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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

Shimon Shetreet*

I. INTRODUCTION

The creation of the culture of judicial independence has been a combined process of national and international developments. The process consists of a cycle of normative and conceptual impact of national law on international law and later, of international law on national law. In the cycle's first phase, which began in 1701 with England's enactment of the Act of Settlement,¹ judicial independence was conceived domestically. In the second phase, which began shortly thereafter, this domestic development crossed national boundaries and impacted the thinking of scholars and political leaders in the international community. It brought about the formulation of established principles of judicial independence on the transnational levels, both regional and global. In the third phase, in which we find ourselves today, the international law of judicial independence begins to impact the domestic laws of nations with significant and even dramatic results.

The impact of international law on judicial independence has been influenced by international human rights treaties that contain principles on fair procedure and the right to be tried before an impartial and independent tribunal.² International standards of judicial independence have made significant

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¹ See generally Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (N Holland 1976).

² These provisions include Article 10 of the Universal Declaration of Human Rights, General Assembly Res No 217A (III), UN Doc A/810 (1948), which states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal"; Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 218 UN

contributions to local rules, which have been reinforced by international jurisprudence.³ Some of the most influential international standards were drafted by professional nongovernmental and intergovernmental organizations. One recent example is the *Mt. Scopus International Standards on Judicial Independence* (“*Mt. Scopus Standards*”).⁴ Conceived in 2007, when an international group of legal academics and professional jurists developed the vision of revised minimum standards on judicial independence, the document was finalized in 2008. The development of the *Mt. Scopus Standards* was necessitated by the absence of a modern, thorough revision of standards for both national and international judges. This dearth was problematic. In order for standards to remain relevant and to continue as cornerstones for the substantive protection of human rights and a healthy economic state, it was critical that they be contemporary.

The *Mt. Scopus Standards* are based on a number of sources: *The Burgh House Principles on the Independence of the International Judiciary*,⁵ the International Bar

Treaty Ser 221 (1950) (“ECHR”), Section 1 of which provides, “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 law”; Article 14 of the International Covenant on Civil and Political Rights, General Assembly Res No 2200 Supp No 16, UN Doc A/6316 (1966) (entered into force Mar 23, 1976), paragraph 1 of which provides, “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”; Article 8 of The American Convention on Human Rights (1969), 1114 UN Treaty Ser 123 (1978) (“American Convention”), paragraph 1 of which provides, “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law”; Article 7 of the African Charter on Human and Peoples’ Rights (1981), 21 ILM 58, Section 1 of which provides, “Every individual shall have the right to have his cause heard. This comprises: . . . (d) the right to be tried within a reasonable time by an impartial court or tribunal”; Article 47 of the Charter of Fundamental Rights of the European Union, 2000 OJ (C 364) 10, which provides,

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

³ See, for example, *Procola v Luxembourg*, 326 Eur Ct HR (ser A) (1995); *McGonnell v United Kingdom*, 30 Eur HR Rep 289 (2000); *Findlay v United Kingdom*, 24 Eur HR Rep 221 (1997).

⁴ *Mt. Scopus Approved Revised International Standards of Judicial Independence* (Mar 19, 2008), available online at <<http://law.huji.ac.il/upload/InternationalStandardsofJudicialInd2008.doc>> (visited May 19, 2009).

⁵ *The Burgh House Principles on the Independence of the International Judiciary* (2004), available online at <http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf> (visited Apr 23, 2009).

Association's *Code of Minimum Standards of Judicial Independence* ("IBA Standards"),⁶ the *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region*,⁷ *Universal Declaration on the Independence of Justice*,⁸ *Basic Principles on the Independence of the Judiciary*,⁹ and the *Revised Draft of Proposed New Canon to American Bar Association's Model Code of Judicial Conduct*.¹⁰

Principles of independence in the judiciary are essential for ensuring the rule of law, protecting human rights, and securing the continued preservation and development of democratic societies. As such, these international standards have had a positive impact on the creation of a culture of judicial independence as an established and accepted system of conceptual principles. These principles are essential for ensuring the rule of law, protecting human rights, and securing the continued preservation and development of democratic societies. Vic Toews, Canada's former Minister of Justice and Attorney General, succinctly explained:

It goes without saying that the rule of law requires a robust and independent judiciary. An effective judicial system inhibits both the state and private parties from acting arbitrarily. This helps promote social stability, progress and prosperity. An independent judiciary is necessary to provide definitive judgments on the interpretation of the law and how it is applied to particular disputes.¹¹

I was privileged to help guide the creation of one of the earlier set of standards of judicial independence, the *IBA Standards*, adopted and confirmed at the 1982 IBA convention in New Delhi. The *IBA Standards* were produced at the end of a three-year project with the participation of over sixty international scholars and professionals.¹² I am now privileged to serve once again in the leadership of an academic and professional project to develop revised

⁶ *International Bar Association Code of Minimum Standards of Judicial Independence* (1982), available online at <<http://www.ibanet.org/images/downloads/Minimum%20Standards%20of%20Judicial%20Independence%201982.pdf>> (visited Apr 23, 2009).

⁷ *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region* (1982); Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in Shimon Shetreet and Jules Deschênes, eds, *Judicial Independence: The Contemporary Debate* 441–46 (M. Nijhoff 1985).

⁸ *Universal Declaration on the Independence of Justice* (1983), in Shetreet and Deschênes, *Judicial Independence: The Contemporary Debate* at 447–61 (cited in note 7).

⁹ United Nations, *Basic Principles on the Independence of the Judiciary*, UN Doc A/CONF.121/22/Rev. 1 (1985).

¹⁰ *Revised Draft of Proposed New Canon to American Bar Association's Model Code of Judicial Conduct* (2005).

¹¹ Vic Toews, Minister of Justice and Attorney General of Canada, Address to the Commonwealth Magistrates' and Judges' Association (Sept 10, 2006), available online at <http://www.justice.gc.ca/eng/news-nouv/spe-disc/2006/doc_31872.html> (visited Apr 23, 2009).

¹² See Shetreet, *Judicial Independence* at 590 (cited in note 7).

international standards of judicial independence for national judges and international judges.¹³

In this Article, I will discuss domestic and international law as they relate to judicial independence, and how their interrelationship impacts judicial independence in both arenas. I will also note current challenges to judicial independence, on both practical and theoretical levels, and suggest some appropriate solutions. Section I reviews the three phases of judicial independence, using England as a case study. Section II considers fundamental concepts surrounding judicial independence: models, principles, and constitutionalism. It is important to review these normative concepts in order to create a common language of judicial independence. Section III explores challenges to judicial independence, both past and present. Section IV analyzes the response to these challenges: the creation of a culture of judicial independence. Section V evaluates the different components that have been, and that continue to be, critical to the culture of judicial independence. Cultures of judicial independence are built on both the domestic and international fronts, and in their more advanced stages consist of a combination of national and international law and jurisprudence. Section VI examines how the interrelationships between domestic law, international human rights law, and professional international standards have had a normative effect on the culture of judicial independence over its three phases. Particular attention is paid to England, the US, Austria, and Canada, with special reference where appropriate to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),¹⁴ and the UK’s Human Rights Act¹⁵ and Constitutional Reforms Act.¹⁶ This Article concludes with a look to the future.

II. THE THREE PHASES OF SHAPING JUDICIAL INDEPENDENCE

As noted in the introduction, there is a cycle of normative and conceptual impact of national law on international law, and subsequent impact of

¹³ Shimon Shetreet, *Proceedings of the Jerusalem Conference on Judicial Independence* (Mar 2008).

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UN Treaty Ser 221, available online at <<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>> (visited Apr 23, 2009).

¹⁵ Human Rights Act 1998, ch 42 (1998) (UK), available online at <http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1> (visited Apr 23, 2009).

¹⁶ Constitutional Reform Act 2005, ch 4 (2005) (UK), available online at <[http://www.statutelaw.gov.uk/content.aspx?LegType=Act+\(UK+Public+General\)&title=constitutional+reform&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&activeTextDocId=1974190&parentActi](http://www.statutelaw.gov.uk/content.aspx?LegType=Act+(UK+Public+General)&title=constitutional+reform&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&activeTextDocId=1974190&parentActi)> (visited Apr 23, 2009).

international law on national law. The United Kingdom provides a most instructive illustration of this phenomenon.

The first phase is characterized by the domestic development of the concept of judicial independence, the second by the seeping of this concept into the international scene, and the third by the re-domestication of newly reformulated international principles of judicial independence, with significant and dramatic results.

The first phase occurred in England with the original conception of judicial independence in the Act of Settlement in 1701.¹⁷ The second phase was evident when England's concepts regarding judicial independence first entered the international scene and from there moved into the domestic arenas of other countries. For instance, England served as the theoretical model for Montesquieu's separation-of-powers doctrine.¹⁸ Also, the Founding Fathers of the US Constitution used England as their dominant model in formulating the Constitution's Article III, which is the foundation of American judicial independence.¹⁹ Other common law countries, including Canada, Australia, and India, also adopted the British model of judicial independence.²⁰

In recent decades the third phase of judicial independence has come into play in the United Kingdom, as the country has been significantly influenced by judicial independence principles developed by international human rights constitutional documents. I refer to the significant impact of the jurisprudence of the European Court of Human Rights ("ECtHR") on the conceptual analysis of judicial independence in England and Scotland. This process began in the 1990s with cases heard by the ECtHR before the United Kingdom adopted the Human Rights Act.²¹ Later, this process found dramatic expression in the application of the ECHR in the British Human Rights Act, which came into force in 2000.²²

¹⁷ See generally Shetreet, *Judges on Trial* (cited in note 1).

¹⁸ See Baron de Montesquieu, *The Spirit of the Laws* (Hafner 1949) (Thomas Nugent, trans).

¹⁹ Article III of the US Constitution provides that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

²⁰ Shetreet, *Judicial Independence* at 590 (cited in note 7). See also John Bell, *Judicial Cultures and Judicial Independence*, 4 Cambridge YB Eur Legal Studies 47 (2001); Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson 1987).

²¹ See note 3.

²² Human Rights Act 1998 (cited in note 16).

Whereas the British national law previously impacted the international law of judicial independence, the British Constitutional Reform Act of 2005²³ signaled a shift, with international law now impacting British domestic law. As will be discussed in more detail in subsequent sections of this Article, the Constitutional Reform Act dramatically reformed government control over the administration of justice in England and Wales; importantly, it discontinued the aberrant position of the Lord Chancellor, one of the country's oldest constitutional offices, who was entrusted with a combination of legislative, executive, and judicial capacities. The Lord Chancellor served as speaker of the Upper House of Parliament, the House of Lords; he served as a member of the executive branch and member of the senior cabinet; and he also served as the head of the judiciary. The Constitutional Reform Act established new lines of demarcation between the Lord Chancellor and the judiciary, transferring all the judicial functions to the judiciary and entrusting the Lord Chancellor only with what are considered administrative and executive matters.

Thus, the United Kingdom, where the first phase of judicial independence began over three hundred years ago, illustrates vividly the mutual impact of national and international law and jurisprudence in the area of judicial independence. It demonstrates a cycle of mutual normative impact and cross-conceptual fertilization. In this process, concepts and ideas have become enriched as they have been implemented in successive judicial and political systems, as each system has enhanced and deepened the concepts and ideas it actualized. In addition to the United Kingdom's instructive illustration, similar developments of conceptual cross-fertilization can be seen internationally—in EU law,²⁴ in civil law countries such as Austria, and in other common law jurisdictions such as Canada.²⁵

This Article will review judicial independence in all three phases, in an effort to show how the relationship between domestic and international law

²³ Constitutional Reform Act 2005 (cited in note 16). For a detailed analysis of the history of this act, see Lord Windlesham, *The Constitutional Reform Act 2005: The Politics of Constitutional Reform*, 2006 Pub L 35; Lord Windlesham, *The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change*, 2005 Pub L 806. For accounts of the main players, see Lord Woolf, *The Pursuit of Justice* 161–74 (Oxford 2008); Lord Phillips, *Constitutional Reform: One Year On*, The Judicial Studies Board Annual Lecture (Mar 22, 2007); Lord Woolf, *The Rule of Law and a Change in the Constitution*, 2004 Camb L J 317; Tom Bingham, *The Business of Judging: Selected Essays and Speeches* 55–68 (Oxford 2000). All three authors served as Lord Chief Justice in these formative years. Lord Woolf was active in the shaping of the legislation and Lord Phillips succeeded him.

