was unconstitutional. In 2017, the judiciary faced yet another budget cut as the government sought to raise money for the presidential election, and in June 2018, the medical insurance cover for all judges and their employees was suspended as there were insufficient funds. While preparing the 2019 budget, approximately KSh 3 billion was slashed off the budget of the judiciary through the Appropriation Act. ICJ Kenya notes with concern that: "the actions by the other two arms of government to strangle and curtail the operations of the judiciary

42 Like the budgets of the Bundespraesident: the President of the Federal Republic; Bundestagspraesident: the President of the Second Housed of Parliament; Bundesratspraesident: the President of the First House of Parliament; and, Bundesrechnungshof: the Federal Audit Office.

43 See *John Eligon*, Courts Budget Intensifies Kansas Dispute Over Powers, New York Times, 6 June 2015,_https://www.nytimes.com/2015/06/07/us/courts-budget-intensifies-kansas-dispute-over-powers.html?emc=edit_th_20150607&nl=todaysheadlines&nlid=66631261.

44 See The McCarville Report, 'Lawmakers Call for Impeachment of Court Justices', *The McCarville Report*, accessed 13 September 2018, http://mccarvillereport.com/archives/31190; Capital News, 'Judiciary Budget Cuts Will Negatively Affect Justice Delivery – ICJ', *Capital News*, 3 August 2018, https://www.capitalfm.co.ke/news/2018/08/judiciary-budget-cuts-will-negatively-affect-justice-delivery-icj/.

through budgetary restrictions amounts to a grave violation of the Constitution and an attack on Kenyan democracy and the rule of law."[45]

These unfortunate cases of governments trying to "punish" the courts by cutting budgets can be avoided entirely if the judiciary could increase its involvement in preparing and controlling its own budgetary needs.

3. The Case for Shared Responsibility

In order to further discuss the division of responsibility for court administration between the judiciary and the executive, I proceed upon the universally agreed assumption that judicial matters should be exclusively within the responsibility of the judiciary. It seems to be of importance that responsibility for judicial matters in court administration is vested in the head of the judiciary. An administrative aid, who should preferably be a judge, should assist the head of the judiciary in exercising this function, or even act in his behalf under general direction.

The division of responsibility for the administrative components of court administration will be discussed next. At the court level, it is my view that the responsibility for these matters should be vested in the hands of the presiding judge of each court exclusively. The registrar or chief clerk of that court will act under the supervision of the presiding judge and will be charged with the daily conduct of these matters. In the parliamentary systems of government, the main responsibility for judicial administration should be vested jointly in the Chief Justice and the Minister of Justice or the Attorney General. The daily conduct of the central administration of the courts should be assigned to an independent administrative unit, which will be separated from the Ministry of Justice and headed by a director enjoying the same terms of service and security as those of superior judges. The director will be appointed by the government after receiving a joint recommendation of the Minister and the Chief Justice and will work under their joint direction.

The common procedure in many countries in relation to the budget of the other institutions, whereby the budget of the court requires approval from the cabinet should be annulled. Instead, the courts' budget should be presented directly to the proper parliamentary committee, without a requirement for special approval.

This model ensures that the justice system has a minister in the government who has a political interest in improving justice and ensuring the proper administration of the courts. That is because the minister will be held responsible to the Parliament for the administration of justice and for the public expenditure in the justice system, which is consistent with the principle of responsible government.

The establishment of a judicial council composed of several branches of government can also express the model of joint responsibility for judicial administration. The challenge to maintain judicial independence from the executive is even higher in a parliamentary system of government, where the cabinet is comprised of the leaders of the ruling party who command a majority in parliament. Thus, the issue should be

45 *Charles Manga Fombad*, Institute for International and Comparative Law in Africa, Judicial Independence in Africa: contemporary issues, paper delivered at the UN conference on judicial independence (N.Y. 2019).

dealt with carefully, by supporting the concept of joint responsibility of the judiciary and the executive for court administration.