²⁴ See Treaty on European Union, art F, 1992 OJ (C 191) 1 (Jul 29, 1992). Paragraph 2 of Article F states, “The Union shall respect 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, as general principles of Community law.”

²⁵ See, for example, *Valente v The Queen*, [1985] 2 SCR 673 (Canada).

affects judicial independence in both arenas. The next section will review the models of interrelations of international and domestic law, using the United States as the main case study with reference to other jurisdictions. Then, the Article will analyze basic judicial independence principles, including personal or substantive independence, collective independence, and internal independence. Later, the Article will discuss constitutional protection of judicial independence, including the required components of such protection.

III. MODELS OF RELATIONS OF INTERNATIONAL LAW AND DOMESTIC CONSTITUTIONAL LAW

A. THE MODELS

The relationships between domestic and international human rights law can be measured and classified according to a number of possible yardsticks. The classic distinction is between the monist and dualist schools regarding the transformation of treaties into national law. According to the monist school, treaties become the law of the land of ratifying countries, whereas according to the dualist school, a ratified treaty is transformed into the national law only through the implementation of legislation.²⁶ In addition, there is a practice of referring to international law in the course of interpretation. One such example is South Africa.

The South African Constitution demands that constitutional interpretation take foreign law into account. It also authorizes domestic courts to consider foreign law in deciding cases.²⁷ Similarly, in common law countries, references to UK law are normal and frequent. One study showed that the Supreme Court of Canada referred to at least one UK case in close to half of its decisions between 1984 and 1995.²⁸

Customary law is held binding on national laws whether or not a treaty has been implemented into the national law in accordance with the constitutional requirements of each jurisdiction. Thus international jurisprudence generally impacts the legal arguments presented by lawyers acting before national courts. Judgments rendered in national courts are often at least partly based on principles developed in the international arena—by tribunals, courts, treaties,

²⁶ See generally Thomas Buergenthal, Dinah Shelton, and David Stewart, *International Human Rights* (West 3d ed 2002).

²⁷ See South Africa Const, art 39(1).

²⁸ C.L. Ostberg, Matthew E. Wetstein, and Craig R. Ducat, *Attitudes, Precedents and Cultural Change: Explaining the Citations of Foreign Precedents by the Supreme Court of Canada*, 34 Can J Pol Sci 377, 386–87 (2001).

conventions, and international standards developed by professional groups—even prior to their formalization into treaties.

Vicki Jackson proposes a second, three-pronged model. Jackson's model categorizes relationships between international and national law as a resistance, convergent, or engagement model.²⁹ The resistance model (analogous conceptually to the dualist school) vigorously rejects outside influences on domestic law. The downside of this school is that in doing so, fewer opportunities are provided for revealing or correcting errors in domestic laws.³⁰ In contrast, the convergent model (analogous to the monist school) considers domestic legal systems to be open to outside influences, the crosscurrents of which lead to the general homogenization of legal norms across multiple domestic systems. The middle position, the engagement model, recognizes domestic legal system engagement with transnational legal influences. According to this model, the domestic system is cognizant of, and to some degree accepting of, outside legal influences, but borrows from abroad within the confines of its own constitutional context.³¹

B. THE MODELS AS REFLECTED IN US CASE LAW AND IN OTHER JURISDICTIONS

The United States provides a good example of the interrelationships between international and domestic law. It paints a picture of a state that, despite having a general aversion to international law, also has a long history of references to external sources, a practice that has been markedly increasing over the last couple of decades.

The recourse to the international law by American judges has historically been minimal compared to their counterparts in Europe and other common law countries. Arguments against the use of international law have included the fear of foreign domination, the fear of judicial activism, and the fear of the unknown.³² However, in the last two decades US courts have increasingly relied

²⁹ Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv L Rev 109, 109–28 (2005).

³⁰ For a discussion of an exclusionist form of sovereigntism, see Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 Intl J of Const L 33 (2007).

³¹ For a more extensive discussion of this modular approach, see Jackson, *Constitutional Comparisons* at 114–15 (cited in note 29). See also Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv L Rev 1147, 1154 (1993).

³² Austen Parrish, *Storm in a Teacup: The US Supreme Court's Use of Foreign Law*, 2007 U Ill L Rev 637, 650–51 (2007).

on international practices regarding human rights and judicial independence as background sources to domestic cases.³³

The US experience can be categorized, according to Jackson's model, in a number of schools.³⁴ The resistance school is advanced by Justice Scalia. For example, in *Roper v Simmons*,³⁵ he vigorously rejected outside influences on domestic law. However, it can also be said that the US Supreme Court practices the engagement model, for international law always has been, and continues to be, relevant to US constitutional interpretation, with several clauses in the Constitution making open reference to institutions of international law.³⁶ These references assume an international law background, which, in the course of adjudication and in interpreting the constitutional texts, provides an essential resource for judicial deliberations. For example, foreign law plays a well-known and central role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment. The Supreme Court has also invoked international and foreign sources in construing other constitutional amendments, including the Thirteenth Amendment, the Eighteenth Amendment, and the Eighth Amendment. After the Second World War, international human rights law further widened the field of interaction between international law and constitutional interpretation. In recent years, the spread of rights-based constitutionalism has further increased the opportunity for comparative use of foreign constitutional law. However, currently the Supreme Court does not construe constitutional rights so as to implement the obligations of international human rights treaties, a practice of some domestic constitutional courts in other countries. Rather, in the United States, international law is used merely as one of many elements in the judicial inquiry into constitutional interpretation, as illustrated in *Lawrence v Texas*.³⁷ Gerald Neuman observed that the decision in *Lawrence* provides an illustration of the appropriate use of international law as one of many elements in a complex inquiry into constitutional interpretation.³⁸ He concludes, "That kind of inquiry creates no danger that foreign powers will dictate constitutional law to the United States, or

³³ *Roper v Simmons*, 543 US 551, 575 (2005); *Lawrence v Texas*, 539 US 558, 571 (2003).

³⁴ See generally Jackson, *Constitutional Comparisons* (cited in note 29).

³⁵ *Roper*, 543 US at 622–28.

³⁶ Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, UC Berkeley Public Law Research Paper No 954359 at 12 (Dec 15, 2006); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am J Int L 82 (2004).

³⁷ The opinion in *Lawrence* cites *King v Wiseman*, 92 Eng Rep 774, 775 (KB 1718), as well as a decision of the European Court of Human Rights. 539 US at 568, 573. However, foreign law is not given higher importance than domestic law or US academic writers. See also Neuman, 98 Am J Int L at 83–84 (cited in note 36).

³⁸ *Id* at 89.

that the political branches can manipulate the content of the Bill of Rights by entering into a treaty.”³⁹

Another example in which the US Supreme Court cited to international documents is *Hamdan v Rumsfeld*.⁴⁰ There the Court held that special military commissions established to try non-US service members are not exempt from judicial review.⁴¹ The court considered whether the special military commission set up by the Bush administration to try detainees at Guantanamo Bay violated federal law and whether Congress is permitted to pass legislation preventing accused combatants from being heard by the Supreme Court prior to the military commission. In granting the petition of *habeas corpus*, the court held that constitutional principles are to be applied to military commissions and that courts may enforce articles of the Geneva Convention.⁴² Thus, despite the general US distaste for using law from outside its borders, there are examples of the Court referring to international law in making its domestic decisions.

The question of whether to consider international law and the experience of foreign nations in interpreting the US Constitution should not be seen as an ideological matter. Both schools of judicial orientation, the liberal and the conservative, can and should view the normative resources in international law and jurisprudence as having persuasive value. Whether we adopt the dualist or monist schools of thought, or the resistance, convergent, engagement classifications, it is evident that international human rights treaties and international jurisprudence play a vital role in the thinking and shaping of concepts, ideas, and attitudes of the national judiciary in adjudicating constitutional cases.

IV. JUDICIAL INDEPENDENCE—THE CONCEPTUAL ANALYSIS

A. FUNDAMENTAL PRINCIPLES OF JUDICIAL INDEPENDENCE

It should be noted at the outset that just as there are varying models of the relationship between international and domestic law, there are different principles of judicial independence.

1. Personal and Substantive Independence

Individual judges must enjoy both personal and substantive independence, both of which are necessary to protect judges from threats to their personal or

³⁹ Id at 90.

⁴⁰ *Hamdan v Rumsfeld*, 548 US 557 (2006).

⁴¹ Id at 613–17.

⁴² Id.

professional security that may influence their official duties.⁴³ Characteristics of personal independence include security of office, life tenure, and adequate remuneration and pensions. Substantive independence refers to the freedom of judges to perform their judicial functions independently.⁴⁴ The *Mt. Scopus Standards* require that both personal and substantive independence be preserved.⁴⁵

2. Collective Independence

The development of the judiciary as a significant social institution with an important constitutional role requires that the concept of judicial independence not be confined to the independence of the individual judge. It must also extend to the independence of the judiciary as a whole, under the rubric of collective independence. It is widely recognized that interference with the independence of individual judges is considered a serious infringement of the rule of law.⁴⁶ Interference with the collective independence of the judiciary also has an adverse impact on individual judges as they discharge their official duties. This is due to the fact that the traditional sense of social responsibility that the judiciary imparts on individual judges is a strong instrument for ensuring its independence. Interference with the judiciary as a whole is, therefore, likely to have a negative impact on the sense of independence of individual judges. The collective independence is protected by the rules outlined above in Section II, which deals with the constitutional position of the judiciary. The *Mt. Scopus Standards* refer to these aspects in sections 2.12 and 2.13.⁴⁷

⁴³ See Sandra Day O'Connor, *The Importance of Judicial Independence*, Remarks before the Arab Judicial Forum (Sept 15, 2003) in *Issues of Democracy* 25 (March 2004), available online at <<http://italy.usembassy.gov/pdf/ej/ijde0304.pdf>> (visited Apr 23, 2009).

⁴⁴ See Shetreet, *Judicial Independence* at 594–99 (cited in note 7); Lucie Atkins, *The Shifting Focus of Judicial Reform: From Independence to Capacity*, in EUMAP (Aug 2002), available online at <<http://www.eumap.org/journal/features/2002/aug02/indeptocapacity>> (visited Apr 23, 2009).

⁴⁵ Section 2.2 makes the distinction between personal and substantive independence. 2.2: “Each judge shall enjoy both personal independence and substantive independence.” 2.2.1: “Personal independence means 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.” 2.2.2: “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.” *Mt. Scopus Standards* (cited in note 4).

⁴⁶ Shetreet, *Judicial Independence* at 643 (cited in note 7).

⁴⁷ Section 2.12 states, “Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.” Section 2.13 states, “The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.”

3. Court Administration

In practice, collective independence is seen in the structure of court administration. There are three different models of collective independence.⁴⁸ These models are the joint executive-judicial model, the exclusive judicial model, and the shared responsibility model. The *Mt. Scopus Standards*, like the *IBA Standards*, express the position that the shared responsibility model is the best approach for the administration of lower courts in parliamentary systems of government.⁴⁹ It should be clarified that the executive may share responsibilities for court administration only on the central level (as distinguished from managing such matters at the court level, which will be inappropriate) but should be barred from intervention in judicial matters and should also be barred from involvement in judicial administration on the local level or in specific cases.

Adjudicative functions of judges should remain independent from directives or pressures from peers or superior judges. Adjudication is composed of three main parts: administration, procedure, and substance.⁵⁰ Judges have administrative responsibility for managing their cases, setting hearing dates, managing their workloads, and expediting hearings and the resolution of cases when appropriate. Judges also have procedural functions for conducting the trial itself by way of regulating the trial process according to the rules of evidence and procedure, and ruling on procedural motions. A judge's substantive duties involve findings of fact and applying the relevant legal norms to the facts of the case to reach a resolution. This may also involve the extension of existing legal norms and the creation of new legal doctrines.

The development of the judiciary as a significant social institution with an important constitutional role requires that the concept of judicial independence not be confined to the personal and substantive independence of the individual judge, but rather that it extend to the independence of the judiciary as a whole.

4. Internal Independence

Internal judicial independence can be considered collective independence but on a micro level. It demands that individual judges be free from unjustified influences not only from entities external to the judiciary, but also from within.

⁴⁸ For details on this classification of the models of responsibility of court administration, see Shetreet, *Judicial Independence* at 644–53 (cited in note 7).

⁴⁹ *Mt. Scopus Standards*, § 10.13 (cited in note 4) (“The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.”). See *id.*, § 10.4 (regarding confidentiality of deliberations). However, it is not appropriate for the executive to be involved or to have responsibility over judicial matters or judicial functions. See also *id.*, §§ 10.9, 10.12.

⁵⁰ See Shetreet, *Judicial Independence* at 590–601 (cited in note 7).

With regard to certain types of adjudicative functions, independence requires that judges be free from directives or pressures from peers or those who have administrative responsibilities in the court such as the chief judge of the court or the head of the division in the court.⁵¹ Adjudicative functions are those official functions for which judges are responsible in the discharge of their official duties. As with collective independence, they are threefold, as mentioned above: administrative, procedural, and substantive.

It can be argued that internal independence is applicable only to the substantive and procedural aspects of adjudication.⁵² This is because, as a general rule, a judge cannot rely on internal independence as a shield against guidance by other judges who are responsible for court administration.

The substantive and procedural aspects of adjudication vary in different legal systems, as do approaches toward recognizing the scope of internal judicial independence. Given this context, it is significant to note that there are conflicting views on the definition of the scope of internal judicial independence vis-à-vis the superior courts. These conflicting views are reflected in the doctrinal approach to precedent. Civil law countries such as Germany perceive the concept of substantive internal judicial independence to extend to judges' independence vis-à-vis superior court decisions. With some exceptions, judges are free to disregard precedent. In common law countries, judges are bound by previous decisions of superior courts and sometimes by those of the same court. The doctrine of binding precedent exists in different legal systems in varying degrees.

With regard to administrative judicial independence, it is generally accepted that judges cannot claim independence from required and necessary guidance and supervision in "administrative" aspects of adjudication. The US Supreme Court accepts this position that judges should be subject to administrative supervision, and the *Mt. Scopus Standards* also refers to this issue of internal judicial independence.⁵³

⁵¹ See Shimon Shetreet, *Models of Constitutional Adjudication: A Comparative Analysis*, in Ada Pellegrini Grinovner and Petronio Calmon, eds, *Papers Presented at the XII Congress of Procedural Law* 769–98 (Forensa 2007). See also Shimon Shetreet, *Judicial Independence on the Scope of Internal Independence*, in *Judicial Independence Today* 345–57 (Giuffrè 1999).

⁵² Consider Mauro Cappelletti, *Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility*, 31 *Am J Comp L* 1, 7–9 (1983) (accepting the proposition only in part).

⁵³ See *Chandler v Judicial Conference*, 398 US 74 (1970). See also *Mt. Scopus Standards*, § 9 (cited in note 4).

B. CONSTITUTIONAL PROTECTION OF JUDICIAL INDEPENDENCE

1. Constitutional versus Legislative Protection

In the normative analysis of the regulation of judicial issues, it must be recognized that certain matters should be regulated in the constitution whereas others may be regulated by ordinary legislation. When a matter is regulated in ordinary legislation, the legislature can create an amendment through simple majority. In contrast, protection granted by the constitution is modifiable only by constitutional amendment. Therefore, in order to better guard judicial independence, issues such as the terms of office for judges should be protected in constitutional provisions.⁵⁴ For example, the composition of the Supreme Court of the United States—how many judges sit in the court—is not constitutionally regulated and therefore the number of sitting judges has been changed by legislation.⁵⁵ During the controversy over New Deal legislation, US President Franklin Roosevelt attempted to pack the court—increasing the number of judges—which he could do by ordinary legislation.⁵⁶

In addition to general constitutional protections of judicial independence, a more detailed constitutional protection should include six fundamental substantive principles. Conceptually, these principles are imperative prerequisites to an independent judicial system.⁵⁷ They will be discussed in the following subsection.

⁵⁴ See Shetreet, *Judicial Independence* at 590 (cited in note 7). Consider Canada Const, §§ 96–101, which provide for the appointment, terms of office, and remuneration of judges.

⁵⁵ The Judiciary Act of 1789 initially sets the number of Supreme Court judges to six. In 1807, Congress increased the number of judges to seven because the number of judicial circuits had increased (each Supreme Court judge represents one judicial circuit). In 1837 Congress increased the number of judges to nine, and in 1863, to ten, for the same reason as in 1807. The Judicial Circuits Act of 1866 provided that the next three judges to retire were not to be replaced, reducing the number of Supreme Court judges to seven. This number increased to nine with the Circuit Judges Act of 1869, the current number of judges. In 1937, President Roosevelt tried to “pack the court” with up to fifteen judges in order to ensure passage of his “New Deal” legislation, by way of the Judiciary Reorganization Bill. However, Congress failed to pass the legislation, so the number of Supreme Court judges remained at nine.

⁵⁶ See, for example, *United States v Will*, 449 US 200 (1980); *Chandler*, 398 US 74; Jamie L. Carson and Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR’s Court-Packing Plan*, 113 Pub Choice 301 (2002); Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 Pol Sci Q 267 (1988); Gregory A. Caldeira, *Public Opinion and The US Supreme Court: FDR’s Court-Packing Plan*, 81 Am Pol Sci Rev 1139 (1987).

⁵⁷ Shetreet, *Judicial Independence* at 592, 615 (cited in note 7).

2. The Six Principles of Constitutional Protection

The first principle of constitutional protection of judicial independence is a rule against ad hoc tribunals. The second is a prohibition against intentionally stripping courts of their jurisdiction and diverting cases to other tribunals with a view to having those cases disposed of by tribunals that do not enjoy the same conditions of independence as the original courts. The third is the standard-judge principle, or the ordinary-judge principle, which requires that judges be selected to hear cases by a predetermined internal plan or assignment schedule prior to the commencement of the case. The fourth principle requires post-decisional independence of the judgment and its respect by the other branches of the government. The fifth principle is that judges must not be part of the administrative arm of the executive branch; rather, they should be viewed as independent constitutional or statutory officers of the state, completely separate from the civil service. The sixth principle is that changes in the terms of judicial office should not be applied to present judges unless such changes serve to improve the terms of judicial service.

a) *The first principle: barring ad hoc tribunals.* The first principle—excluding ad hoc or special tribunals—is widely accepted and implemented. There are a number of countries that guarantee trial by ordinary courts, precluding the need for a separate clause prohibiting special courts.⁵⁸ Some countries prohibit ad hoc tribunals and guarantee trial by an ordinary court.⁵⁹ Other countries only prohibit special courts.⁶⁰ International standards generally mention both rights.⁶¹

Article 8 of the American Convention on Human Rights (“American Convention”) attained this goal by providing for the right to be tried before a “competent, independent, and impartial tribunal, previously established by law.”⁶² This language clearly excludes an ad hoc tribunal, though an exception is made for the establishment of a military court under separate jurisdictional

⁵⁸ These countries include Ghana, Greece (Greece Const, art 8), Finland, Italy, the Netherlands, Norway, Spain, Sweden, Uganda, Uruguay, the US (US Const, amend V, VIII), and Belgium (Belgium Const, art 94). Section 83(2) of Austria’s Constitution establishes the right for an ordinary judge. Article 6 of the ECHR and Article 8 of the American Convention also declare such a right (cited in note 2).

⁵⁹ Ghana, Greece, and Sweden prohibit the establishment of a court for an act already committed or for a special purpose. See generally Amos J. Peaslee and Dorothy P. Xydis, *Constitutions of Nations* (Nijhoff rev 3d ed 1965–70). For a country study of judiciaries, see generally Shetreet, *Judicial Independence* (cited in note 7).

⁶⁰ Brazil, Japan, and Portugal are among such countries. See generally Peaslee and Xydis (cited in note 59).

⁶¹ See *IBA Standards*, art 21 (cited in note 6); *The Universal Declaration on the Independence of Justice*, art 2.06 (allowing emergency regulations as well as the standard rule) (cited in note 8).

⁶² American Convention (cited in note 2).

arrangements.⁶³ In line with the American Convention, precious few countries allow special courts. Those that do permit special tribunals generally limit their use.⁶⁴ Although a limitation rather than outright prohibition does not fit under the stricter conditions delineated by the American Convention, it does emphasize that even the most open-armed system is reticent to fully embrace the concept of ad hoc tribunals.

This strict limitation by most countries does not generally exclude the possibility of establishing courts by means of legislation in order to deal with a specialized branch of law. The litmus test that distinguishes a specialized court from a "forbidden" special court is that the scope of a specialized court is defined widely in terms of a field of law, and not by a given crime or a specific occurrence. In contrast to a permissible specialized court, a "forbidden" special court acts as a severe limitation on judicial independence by giving the executive the possibility to prosecute people before a special tribunal on the executive's own terms, thus bypassing the protections afforded to defendants in the ordinary court system.

b) The second principle: the prohibition of diversion of cases from the ordinary courts. The second of these principles prohibits the intentional stripping of a court's jurisdiction and diverting cases to other tribunals with a view toward having those cases disposed by tribunals that do not enjoy the same conditions of independence as the original courts. This is sometimes referred to as the non-diverting principle. Ordinarily, this second constitutional principle applies to criminal cases. One illustration of this principle concerns a German ordinance, in force from 1931 to 1976, which authorized the fiscal authorities to investigate cases of suspected criminal violations of the tax law.⁶⁵ The fiscal authorities⁶⁶ were also authorized to punish less severe offenses, mainly by imposing fines, without providing recourse to the regular criminal procedure. Two different procedures were possible, with Section 445 of the ordinance governing cases in

⁶³ Italy, Netherlands, the United States (US Const, amend V), and Austria (during wartime) allow for similar exceptions. See generally Peaslee and Xydis (cited in note 59).

⁶⁴ Malta and Norway are among such countries (guaranteeing trial before an ordinary court, although special courts can be established). See *id.* Right to appeal is reserved, however, for ordinary courts. The Indian Constitution provides that although the Supreme Court has general jurisdiction with regard to appeals from Indian courts and tribunals, this jurisdiction does not apply to "any court or tribunal constituted by or under any law relating to the Armed Forces." India Const, § 136.

⁶⁵ Abgabenverordnung vom 13, December 1919 (RGL S 1993) IBA der Bekanntmachung vom 22 Mai 1931 (RGL IS 161). This was superceded by the Abgabenordnung (AO 1977) vom 16 Maerz 1976 (BGBl L S 613) of § 96 of the Einfunrungsgesetz zur Abgabenordnung (EGAO 1977) vom 14 December 1976 (BGBl I S 3341).

⁶⁶ *Id.*, §§ 421(2), 445, 447(1).

which the accused confessed guilt, and Section 442 governing all other cases.⁶⁷ The fine imposed in either case was considered a criminal sentence; the “Notification of Penalty” was open to administrative appeal and to regular criminal appeals courts.⁶⁸

The constitutionality of this criminal jurisdiction of the fiscal authorities was considered doubtful due to the Basic Law of the Federal Republic of Germany, which came into force in 1949.⁶⁹ In 1967, the federal constitutional court ruled that these sections of the ordinance were unconstitutional.⁷⁰ The court held that Section 101(1) of the Basic Law guarantees everyone the right not to be removed from the jurisdiction of his or her lawful judge. Accordingly, an authority vested by the constitution in judges may not by law be vested in the administrative branch of government—in this case the fiscal authorities. The court also held that Section 92(1) of the Basic Law vests the authority of imposing criminal sentences with judges. Judicial power is exclusively vested in judges and must be interpreted in its material sense, that is, as one branch of government according to the theory of the separation of powers.

c) The third principle: the predetermined plan. The third principle requires that cases be heard by judges according to an internally predetermined plan or schedule prior to a case’s commencement. To schedule cases otherwise raises the possibility that a judge will be assigned a particular case in order to increase the likelihood of a certain ruling.⁷¹ In civil law countries this practice is not acceptable. In Germany this principle of a pre-determined plan is defined as the right to a lawful judge. It is a matter of doctrine and not of practical regulation. In Russia there has been a practice of consciously and purposefully selecting judges in order to reach certain outcomes. The Council of Europe noted the following about this practice:

There is a widespread practice that the Chairman of a court or the heads of collegias or divisions within the courts, assign the cases to the judges as they like and without regulations for predictable criteria. We heard a Chairman judge say, “After having read a new case I’ll know to which judge

⁶⁷ Consider Bundesverfassungsgericht 22, 49, 54–57 (“BverfGE”).