The examination of this proposed model will reveal its similarities to the English model of responsibility for judicial administration. After the Constitutional Reform Act of 2005 all judicial matters were transferred from the Lord Chancellor to the Lord Chief Justice, where and the Lord Chancellor is entrusted with responsibility for administrative matters

V. Creating a Culture of Judicial Independence: A Wider Conception

The relations between the branches of government and judicial independence is one of the most fundamental components of governmental culture in every democracy, as it is a basic value of the administration of justice. Therefore, the principle of judicial independence must be immune to the changing political climate and be preserved as a concept that is a central pillar of the social consensus. The political leadership and the professional legal elite must work together to develop and implement a culture of judicial independence, in lieu of several significant guidelines in a long and gradual process.[46]

Five important and essential aspects create a democratic culture of judicial independence: solid institutional structures, a proper constitutional infrastructure, legislative provisions and constitutional safeguards, adjudicative arrangements and jurisprudence, and the protection and maintenance of ethical traditions and a code of judicial conduct.

Solid institutional structures should regulate matters related to the status of the judges and the jurisdiction of the courts. A proper constitutional infrastructure must embody the constitution main provisions of the protection of the judiciary. Legislative provisions should offer detailed regulations including the basic constitutional principles. The courts add to the constitutional infrastructure and the legislative provisions complimentary interpretations and jurisprudence on various aspects of the conduct of judges and the operation of courts. The ethical traditions and code of judicial conduct ought to cover the judge's official and non-official spheres of activities and shield the judge's substantive independence from dependencies, associations, and even its involvement potentially casting doubts on judicial neutrality.

46 Mt. Scopus international Standards of Judicial Independence Article 1.4, https://docs.wixstatic.com/ugd/a1a798_21e6dfdcb80a44d388ed136999ddf63 d.pdf, see the analysis of various aspects of culture of judicial independence, see *Shimon Shetreet*, The Mt. Scopus International Standards of Judicial Independence, in: Shimon Shetreet and C. Forsyth (eds.), The Culture of Judicial Independence: Conceptual Foundations And Practical Challenges, Ch. 33 (Martinus Nijhoff Publishers 2012); and see *Shimon Shetreet*, Amendments to Mt. Scopus Standards, Ch. 27, in: Shimon Shetreet and Wayne McCormack (eds.), The Culture of Judicial Independence in a Globalised World, p. 359 (Brill Nijhoff 2016).

VI. Legitimacy of the Justice System

Local dispute resolution must be carried out legally and in an organised manner. Any good government must maintain and preserve the legitimacy of its country's courts in order to keep the public order and to ensure that the public will accept the court's rulings. In addition to this basic principle, which is fundamental to any legal system and proper state management, the legitimacy of the justice system serves other functions on the global scale, which nowadays are mainly comprised of the national economic interests.

The process of globalisation has an impact on global justice, as the changing economic sphere requires courts to act upon certain ethical legal and constitutional standards, not only for its own nationals, but also in order to win the recognition of other courts around the world. The ability of courts to enforce foreign decisions plays a vital role in the current transnational economies, since nationals and non-nationals alike may find themselves subject to foreign decisions. Therefore, all business parties involved must trust that the decision they have received in a foreign country can be enforced in their own national court, thus not requiring further adjudication, time and other resources. The parties must also have faith that the court is fair and independent, and that it is perceived that way by the international community, otherwise traders would refuse to import, invest and to do business in a country suspected of legal corruption and an absence of independence and impartiality.

When examining the various aspects of the legal structure, we see every country has a different regulation and different rules that may apply to the various aspects of trade law and dispute resolution. It is important to discuss the justice system when dealing with trade and economy. While in most cases the justice system applies its laws domestically, it can also receive requests for litigation with foreign entities. With the development of global trade, companies have a growing global grip in numerous countries at the same time. Therefore, more and more companies are exposed to litigation in foreign countries. This reality makes it absolutely imperative that countries have an efficient mechanism for global trade that would provide legal protection for international traders. If a country wishes to maintain it and increase its global trade, it must earn the trust of non-nationals in its judicial system by increasing its accessibility to such litigants, and by providing a fair and equal dispute resolution mechanism. Only such guarantees could promise effective economy and trade at domestic and transnational levels.