⁶⁸ Basic Law for the Federal Republic of Germany, art 19, § 4 (containing official English translation of the Grundgesetz).

⁶⁹ Grundgesetz fuer die Bundesrepublik Deutschland vom 29 Mai 1949 (BGBl S 1).

⁷⁰ BverfGE 22, 49. However, if these offenses were decriminalized, such administrative authorities may be unconstitutional.

⁷¹ On case scheduling, see generally Maureen Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (American Bar Assoc 1987); James S. Kakalik, et al, *Just, Speedy, and Inexpensive?: An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (Rand 1996).

I'll give it." It is not necessary for us to underline that this practice undermines the appearance of individual independence of judges.⁷²

d) *The fourth principle: post-judicial independence of judgments.* The fourth principle is post-judicial independence of the judgment and its respect by the other branches of the government. Frustrating the execution of a judgment has the same net effect as preventing a citizen from appearing before the courts in the first place.⁷³ Similar to frustrating judgments is the requirement that the power of pardon be used sparingly,⁷⁴ as the granting of pardons also can frustrate the just execution of judgments.

Tied in with this fourth principle is the ban against passing legislation reversing a specific judgment, a practice that has unfortunately been witnessed.⁷⁵ Another sub-issue is the prohibition against passing laws with the intent of preventing the courts from completing a hearing, or ensuring that a case does not arrive before the courts at all. An example of this occurred in India, in the *Gandhi Election Case*, when the Indian government passed a series of constitutional amendments in an attempt to prevent a Supreme Court of India from deciding on the validity of the current election.⁷⁶

e) *The fifth principle: separating between judges and civil servants.* The fifth principle is that judges must not be part of the administrative arm of the executive branch of the government; rather, they should be viewed as independent constitutional or statutory officers of the state, completely removed from the civil service. This helps keep judges independent, helps prevent them from having, or being perceived as having, a conflict of interest in the cases that they hear, and, in turn, helps prevent judicial disqualifications.

Special consideration needs to be taken into account with regard to civil jurisdiction career judiciaries, for in some of these countries the positions of judge and public prosecutor are interchangeable. In addition, certain other of the civil law countries group judicial salaries along with those of civil servants.⁷⁷

f) *The sixth principle: changes should not affect serving judges.* The sixth principle is that changes in the terms of judicial office should not be applied to presently sitting judges unless such changes serve to improve the terms of judicial

⁷² Willi Fuhrmann and William Bowring, *Diagnostic View of the Court System in Russia* 5 (International Bank for Reconstruction and Development 2002).

⁷³ Shetreet, *Judicial Independence* at 609 (cited in note 7).

⁷⁴ *Id* at 620.

⁷⁵ *Id* at 609. An example is the War Damage Act 1965, c 18 (1965) (UK).

⁷⁶ Sudipta Kaviraj, *Indira Gandhi and Indian Politics*, *Econ and Pol Weekly* 38 (Sept 20–27, 1986).

⁷⁷ Shetreet, *Judicial Independence* at 623 (cited in note 7).

service.⁷⁸ Changes include reducing judicial salaries both directly and indirectly (such as through altering pension plan contribution amounts), as well as adjusting the retirement age for judges. The Supreme Court of Canada has held that an exception to this rule exists when a reduction in, or freezing of, a previously approved salary increase is made as a general economic austerity measure.⁷⁹

Whenever changes in the term of office are introduced, a grandfather clause should be included providing that the changes will not apply to serving judges, such as in the Judicial Pensions Act in the United Kingdom. The act introduced a retirement age of seventy-five for judges, but expressly provided that it did not apply to serving judges.⁸⁰

V. JUDICIAL INDEPENDENCE CHALLENGED

A. PATTERNS OF INTERFERENCE WITH JUDICIAL INDEPENDENCE

Even once achieved, the continuation of judicial independence is not a matter of course. It is constantly subject to challenges, sometimes by other branches of government, and at other times as the result of internal developments, changing political circumstances, or social and economic pressures. Violations of accepted principles of judicial independence have occurred in countries that represent all forms of government and all geographic regions in the world. Challenges to judicial independence include interference with personal independence through legislation, including legislation abolishing security of tenure, lowering the retirement age, or abolishing certain courts so as to effectively end the service of a judge.⁸¹

⁷⁸ Id. See also Jonathan L. Entin and Erik M. Jensen, *Taxation, Compensation, and Judicial Independence: Hatter v United States*, 90 Tax Notes 1541, 1543 (2001).

⁷⁹ See, for example, *Beauregard v The Queen*, [1981] 130 DLR 3d 433 (Canada).

⁸⁰ Judicial Pensions Act 1959, ch 9 (1959) (UK), available online at <<http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&parentActiveTextDocId=1128286&ActiveTextDocId=1128286&filesize=20043>> (visited Apr 23, 2009).

⁸¹ Mark Tushnet, *Leadership in Constitutional Courts*, Conference Materials, Krakow (Mar 2008). See also Shetreet, *Judicial Independence* at 607–08 (cited in note 7).

B. COUNTRY ILLUSTRATIONS OF DISMISSAL OF JUDGES: ECUADOR, PAKISTAN, AND OTHERS

Ecuador provides a salient example of infringements on judicial independence through the removal of judges. On April 24, 2007, all nine judges of Ecuador's Constitutional Court were removed following an unpopular ruling. The removal was executed by a congressional vote lacking any legal basis. According to Ecuadorian law, the Constitutional Court's judges are removable only by impeachment. Still, this was the third time in three years that judges were removed by Congress. This act demonstrated a flagrant disregard for the independence of the judiciary. Furthermore, a month prior to the firing, the President of the Supreme Electoral Court was removed by Ecuador's legislature one day after the Court handed down an unpopular decision.⁸²

The situation in Ecuador is reminiscent of that in Uruguay in the early 1970s. In 1973, after the dissolution of the houses of parliament and the establishment of a new system of government by the Constitutional Reform Act, judicial independence was abolished. A special statute⁸³ passed by the "civil-military" government abolished tenure for judicial offices and transferred all powers of judicial administration to the executive. A new statute⁸⁴ enacted in November 1981 introduced reforms providing for some participation of the judiciary in conducting the affairs of the judges, but the executive's control over the judiciary remained substantial.⁸⁵

Fortunately, political efforts to interfere with judicial independence by seeking the removal of judges do not always succeed, as exemplified by the Czech Republic.⁸⁶ The Czech president attempted to remove the Chief Justice of the Czech Supreme Court from her position, but the Court upheld the principle of judicial independence by ruling this attempt invalid.

C. REDUCING JUDICIAL SALARIES AND SUSPENDING COURTS

Violations also take the form of reducing salaries of judicial officers, as previously took place in Portugal. It should be noted that reductions in, or the freezing of, previously approved judicial salary increases, as general economic austerity measures, are constitutionally acceptable. However, they have created

⁸² Human Rights Watch, *Ecuador: Removal of Judges Undermines Judicial Independence* (May 10, 2007), available online at <<http://www.hrw.org/en/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence>> (visited Apr 23, 2009).

⁸³ Institutional Law No 8 (Ecuador).

⁸⁴ Institutional Law No 12 (Ecuador).

⁸⁵ See Shetreet, *Judicial Independence* at 590 (cited in note 7).

⁸⁶ Tushnet, *Leadership in Constitutional Courts* (cited in note 81).

controversy in a number of countries, including in the United Kingdom in the 1930s,⁸⁷ in the United States in the 1970s,⁸⁸ and in Canada.⁸⁹ Challenges to judicial independence sometimes take the form of transferring judges to other locations, which can be tantamount to removal when the transfer is effected in order to rid a court of, or to punish, a particular judge.⁹⁰ In Poland, a judge may be relocated only with that judge's prior consent, or else through a disciplinary court decision and based on grounds specified in the Structure of Common Courts Act.⁹¹

Sometimes, the violation of judicial independence is effected by closing down courts, as in Malta in 1981.⁹² Alternatively, attacks on judicial independence sometimes come in the form of frustrating the execution of judicial decisions or preempting judicial decisions, through suspending court operations, legislating preempting adjudication, or reversing judicial decisions.⁹³

D. INFRINGEMENTS OF JUDICIAL INDEPENDENCE IN RUSSIA AND POLAND

Russia provides a salient example of a system that has challenged the concept of judicial independence. The greatest challenge to Russian judicial independence is the close relationship between the executive branch and the

⁸⁷ For the statute that caused the controversy, see An Act for the Further Limitation of the Crown, and Better Securing the Rights and Liberties of the Subject, 12 & 13 Will 3, ch 2, 10 Statutes at Large 357, 357–360 (1700) (“Act for the Further Limitation of the Crown”) (“[Be it enacted that] judges['] commissions be made *quamdiu se bene gefferint*, and their salaries ascertained and established . . .”).

⁸⁸ See, for example, *Will*, 449 US 200.

⁸⁹ See, for example, *Beauregard*, 130 DLR 3d 433. Similar controversy arose in Israel in 1985 when salaries and prices were frozen and the emergency regulations included the judges under public servants whose salaries were frozen. The judges challenged this approach, arguing that they were not to be included. Israel's Basic Law resolves this issue by providing that judicial salaries cannot be singled out for reduction but may be reduced with other sectors of the public service. See Basic Laws of Israel: The Judiciary § 10, available online at <http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm> (visited Apr 23, 2009). See also Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Martinus Nijhoff 1994).

⁹⁰ See Jill Cottrell, *The Indian Judges' Transfer Case*, 33 Int & Comp L Q 1032 (1984).

⁹¹ *Ustawa Prawo o Ustroju Sadow Powszechnych*, Journal of Laws (July 27, 2001) (referred to in Pawel Pietkiewicz and Lukasz Hejmej, *The Polish Judicial System and Legal Procedure*, in Zdzislaw Brodecki, ed, *Polish Business Law* 43 (Kluwer Law International 2003)).

⁹² Shetreet, *Judicial Independence* at 602 (cited in note 7).

⁹³ *Id* at 610.

judiciary,⁹⁴ resulting in a lack of sufficient judicial independence. This challenge can be seen by subjective case assignments and reassignments, and the pressures exerted on judges by both the executive branch and by higher ranking judges.⁹⁵

This challenge to judicial independence is seen in informal judicial supervision, primarily of lower court judges. One form of “supervision” is manifested in the ability of higher level judges and prosecutors to insist on reviews of lower court judgments. These forced reviews mean that lower court decisions can be vacated, at any time. Supervision is also seen through the “advice” and “hints” provided by higher court judges to their lower court counterparts. Lower court judges often seek and welcome these suggestions on account of Russia’s system of judicial promotions. Judicial promotions are largely based on judicial records of overturned judgments, thus providing an impetus to judges to ensure that their decisions are congruous with higher court sentiments. Finally, judges are appointed supervisor judges who officially review supervisees’ decisions and serve in the role of “mentors.”⁹⁶

The case of *Kudeshkina v Russia*, pending before the ECtHR, illustrates systemic challenges of Russian judicial independence. In *Kudeshkina*, former Judge Kudeshkina placed a complaint before the ECtHR.⁹⁷ The background to the complaint illustrates a system in which undue pressure is put on judges: while sitting on a 2003 criminal case, both the public prosecutor and the chief judge pressured Kudeshkina. The significance of *Kudeshkina* is due to the applicant—not a layperson but a former judge with close to two decades of experience.

Ms. Kudeshkina testified that

[T]he public prosecutor who was representing the Prosecutor General’s Office clearly decided that this questioning was not favourable to the prosecution and therefore did everything possible to disrupt the hearing. For no reason he challenged me as a judge, the lay assessors and the whole

⁹⁴ Jackson Diehl, *In Russia “Legal Nihilism as Usual”*, Wash Post A17 (July 28, 2008); Peter H. Solomon and Todd S. Fogelson, *Courts and Transition in Russia: The Challenge of Judicial Reform* 47–49 (Westview 2000).

⁹⁵ Fuhrmann and Bowring, *Diagnostic View of the Court System in Russia* at 5 (cited in note 72).

⁹⁶ Solomon and Fogelson, *Courts and Transition in Russia* at 50–52 n 66 (cited in note 94); Gerard P. van den Berg, *Recourse Against Judgments in Civil and Criminal Cases in Russia*, in Ferdinand Feldbrugge, Roger Clark and Stanislaw Pomorski, eds, *International and National Law in Russian and Eastern Europe* 42–43 (Martinus Nijhoff 2001).

⁹⁷ *Kudeshkina v Russia*, App No 29492/05 Eur Ct HR (2005), available online at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847800&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> (visited May 31, 2009).

composition of the court. His motions were made in a manner that was humiliating, offensive and insulting to the court, and were clearly untrue.⁹⁸

Ms. Kudeshkina testified that the procurator laid several challenges against the assessors and herself, and that all parties save for the procurator objected to these challenges. She further testified that as a result of the challenges the lay assessors withdrew from the case. One of the assessors explained to the former judge that the withdrawal was due to the pressure being placed by the agent of the Prosecutor General's office.

According to Ms. Kudeshkina, the chief judge also put pressure on her during that case, resulting in her complaint to the High Judiciary Qualification Panel in December 2003. Ms. Kudeshkina in her complaint stated that the chief judge

demanded that I give an account on the merits of this case while its examination was underway, and that I inform her about the decisions the court was about to take; she even called me out of the deliberations room for that purpose. [She] insisted on removing certain documents from the case file, forced me to forge the minutes of the hearing, and also recommended that I ask the lay assessors not to turn up for the hearing. Following my refusal to bow to this unlawful pressure [she] removed me from the proceedings and transferred the case to another judge.⁹⁹

Another example of infringement on judicial independence in Russia can be seen in the Zorkin-Yeltsin affair. After the collapse of the Soviet Union, the constitutional court was led by Chief Justice Valery Zorkin in several cases involving the transition of rule from the Soviet to the post-Soviet era. These cases were controversial, and included both an invalidation of one of President Yeltsin's decrees and a finding that Yeltsin's actions were unconstitutional. In response to these and other decisions, Yeltsin shut down the constitutional court for several years. When it reopened, Valery Zorkin remained with the court. However, the court's perspective was notably different after its reopening: it began to regularly agree with government actions.¹⁰⁰

Poland has seen a struggle between the executive and the judiciary over the proper demarcation lines between the two branches, as outlined in the detailed reports of a high level committee of the IBA. The reports outline a series of measures introduced by the Polish government which, when considered collectively, appeared to have been designed with the intention of ensuring that the judiciary follow the will of the executive branch. These measures included the appointment of trainee judges for trial periods and increased authority by the

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Mark Tushnet, *Leadership in Constitutional Courts* (cited in note 81).

Minister of Justice over the judiciary, including the Minister's power to transfer judges against their wills and to order immediate suspensions in certain situations. In addition, the Minister of Justice was given the ability to appoint presidents of courts upon only the opinion of the General Assembly of Judges, as well as the power to appoint temporary presidents for consecutive terms. Following, and perhaps on account of, the IBA's November 2007 report of these issues, the Polish government retracted many but not all of its practices. In September 2008, the IBA published a follow-up report which expressed satisfaction that many of the changes had been reversed, but restated concerns that some measures, including the Minister of Justice's power to transfer judges, remained.¹⁰¹

VI. THE CREATION OF THE LEGAL CULTURE OF JUDICIAL INDEPENDENCE

The legal culture of judicial independence is created through the intermingling and interrelationship of domestic and international law. Contributing factors include domestic constitutional and legislative protections of judicial independence, the effect of international jurisprudence on national laws, and the emergence of professional international standards on judicial independence.

A. CONTRIBUTIONS OF DOMESTIC LAW TO THE CREATION OF THE LEGAL CULTURE OF JUDICIAL INDEPENDENCE

Domestic law plays a significant role in shaping judicial independence. English and American law illustrate how domestic law can shape the development of an international culture of judicial independence. The main impact on the developments leading to the establishment of national laws protecting judicial independence took place towards the end of the seventeenth century and the beginning of the eighteenth century in England. Later it was developed in the United States, as evidenced in the US Constitution.

¹⁰¹ See generally International Bar Association, *Justice under Siege: a Report on the Rule of Law in Poland* (Nov 2007), available online at <http://www.google.com/url?sa=t&source=web&ct=res&cd=3&url=http%3A%2F%2Fwww.ccbe.org%2Ffileadmin%2Fuser_upload%2FNTCdocument%2F11_2007_Nov06_Report1_1194344860.pdf&ei=fB6oSZbtJZC-nQfB0unmDw&usg=AFQjCNGfvL8q7QgAJ7w6m5LwawLDKCCQnBw&sig2=FwResMUuEdN8uLaeKbl-vg> (visited Apr 23, 2009); International Bar Association, *Follow Up Report to Justice under Siege: a Report on the Rule of Law in Poland* (Sept 2008), available online at <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=DF75F80F-A773-410C-A6A8-661F6612D0CC>> (visited Apr 23, 2009).

1. The English Experience

The English experience highlights the crisis that a society must often go through in order to attain the goal of securing an independent judiciary.¹⁰² For centuries, sovereignty was concentrated in the king, who was an absolute monarch and thus the source of all governmental and political power. The king may have established courts, but these courts existed only for the purpose of exercising and carrying out the king's powers and responsibilities. Judges were an integral part of the royal administration, and thus to an observer, "the distinction between judicial and administrative duties would have been rather obscure."¹⁰³ This seemingly impossible beginning for the judiciary was not, however, one which gave rise to much concern. At that period, the judges undoubtedly were not independent, being under strict royal control. The king enjoyed the cooperation of the judiciary. This collaboration was harmonious and widely accepted, due to the fact that the sovereign did not seek to use judges as instruments in political struggles.¹⁰⁴

Thus, the political makeup of England was not endangered until change came about as a result of a clash between the king and Parliament in the seventeenth century. Both sides demanded the backing of the courts, which were responsible for giving legal interpretation to the meaning of royal prerogative and parliamentary privilege.

The king had the upper hand due to his control over the judiciary, including the power of dismissal from office, suspension, and transfer from one judicial office to another. It was due not only to the countervailing power of Parliament, but also to a number of strong-willed judges, that the judiciary eventually secured its independence along the lines it follows in England today. Parliament's own efforts to control the judiciary were "in the main motivated by political considerations. Judicial activities were labeled 'illegal,' 'contrary to fundamental laws' or 'corrupt,' but in effect the judges were proceeded against by Parliament to protect the political interests at stake and to curb royal powers."¹⁰⁵ Judges could be impeached or called before Parliament to explain their actions as if their only duty was to serve Parliament.

¹⁰² For a detailed analysis, see Martin Shapiro, *Courts: A Comparative and Political Analysis* 65 et seq (Chicago 1981).

¹⁰³ Shetreet, *Judges on Trial* at 2 (cited in note 1).

¹⁰⁴ Id. See also Sir William Searle Holdsworth, *A History of English Law* 347 (Sweet & Maxwell 2d ed 1937).

¹⁰⁵ Shetreet, *Judges on Trial* at 7 (cited in note 1). See generally Alfred F. Havighurst, *The Judiciary and Politics in the Reign of Charles II*, 66 L Q Rev 229 (1950); W.J. Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* 18–19, 21–22, 51–52 (George Allen & Unwin 1971).

This conflict of power was expressed in the crucial debate between Sir Edward Coke, Chief Justice of the Court of Common Pleas, and later of the King's Bench, and Sir Francis Bacon. Bacon's view was that the judge's function was not merely to declare the law, but also to support the government. Coke, in a series of cases culminating in direct confrontation with James I over the *Case on Commendams*,¹⁰⁶ steadfastly maintained that the judge must preserve his impartiality in all matters, and was under no duty to consult the king even when decisions affected the powers of the Crown.¹⁰⁷ Coke's view has prevailed, although it requires some interpretation to bring it in line with modern practice. His advocacy of the courts' exercise of control over a "repugnant" act of parliament has been seen as a call for narrow interpretation of statutes purported to offend fundamental laws, rather than for the invalidation of such statutes by judicial review.¹⁰⁸

Parliament battled with the Crown on the issue of control of the judiciary by exerting sanctions of its own, and the seventeenth century saw a number of celebrated impeachments.¹⁰⁹ A second line of attack was to enact legislation aimed at the elimination of royal interference with the judicial process. Measures adopted included a judicial oath not to receive fees or presents from a party to a case except from the king, who paid judges' salaries, nor to heed any direction from the king on an issue pending before the court.

Security of tenure was the central issue, however, and it was not until the Act of Settlement in 1701 that an important measure of security was finally guaranteed.¹¹⁰ Prior to the act, judges had ordinarily been appointed by the monarchs "during pleasure," and thus had been subject to the royal whim. The Act of Settlement provided for judges to be appointed during good behavior (*quam diu se bene gesserint*) and for their salaries to be "ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them." However, judicial tenure was still not yet completely secured; judicial appointments terminated on the death of the monarch or six months thereafter. An amendment in Queen Anne's reign not only did not guarantee security after the six-month period, but also was worded so as to cast doubt on the six month

¹⁰⁶ *Colt and Glover v Bishop of Coventry*, [1617] Hob 140 (UK).

¹⁰⁷ Shetreet, *Judges on Trial* at 6 (cited in note 1).

¹⁰⁸ *Id* at 6–7.

¹⁰⁹ The Commons impeached Lord Chief Justice Scroggs in 1680 and though fellow lords refused to impeach him, he was removed from the bench. See 2 Parl Deb 1, 22–25 (1680–1692). See also Shetreet, *Judges on Trial* at 7 (cited in note 1).

¹¹⁰ Act for the Further Limitation of the Crown, 12 & 13, Will 3, ch 2, 10 Statutes at Large at 360 (cited in note 87).

period's applicability to judges at all. It took the initiative of George III in 1760 to help secure the term of judicial office beyond the lifetime of the monarch.

The current formula has evolved from the consolidation of the Act of Settlement and the said 1760 Act. According to both constitutional statutes neither king nor parliament would be capable of attaining their particular political objectives or ambitions by exercising control over the decisions of the judiciary. The king could no longer hold over every judge's head the threat of immediate dismissal from an office held at his pleasure, nor could Parliament attain its own ends by an equally preemptory and almost as effective withdrawal of livelihood.¹¹¹ Subsequently, Section 12(1) of the Supreme Court of Judicature (Consolidation) Act of 1925, which is the modern formulation of the historical development, stated: "All the judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, shall hold their offices during good behavior, subject to a power of removal by His Majesty on an address to His Majesty by both Houses of Parliament."¹¹²

However, the situation in 1760 was in need of further change. The reliance of the system on litigants' fees for judicial remuneration left the system open to abuse and misconduct. George III's reign saw the establishment of salaries and pensions. However, it was only in the last century that the salary became substantial, and a prohibition against supplementing it was added. In this way, "[t]he additional sources of income were eliminated in a very long gradual evolution extending over three centuries."¹¹³ Association between the judiciary and the other branches of the government, the executive and the parliament, was not eliminated altogether. The last aspect of judicial association with the executive was gradually extinguished when judges stopped taking high government appointments. This practice ceased only after Chief Justice Ellenborough's appointment caused public criticism in 1805. Although Ellenborough retained his cabinet seat while he sat on the bench, such appointments were not repeated.¹¹⁴ It was partly under the influence of such incidents that the respective constitutional roles of the executive and judiciary were crystallized. In addition, no common law judge has sat in the House of Commons since 1803 and no superior judge has done so since the passage of the 1873 and 1875 Judicature Acts.¹¹⁵

¹¹¹ *Beauregard*, 130 DLR 3d 433.

¹¹² 15 & 16 Geo 5, ch 49 (1925) (Eng).

¹¹³ Shetreet, *Judges on Trial* at 11 (cited in note 1).

¹¹⁴ *Id* at 14–15.

¹¹⁵ *Id* at 13–15.