The fact that nowadays companies and individuals can litigate an issue outside of their country's territory, and even choose a country in which to litigate, as well as which set of laws will apply, is one of the greatest impacts that globalisation has had on economic trade. In order to keep this cross-border litigation efficient, the forum state must maintain impartiality. A court may be asked to recognise foreign judgements during its proceedings. Nonetheless, the enforcement of foreign judgements should be granted only if the court is certain that the justice system of the state where the judgement was given is impartial and independent. If the court is not satisfied that this was the case, it will not enforce nor recognise the foreign judgement.

The use of foreign forums will persist only if the litigants believe they will receive a fair trial irrespective of the country of the forum. Elsewhere I have analysed the im-

pact of the jurisprudence of international tribunals over domestic law, and the interplay between national and transnational legal norms in relation to judicial independence.[47] If a legal system in a certain country is not perceived as impartial and just, and operating with integrity, then international entities will avoid litigating or even investing in that country. The Mount Scopus Standards for Judicial Independence, which were discussed above, may also be of use in this respect, as these standards set global criteria for ensuring judicial independence and integrity.

VII. Conclusion

As I have tried to show in this paper, the legitimacy of the courts can only be preserved by following the fundamental values of the justice system. Among these values, the value of judicial independent has been the main focus. A culture of judicial independence can only exist in a state system that is based on the principles of the separation of powers. It appears that, despite the long democratic tradition of the separation of powers, the principle of judicial independence has not yet been embedded in many countries when it comes to court administration and is therefore constantly subject to political strife and challenges, sometimes presented by other branches of government, and at other times as a result of various types of internal circumstances.

The culture of judicial independence at national and transnational levels faces particular challenges in two main areas; one is judicial independence in administrative justice, and the other is maintaining judicial legitimacy at a national level and in cross-border litigation.

The first area is the independence of administrative tribunals and judges. Notably, even in the United States, which is currently being used as a living example of the most advanced independent judicial administrative mechanism, the independence of its judges can be questioned. There is an ongoing debate over what is referred to in England as "tribunal judiciary", and in the United States as "administrative judges". The issue under discussion is to what extent the practice of administrative judges acting within administrative agencies can be defined as impartial and independent.[48]

Case examples in many countries demonstrate clearly some of the challenges in the rule of law that states are facing today. These challenges have arisen in countries with various governmental structures in diverse parts of the world. We have seen them taking place in such countries as Hungary and the legislative changes regarding its judiciary, in Poland and its executive reforms giving greater control to the executive in judicial matters, and in Romania and Israel. Turkey offers an exceptionally objectionable case of an aggressive attack on the rule of law and democratic structures.

47 *Shimon Shetreet*, The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges, Chi. J. Int'l L.10(1)/2009, p. 275.

48 See *Lubbers*, The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs, Admin. L. J. Am. U. 7/1993, p. 589, 613–617; *James P. Timony*, Performance Evaluation of Federal Administrative Law Judges, *Admin. L. J. Am. U.* 7/1993, p. 629, 641.

These and other challenges require careful study, as these examples are only the latest episodes in a series of worldwide challenges facing the judicial system.

The second area that offers a serious challenge in the upcoming years is the economic and global reality, which deems it imperative that legal protection is granted for international traders, and that a mechanism of enforcement and recognition of foreign judgements be embedded. An acceptable universal standard for the examination of the national standpoint should be implemented in order to review the local and the global concepts of justice. This will allow global trade to run freely and will increase the quality of justice on the national and international scale.

In order to maintain the legitimacy of courts and of the justice system, efforts must be made by all branches of government to promote the fundamental values of democracy and justice, and in particular – the independence of the judiciary in the administration of courts, be it by adopting the shared model of responsibility, or by fully acknowledging the ability and the social desirability of a judiciary that administrates itself.