An important development affecting judicial independence was the fundamental reform of the Courts Act of 1971,¹¹⁶ introduced on the recommendations of the Beeching Commission Report.¹¹⁷ The Courts Act eliminated centuries of local control over courts, established a new class of judges, called circuit judges, set up an administrative hierarchy across the country, and made court personnel a part of the national civil service. The Act, which restructured the criminal court system in England, has been described as a “radical, even a spectacular reform.”¹¹⁸ This reform, however, carried with it mixed blessings for the independence of the judiciary in England. While it promoted judicial independence by considerably reducing the dependence of the criminal justice system on part-time judges, the centralization of judicial administration in England brought increased executive control and thus endangered judicial independence.¹¹⁹ This was to be resolved only three decades later in the Constitutional Reform Act, which will be discussed later.¹²⁰

2. The American Experience

The American perspective on judicial independence differed from that of the English. The American Founding Fathers adhered to a much stricter doctrine of separation of powers in the US Constitution. The Founding Fathers adopted the doctrine of checks and balances based on the concept that no function of one branch of government should be exercised by another branch and that each branch should function as a check on any improper use of power by the other branches.

In this context, the Founding Fathers wished to ensure judicial independence. The Declaration of Independence charged George III with making “Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹²¹ Foundations of judicial independence are laid out in Article III of the US Constitution, which states that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a

¹¹⁶ Courts Act 1971, ch 23 (1971) (UK), available online at <http://www.opsi.gov.uk/acts/acts1971/pdf/ukpga_19710023_en.pdf> (visited Apr 23, 2009).

¹¹⁷ Lord Beeching, *Royal Commission on Assizes and Quarter Sessions, 1966-1969*, Cmnd 4153 (HMSO 1969).

¹¹⁸ Lord Hailsham, 312 HI Deb 1247 (Nov 19, 1970).

¹¹⁹ Lord Lane, *Judicial Independence and the Increasing Executive Role in Judicial Administration*, in Shetreet and Deschenes, eds, *Judicial Independence: The Contemporary Debate* at 525–28 (cited in note 7).

¹²⁰ See Section VI.D.

¹²¹ United States Declaration of Independence (1776).

Compensation which shall not be diminished during their Continuance in Office.”¹²²

An important development took place in the mid-nineteenth century. A radical political movement called Jacksonian Democracy introduced the practice of electing short-term judges. The practice is found in many state courts today and is motivated by a desire to make judges more accountable to the people. The federal judiciary escaped the onslaught of Jacksonian Democracy; its appointive procedure of selection was not affected. This fact is largely due to the relative unimportance of the federal trial courts at the time, as well as the difficulty of amending the federal Constitution. However, it should be noted that during the last three to four decades, countries have introduced appointive or mixed appointive-elective models of judicial selection.

The federal judicial system was given a large degree of administrative autonomy in 1939 with the creation of the Administrative Office of the United States Courts, and the transfer of court administration from the Department of Justice to the judiciary. The result was a largely centralized federal judicial administration system, autonomous in the conduct of its administrative and financial matters. Budget estimates submitted by the judiciary were not subject to executive revision after this date.¹²³ In contrast, the state judiciary, which is not uniform, does not always have the effective administrative control or budgetary freedom of the federal courts. The problems of court financing have led to numerous suits brought by trial courts against local governments that have failed to provide the budget necessary for the courts.¹²⁴

B. THE SHIFTING DIRECTIONS OF JURISPRUDENCE ON JUDICIAL INDEPENDENCE: THE EFFECT OF POST-WORLD WAR II INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE ON NATIONAL LAWS

After the Second World War, there was a shift in the direction of the normative cycle. Previously, the main area of impact was from national jurisprudence contributing to the creation of the culture and the establishment of the principles of judicial independence. However, beginning in this post-war period, the momentum moved to the international scene, with international jurisprudence contributing to the creation of the culture and the establishment

¹²² US Const, art III.

¹²³ Ernest C. Friesen, Edward C. Gallas, and Nesta M. Gallas, *Managing the Courts* 87–88 (Bobbs-Merrill 1971).

¹²⁴ See, for example, *Judges for Third Judicial Circuit v County of Wayne*, 172 NW 2d 436 (Mich 1969); *Smith v Miller*, 384 P2d 738 (Colo 1963).

of the principles of judicial independence in national systems. Major international and regional human rights treaties contained provisions aimed at securing judicial independence in international tribunals and in the states party to the conventions.¹²⁵ In addition to the treaties, international court cases provided remedies to enforce the right to an independent and impartial tribunal when such a right was violated by the state. These decisions, issued by the ECtHR, are binding upon the member states of the ECtHR and thus influence the judicial independence in domestic national laws.

An example of international jurisprudence influencing domestic laws is *Procola v Luxembourg*,¹²⁶ in which the plaintiffs complained before the ECtHR of an infringement on their right to an independent and impartial tribunal under Article 6, paragraph 1 of the ECHR.¹²⁷ The ground for the complaint was that some of the members of the Judicial Committee of Luxembourg who ruled on Procola's application for judicial review had previously given their opinion on the lawfulness of the impugned provisions in their other role as members of the Conseil d'Etat. Their interpretation was that Article 6 is applicable only when the proceedings are decisive for a civil right.

In determining whether Article 6 was violated, the ECtHR ruled that in the context of an institution such as Luxembourg's Conseil d'Etat, the mere fact that certain persons performed both the advisory and the reviewing functions with respect to the same decisions casts doubt on the institution's structural impartiality. Procola had legitimate grounds for fearing that the members of the Judicial Committee would feel bound by the opinion previously issued. That doubt, however slight, was sufficient to vitiate the impartiality of the tribunal in question, thereby breaching Article 6, paragraph 1.

Another example of international jurisprudence was the case of *McCannell v United Kingdom*,¹²⁸ in which the applicant claimed that a bailiff, while presiding over the Court of Appeal, was not impartial due to his executive and legislative roles as a representative of the UK government. The ECtHR was asked to consider whether any direct involvement in the passage of legislation or executive rules is sufficient to cast doubt on the impartiality of a judge subsequently called on to interpret the wording of the legislation or rules at issue. The ECtHR found that despite the lack of any proof of actual bias, the bailiff could only cast a vote in the event of deadlock. However, there was no obligation on the bailiff to exercise his casting vote where that vote impinged on

¹²⁵ For a list of such treaties, see note 2.

¹²⁶ *Procola*, 326 Eur Ct HR.

¹²⁷ ECHR, art 6, ¶ 1.

¹²⁸ *McCannell*, 30 Eur Ct HR 289.

his conscience. Moreover, the States of Deliberation in Guernsey, the legislature of the island in which the bailiff participated, was the body that passed the regulations at issue. It can thus be seen to have had a more direct involvement with the legislature than had the advisory panel of the Conseil d'Etat in the case of *Procola* with its regulations.

In the case of *De Haan v The Netherlands*,¹²⁹ the judge who presided over the appeals tribunal was called upon to decide an objection for which he himself was responsible. In that case, notwithstanding an absence of prejudice or bias on the part of the judge, the court found that the applicant's fears regarding the judge's participation were objectively justified.¹³⁰

These rulings by the ECtHR, specifically *Procola* and *McGonnell*, cast doubt on the legality of the traditional practice in England of the Lord Chancellor presiding over appeals in the House of Lords, given that he is also a member of the British cabinet. It is possible that, as in the cases of *Procola* and *McGonnell*, the Lord Chancellor could be seen at that time as reviewing his own decisions made as a member of the executive branch.¹³¹

In *Findlay v United Kingdom*, the ECtHR stated the conditions that a tribunal has to meet in order to be considered independent:

The Court recalls that in order to establish whether a tribunal can be considered as "independent," regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.¹³²

Based on these criteria, the court determined that court-martial proceedings were not adequately independent.¹³³

Standards of impartiality have been applied rather strictly, and in terms indicating that they reflect an international law standard of independence. In *Gonzalez del Rio v Peru*, the Human Rights Committee stated, "The right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception."¹³⁴ Likewise, the UN Special Rapporteur on the

¹²⁹ *De Haan v The Netherlands*, 1997-IV Eur Ct HR 1392, 1393.

¹³⁰ Id at 1392, 1393 ¶¶ 50–51.

¹³¹ For a detailed analysis of the jurisprudence, see James Crawford, *The Independence of the Judiciary in International Law*, paper delivered at the Conference on Judicial Independence in International Law, Jerusalem (2007).

¹³² *Findlay*, 24 Eur HR Rep 221.

¹³³ Id. See also *Coëme v Belgium*, 2000-VII Eur Ct HR 120.

¹³⁴ United Nations, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/46/D/263/1987 ¶ 5.2 (1992).

independence of the judiciary and lawyers was “of the opinion that the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom.”¹³⁵ In Germany, the Arbitral Commission on Property, Rights and Interests stated, “It is in the general principles of international public law that one must look for any grounds for disqualification of international judges.”¹³⁶ Furthermore, a lack of independence on the part of a tribunal may also violate other norms of international law. Similarly, if an executive attempts to rearrange the composition of the courts, it may amount to both a denial of justice and a violation of the right to a trial before an independent tribunal.¹³⁷

In *Prosecutor v Delalić (Celebici)*, appellants argued for Judge Odio Benito’s disqualification on the basis that her appointment to the position of Vice President of Costa Rica called into question her impartiality as required by international law.¹³⁸ Prior to accepting the nomination as vice president, Judge Benito wrote to the president of the International Criminal Tribunal for Yugoslavia (“ICTY”) stating that, if elected, she would not assume any executive functions until the completion of her judicial duties as a member of the trial chamber in the *Celebici* case.¹³⁹ The appeals chamber rejected the appellants’ submission that Judge Benito had exercised any executive functions in Costa Rica during the time she was also a judge of the ICTY. The appeals chamber noted that “it is beyond question that the principles of judicial independence and impartiality are of a fundamental nature which underpin international as well as national law.”¹⁴⁰ The appeals chamber then expressed its position on the application of the principle of separation of powers in factual situations:

The application of the principle of separation of powers to the factual situation underlying this ground of appeal is nevertheless misconceived. The doctrine applies principally to ensure the separate and independent exercise of the different powers within the same sphere or political system. The

¹³⁵ United Nations, *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report of the Special Rapporteur, Param Cumaraswamy*, UN Doc E/CN.4/1995/39 ¶ 35 (1995).

¹³⁶ *Bengston v Federal Republic of Germany*, 28 ILR 549, 557 (Arbitral Commn on Property, Rights & Interests 1959).

¹³⁷ See, for example, Jan Paulsson, *Denial of Justice in International Law* 163 (Cambridge 2005).

¹³⁸ *Prosecutor v Delalić*, Case No IT-96-21-A (Oct 25, 1999) ¶¶ 1–3; *Prosecutor v Delalić*, Case No IT-96-21-A (Feb 20, 2001). The appellants also sought to argue that, following this appointment, Judge Odio Benito failed to meet the requirements for the qualification of judges set out in Article 13 of the International Criminal Tribunal for Yugoslavia Statute. In particular, it was argued that her appointment disqualified her from “appointment to the highest judicial offices” in Costa Rica. *Delalić*, ¶ 656 (Feb 20, 2001).

¹³⁹ *Id.*, ¶ 684.

¹⁴⁰ *Id.*, ¶ 689.

purpose of requiring a separation of judicial from other powers is to avoid any conflict of interest. Where the relevant powers arise in separate systems or on different planes—such as the national and the international—the potential for there to be any convergence in the subject matter of the powers, and therefore for a conflict of interest to arise, is greatly reduced.¹⁴¹

Not every association with a case will give rise to disqualifying a judge. Thus the standards of impartiality do not entail the allowance of disqualification of a judge on the basis of alleged partiality deriving from his or her previous experience. In *Prosecutor v Furundzija*, the appellant challenged his conviction on the basis that the presiding judge, Judge Mumba, “should have been disqualified as an appearance was created that she sat in judgment in a case that could advance and in fact did advance a legal and political agenda which she had helped to create whilst a member of the [UN Commission on the Status of Women].”¹⁴² It was shown that prior to her election to the ICTY, Judge Mumba had served as the Zambian representative to the UN Commission on the Status of Women. Thus, it was suggested, among other things, that Judge Mumba advocated the position that rape was a war crime and encouraged the vigorous prosecution for war crimes of persons charged with rape. The appeals chamber decided to dismiss this challenge on the basis that Judge Mumba acted as a representative of her country and therefore in an official and not a private capacity.¹⁴³ In addition, the appeals chamber ruled, after examining various international precedents, that a judge should not be disqualified because of his or her alleged partiality due to previous experience.¹⁴⁴

In *Bengston v Federal Republic of Germany*,¹⁴⁵ the Arbitral Commission on Property Rights and Interests in Germany considered a challenge to one of its members on the basis of apprehended prejudice. The appellants claimed that one of the arbitrators should have been disqualified due to his close connections with the German government, the defendant in the proceedings. Although the

¹⁴¹ *Id.*, ¶ 690.

¹⁴² *Prosecutor v Furundzija*, No IT-95-17/1-A, ¶ 169 (Jul 21, 2000).

¹⁴³ *Id.*, ¶199.

¹⁴⁴ *Id.*, ¶ 205 (Stating:

The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba’s membership in the United Nations Commission on the Status of Women (“UNCSW”) and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. . . . In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.).

¹⁴⁵ *Bengston*, 28 ILR 549 (Arbitral Commn on Property, Rights & Interests).

provisions of the Commission's constituent instrument did not operate to disqualify the member, the Commission examined whether there were any general principles of international law that were applicable in the situation. After examining various international precedents and the constituent instruments of other international tribunals, the Commission concluded that there was no basis in public international law for the disqualification of the challenged member.¹⁴⁶

By virtue of Article 46 of the ECtHR,¹⁴⁷ which provides that members "undertake to abide by the final judgment of the [ECtHR] in any case to which they are parties"¹⁴⁸ and that "[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution,"¹⁴⁹ the rich and vast amount of judge-made jurisprudence in the international courts based on treaties and soft law provides a very significant source for national legal systems in the shaping of the concept of judicial independence. In addition, Title I, Article 6 of the Consolidated Version of the Treaty of the European Union,¹⁵⁰ which provides that "the Union shall respect 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, as general principles of Community law"¹⁵¹ further ensures the domestic application of the ECHR to member states. Thus, the principles regarding judicial independence have become part of the law of the EU.

In addition, major international and regional human rights treaties containing provisions aimed at securing judicial independence in international tribunals and in the states party to the conventions also transform international law into domestic law through the domestic applicability of their principles. These international and regional treaties include Article 10 of the Universal Declaration of Human Rights; Article 6 of the ECHR; Article 14 of the International Covenant on Civil and Political Rights, paragraph 1 of which provides, "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"; Article 8 of the American Convention, paragraph 1 of which states, "Every

¹⁴⁶ *Id.* at 555 ("It considers [the concept of disqualification on the ground of apprehended prejudice] to be unsuited to a transfer from the national to the international sphere of law when considering the different, and much stricter, conceptions prevailing in a great many States.").

¹⁴⁷ ECHR, art 46, ¶ 1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*, ¶ 2.

¹⁵⁰ Consolidated version of the Treaty on European Union, 2002 OJ (C 325) 33 (Dec 24, 2002).

¹⁵¹ *Id.* at 7–8.

person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law"; Article 7 of the African Charter on Human and Peoples' Rights, which states, "Every individual shall have the right to have his cause heard. This comprises: . . . (d) the right to be tried within a reasonable time by an impartial court or tribunal"; and Article 47 of the Charter of Fundamental Rights of the European Union, which states,

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.¹⁵²

C. THE EMERGENCE OF PROFESSIONAL INTERNATIONAL STANDARDS ON JUDICIAL INDEPENDENCE AND THEIR NORMATIVE IMPACT

As international conventions and treaties and their surrounding jurisprudence affected the legal culture of judicial independence, so too has there been noticeable impact on the work of international scholars and professional organizations on judicial independence, national courts, and jurisprudence.¹⁵³ This impact has included the development of a series of important standards related to judicial independence. International professional organizations such as the IBA, the Law Asia Association, the UN Expert Group, and other NGOs have issued statements or standards relative to judicial independence that have become incorporated into the global judicial consciousness.¹⁵⁴

The most recent of these, the *Mt. Scopus Standards*, were developed by the International Project on the International Standards of Judicial Independence after three years of work. As elaborated in the Introduction to this Article, the

¹⁵² Charter of Fundamental Rights of the European Union, 2007 OJ C 303 (Dec 14, 2007).

¹⁵³ See generally Shetreet, *Judges on Trial* (cited in note 1); *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*, [1999] 1 ALL ER 577, 2 WLR 272 (UK); *Valente*, [1985] 2 SCR at 673; *Regina v Nolin*, [1982] 17 ManR 2d 379 (UK).

¹⁵⁴ *IBA Standards* (cited in note 6); *Tokyo Principles on the Independence of the Judiciary* (cited in note 7); *Basic Principles on the Independence of the Judiciary* (cited in note 9); *Council of Europe Statements on Judicial Independence*, particularly the *Recommendation of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, available online at <[www.venice.coe.int/site/main/texts/JD_docs/recR\(94\)12_E.pdf](http://www.venice.coe.int/site/main/texts/JD_docs/recR(94)12_E.pdf)> (visited Apr 23, 2009); *Bangalore Principles of Judicial Conduct* (Nov 2002), drafted by the Judicial Integrity Group and endorsed by the member states of the UN Commission on Human Rights.

Mt. Scopus Standards consolidated and revised a rich body of principles drawn from the previous work and experiences of international, governmental, and professional associations.

International standards, both individually and collectively, have an important normative impact on judicial independence on several levels. First, as subscribing states are under a legal or moral obligation to follow the precepts and rules contained in, and derived from, the treaty or standards, standardized international rules are applied in parallel domestic contexts. Not only do the international standards or agreements surrounding them contain provisions obligating adherence to their principles, but many states or regional organizations also, on their own initiative, create internal obligations to respect international principles. We have already seen this, in our discussion above of Article 46 of the ECtHR. Another example of this, on a regional level, is *The Cairo Declaration on Judicial Independence*, which in its preamble calls on its members to “reaffirm commitments among the three branches of government to the basic United Nations principles and standards of judicial independence adopted by the General Assembly in 1985 and adopt measures to implement the principles [of] judicial independence enshrined in the *Beirut Declaration* of 1999.”¹⁵⁵

Second, as both innovative and revised models are drawn from previous concepts, the rules and principles of judicial independence are consolidated and refined, and then domestically adopted. This principle was reviewed above, in previous discussions regarding the *Mt. Scopus Standards*.

Third, as international standards often draw from positive cases regarding judicial independence in individual states, standards that have been successfully implemented in a domestic context or at the international level are crystallized by way of international standards,¹⁵⁶ and then transplanted into member state systems. Illustrations of this third group are elaborated in the next section of this Article, with the discussion of the principles of fair reflection and the democratic accountability of the judiciary.

D. THE PRINCIPLE OF FAIR REFLECTION

Two doctrines that relate to the composition of the court are the exclusionary model, which demands the exclusion of a judge from a case due to bias, and the inclusionary model, which requires that judges reflect society and, in given situations, that judges of certain backgrounds sit on the bench.

Criticism of the narrow social, ideological, or geographical background of judges has been recorded in numerous countries, including Canada, England,

¹⁵⁵ ECHR, art 46, ¶ 1 (cited in note 2); *Cairo Declaration on Judicial Independence* (Feb 2003).

¹⁵⁶ Alternately, domestic standards may be crystallized regionally through regional standards.

France, Germany, and Greece. African countries are also sensitive to judicial backgrounds, with regional, tribal, and cultural considerations imperative in creating at least the appearance of impartiality and in thereby maintaining public confidence in the courts.

The appointment process is important in assuring a balanced composition of the judiciary ideologically, socially, and culturally. The principle of fair reflection suggests that the judiciary is a branch of the government, not merely a dispute-resolution institution, and therefore cannot be composed with total disregard for the makeup of society. The principle is also concerned with preserving public confidence in the courts, especially in appellate courts, and particularly when cases are fraught with public or political issues.

The fair reflection principle is most commonly found in federal or multicultural countries where a reflection of the constituent political units or cultures is expected on the bench. Thus, the inclusionary model is illustrated by the selection of international ad hoc judges. The inclusion of certain types of judges is secured at times by express statutory provisions, and other times by strictly followed conventions.

The principle of fair reflection also exists domestically, and comes in response to the common criticism that the judiciary is predominantly composed of the upper-middle class, or from a particular geographical or tribal area.

Canada offers an instructive example of the application of the fair reflection principle. By statute, three of the nine justices of the Supreme Court of Canada must come from Quebec, and by convention three are selected from Ontario, two from the western provinces, and one from the Atlantic provinces. Similarly, the House of Lords in Great Britain always has one judge from Scotland and one from Northern Ireland. Other countries, such as Belgium, Brazil, and Uganda, also pay special attention to the principle of fair reflection, and select their judges from all geographical areas of the country.

Section 64 of the United Kingdom's Constitutional Reform Act provides for fair reflection in the judiciary in its rules regarding judicial appointments.¹⁵⁷ It provides that the Judicial Nomination Commission established by the act shall aim at encouragement of diversity. It directs the commission to encourage diversity in the range of persons available for selection for appointments. By virtue of Section 63, the act qualifies this directive on diversity with the duty to select judges based on merit and requires that persons of good character shall be selected.

¹⁵⁷ Constitutional Reform Act 2005, § 64 (cited in note 16).

A reflective judiciary is necessary for maintaining public confidence in the courts,¹⁵⁸ but the emphasis should be placed on striking a proper proportion. Overemphasis should not be given to the impact of personal values on judicial decisionmaking nor should the balancing effect of social controls, system factors, and institutional controls be disregarded. Still, greater emphasis should be given to the idea that adjudication involves some imposition of the judges' own values, and thus the argument for a reflective judiciary. Compliance with this principle of a reflective judiciary is subject to the requirements of maintaining the professional quality and the moral integrity of the judiciary.

The concept of a reflective judiciary should also apply to the composition of panels in particular cases. Panels should be either neutral or balanced. Judges with strong convictions or past experiences that strongly identify them with one side should refrain from sitting in cases where the public might question their total neutrality.¹⁵⁹

After their appointment to the bench, judges are expected to be completely independent and to express no overt bias toward the sector of society from which the judge originates and reflects. This is unlike the representation in Parliament where the elected member continues to view him or herself legitimately as a representative of that member's constituency and community. Also, whereas representation in the legislature is expected to be numerically accurate ("one person one vote"), the reflection of society in the judiciary or in supreme courts is intended to be fair rather than numerical. This difference is due to an important distinction between legislative representation and judicial reflection: whereas legislative representatives are elected in order to promote the interests of their constituents, judges are bound to justice alone, and not to the societal body of which they are reflective. The goal of judicial reflection is to create confidence in the judiciary, not to forward any particular societal interest.¹⁶⁰

¹⁵⁸ See Justice Dobbs, *The Judge and the Defendant: Demographics and Diversity in the Criminal Justice System*, New Developments in Criminal Justice Lecture at King's College London (Apr 24, 2008) ("By being reflective of society, the courts are given legitimacy. Members of society are more likely to respect and trust courts whose judges include people like themselves. It increases accountability and thus public confidence.").

¹⁵⁹ Section 2.15 of the *Mt. Scopus Standards* provides that the judges selected fairly reflect society:

The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects. Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, color, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.

¹⁶⁰ See Shetreet, *Models of Constitutional Adjudication* (cited in note 51) (emphasis added).

The reflective approach moves away from the wording of the *IBA Standards* of 1982, which talks of representation: “The process and standards of judicial selection must insure fair *representation* of all social classes, ethnic and religious groups, ideological inclinations and where appropriate, geographical regions. The representation should be fair and not numerical or accurately proportional.”¹⁶¹ The reflective approach is found in Article 2.13 of the *Montreal Declaration*, which provides that “the process and standards of judicial selection shall give due consideration to insuring a fair reflection by the judiciary of the society in all its aspects.”¹⁶² Section 2.17 of the *Mt. Scopus Standards*, taken from the *Montreal Declaration*, continues to emphasize the judicial principle of reflection rather than representation.¹⁶³

The opposite theoretical paradigm from the inclusionary model, on which the principle of fair reflection is based, is the exclusionary model, in which a judge must be disqualified in certain instances.¹⁶⁴ Disqualification is not required if no other judge can adjudicate the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.¹⁶⁵ Sections 18.1,¹⁶⁶ 18.2,¹⁶⁷ 19.1,¹⁶⁸ and 20¹⁶⁹ of the *Mt. Scopus Standards* lay down guidelines for the

¹⁶¹ See *id.*

¹⁶² *Universal Declaration on the Independence of Justice* (cited in note 8).

¹⁶³ *Id.*, § 2.13. See also Shimon Shetreet, *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, in Shetreet and Deschênes, eds, *Judicial Independence: The Contemporary Debate* at 401 (cited in note 7).

¹⁶⁴ Section 7.8 of the *Mt. Scopus Standards* states: “A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.”

Section 8.9 states:

Such proceedings include, but are not limited to, instances where: the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; the judge previously served as a lawyer or was a material witness in the matter in controversy; or the judge, or a member of the judge’s family, has an economic interest in the outcome of the matter in controversy.

¹⁶⁵ This exception is known as the “principle of necessity.” See, for example, *Will*, 449 US at 212–18.

¹⁶⁶ Section 18.1 of the *Mt. Scopus Standards* states:

Judges shall not serve in a case in which they have previously served as agent, counsel, advisor, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute or in a case where they had previously commented or expressed an opinion concerning the subject matter in a manner that is likely to affect or may reasonably appear to affect their independence or impartiality.

¹⁶⁷ Section 18.2 states: “Judges shall not serve in a case with the subject matter of which they had other forms of association that may affect or may reasonably appear to affect their independence or impartiality.”

disqualification of judges who have past links with a particular case or party to avoid conflict-of-interest issues or judges having a potential interest in the outcome of a particular case. These guidelines for disqualification, which judges should proactively follow when applicable, serve the long-term interest of preserving judicial independence by preserving the citizenry's faith in the integrity of the justice system.

E. THE ISSUE OF DEMOCRATIC ACCOUNTABILITY OF THE JUDICIARY

The second professional international standard on judicial independence and its normative impact is that of democratic accountability. Democratic accountability demands that a state select the model of constitutional adjudication that complements its method of judicial appointments, in order to ensure that the judiciary's power to invalidate legislation corresponds with that system's form of judicial appointments. Thus, in countries where judicial selection procedures include democratic input and accountability, it is justifiable to adopt an adjudicative model that grants the court power to invalidate unconstitutional statutes.¹⁷⁰ In contrast, in models where the judiciary is appointed on the basis of professional qualifications, but without democratic input, this lack of democratic accountability should be taken into account and one of two alternative elements of judicial review should be considered. The first is that constitutional judgments of the court will be declaratory only, where the judiciary would not have the power to invalidate a statute, but only the authority to declare incompatibility between the law and the constitution. The second model for resolving the lack of democratic accountability allows the court to invalidate a statute, but provides for a parliamentary power to override this invalidation. The legislature may either modify a statute to fit the court's

¹⁶⁸ Section 19.1 states:

Judges shall not sit in any case involving a party for whom they have served as agent, counsel, advisor, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

¹⁶⁹ Section 20 states:

20.1: "Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest."

20.2: "Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material, personal, professional or financial interest."

20.3: "Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of a judge's participation in the proceedings."

¹⁷⁰ See Shetreet, *Models of Constitutional Adjudication* (cited in note 51).

constitutional interpretation, or else decline altogether to engage in statutory modification. The first alternative is best expressed by the United Kingdom's declaratory model, whereas the Canadian system best illustrates the second.

1. The Dilemma of Constitutional Adjudication

An analysis of the models of constitutional adjudication reveals this link between the scope of judicial review and the provision for democratic accountability.¹⁷¹ Underlying the principle of constitutionality is the concept that limiting the power of the legislative branch may be justified in proper circumstances. This idea is widely accepted in most systems of government, in spite of the dilemma raised by the constitutional restrictions imposed on the legislative branch in representative democracies.

This dilemma relates to the democratic legitimacy of constitutional adjudication, and the nature of the method of constitutional settlement of disputes in each society.¹⁷² The constitutional power of the judiciary to review discretionary decisions of the democratic, representative legislative branch requires that the exercise of this power by the supervising judicial authority be subject to a set of rules aimed at the prevention of judicial abuse of power. These rules are required because of the inherent problems with nondemocratic accountability in the exercise of judicial review by the courts, for while the judicial review is based on basic values, the exercise of the power is not subject to democratic accountability.

Noteworthy also is the fact that the judiciary usually serves for long periods, sometimes for life and mostly until retirement age. Therefore, accountability is more diminished than that of the political branches of government, whose members are subject to strict accountability and periodic reelection procedures, normally after four years and sometimes even more frequently.

It should be noted that there is nothing deficient in the fact that the judicial branch has different forms of selection and appointment than the political branches. However, the fact that the judicial branch exercises judicial review over legislative judgments while exercising constitutional adjudication and, yet, is not subject to any accountability is clearly contrary to the doctrine of separation

¹⁷¹ See Yoav Dotan, *Judicial Review and Accountability: A Comparative Analysis*, 2007 Mishpat Umimshal 10-2.

¹⁷² See, for example, Ruth Gavison, *The Constitutional Revolution: Description of Reality or a Self-Fulfilled Prophecy*, 28 Mishpatim 23, 28-32 (1997); Yoav Dotan, *Constitution for Israel? The Constitutional Dialogue after the Constitutional Revolution*, 27 Mishpatim 149 (1996); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L J 1013, 1030-31, 1045-47 (1984); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U Chi L Rev 633, 638, 647 (1991).

of powers and the principle of constitutionalism. Constitutionalism includes the idea that executive, legislative, and judicial legitimacy depends on that branch respecting the limits to its powers. Judicial review is a limit to the power of the political branches in that judges are less prone to external pressures than politicians and legislatures. However, this very detachment brings with it the associated danger of unaccountability. Hence, the dilemma of constitutional adjudication is thus: an undemocratically appointed court is a good foil for rash governments but in turn is incongruent with the principles of constitutionalism, balanced government, and democracy.

2. Possible Responses to the Dilemma of Constitutional Adjudication

There are a number of possibilities open to constitutional framers in resolving the issue of the accountability of the judicial branch with regard to constitutional adjudication. One option, though challenging to achieve, is to draft a constitution in a precise manner, using detailed and specific rules, so that the constitution guides its judges in the exercise of judicial review of the constitutionality of statutes.¹⁷³ This is not a preferred strategy since constitutions are normally drafted in broad terms and leave wide discretion for the judiciary to travel far from the original intention of the founding framers of the constitution, particularly when the judiciary uses methods of objective interpretation that are not closely linked to the text, but rather to the purpose of the legislation and the values of the system.¹⁷⁴

A second strategy focuses on the method of the selection of judges. The solution offered by the American model is to promote the accountability of judicial power by giving all courts the power of judicial review, but circumscribing that power by ensuring democratic input into the federal and state systems of judicial appointments.¹⁷⁵

The European model, adopted by several countries, including Germany and Italy, attempts to resolve this dilemma of democratic accountability with regard to constitutional adjudication by entrusting the power of judicial review not to the ordinary court system, but rather to constitutional courts. These courts meet requirements of democratic accountability by providing for special procedures for selection of their members. This view recognizes that

¹⁷³ See P.P. Craig, *Administrative Law* 3 (Sweet & Maxwell 3d ed 1994); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1667, 1694–95 (1975).

¹⁷⁴ For the objective method of interpretation, see Aharon Barak, *The Judge in a Democracy* (Princeton 2006); Aharon Barak, *Parshanut Takblitit Be-mishpat* 239 (Nevo 2003); Aharon Barak, *Parsanut Bam-mispat* 165 (Nevo 1993).

¹⁷⁵ See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L Rev 579, 593–94 (2005).

constitutional adjudication requires a wider value-oriented approach and also that the European career judiciary in the ordinary court system cannot adequately ensure democratic accountability.¹⁷⁶ Normally, the process of election of members of the separate constitutional court is more political than the appointment in the ordinary system, which is primarily based on judicial career.¹⁷⁷

Thus, the incongruence between an undemocratic and unaccountable court having the ultimate power over an accountable political branch is at least partially resolved. Section 4.2 of the *Mt. Scopus Standards* recognizes this strategy. It considers as legitimate the possibility of democratic input into the selection of judges:

- a) The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.
- b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature, the Executive, the Judiciary and the legal profession take part, should be viewed favourably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government.¹⁷⁸

There are other models in addition to the introduction of democratic input into the process of judicial appointments. One is to resolve the issue of the lack of accountability and the possible conflict between the branches of government by providing that the court can only declare incompatibility between a parliamentary statute and constitutional provisions, but the parliament (possibly together with the executive) must decide what to do next. It may abolish the statutory provision that has been declared incompatible, it may amend it, or it may leave it as is. This is the model adopted in the United Kingdom where the basic norm is not a constitutional one but borrowed from the ECHR and adopted into the law.

Another model designed to respond to the lack of accountability in the judiciary is the common law model. The common law model focuses on restricting the scope of judicial review and abstention from rigid constitutions, thus resolving the issue of the lack of judicial accountability by restricting the

¹⁷⁶ This is the reason for the criticism regarding the absence of term limitations for federal justices. See *id* at 615–16; David R. Stras and Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 Wash U L Q 1397, 1426 (2006).

¹⁷⁷ See generally Shetreet and Deschênes, eds, *Judicial Independence* (cited in note 77); John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge 2006).

¹⁷⁸ *Mt. Scopus Standards*, § 4.2(a), (b) (cited in note 4).

circumstances under which the judiciary will find itself in a position where it overrides legislative decisions.¹⁷⁹

Rigid constitutionalism was adopted only in federal common law states such as Canada and Australia, in order to regulate the interrelationship between their federal and provincial units. There is even more justification to restricting the scope of judicial review in these countries, for they have a professional process of judicial appointment with limited democratic input.¹⁸⁰ However, as noted earlier, the dilemma of judicial accountability can be resolved by coupling the power of judicial review with a legislative override or amending power, allowing the legislature to reverse judicial resolutions. This has been Canada's solution to the dilemma.

The democratic accountability of the courts, a building block to the attainment of constitutionalism, helps ensure the existence of the rule of law. With the rule of law, in addition to the intrinsic benefits enjoyed by society, the courts' legitimacy is enhanced, further strengthening judicial independence. The underlying principle of the rule of law is provided for in Section 1 of the *Mt. Scopus Standards*: "The significance of the Independence of the Judiciary [is to] ensure that all people are able to live securely under the rule of law." Bringing this principle to fruition inevitably leads us to the various models of the democratic accountability of the judiciary. As phrased by a Canadian judge, Mr. Justice Riddell, "Judges are the servants, not the masters. . . . Servants are accountable, so are judges."¹⁸¹

¹⁷⁹ Canada's system of constitutional-override allows Parliament to declare that certain types of legislation shall operate notwithstanding their unconstitutionality, on the condition that Parliament makes this declaration expressly, and that such declaration expires after five years. The wording is as follows:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. Canada Const, § 33.

¹⁸⁰ See Yoav Dotan and David A.R. Williams, *The Judicial Appointment Process*, 2004 NZ L Rev 39, 34–44, 47–48; Mita Bhattacharya and Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J Legal Studies 223, 229–32 (2001); Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* 398 (Penguin 7th ed 1994).

¹⁸¹ See Shetreet, *Judicial Independence* at 593 (cited in note 7) (referring to *Davis Acetylene Gas Co v Morrison*, [1915] 34 OLR 155, 23 DLR 871 (Canada)). See also Constitution Act 1982, Schedule B to the Canada Act 1982, ch 11, § 33 (1982) (UK).

VII. THE NORMATIVE CYCLE OF INTERNATIONAL AND NATIONAL LAW ON MATTERS RELATING TO JUDICIAL INDEPENDENCE

During the second and third phases of judicial independence, where domestic law influences the international, and international moves the national, a normative effect is created whereby common principles are widely applied, regardless of borders. The United Kingdom, Austria, and Canada will be examined in this section in order to provide a series of examples of the normative cycle of law on matters relating to judicial independence.

A. THE CASE OF THE UNITED KINGDOM

The United Kingdom's adoption of European human rights conventions over the last decades has significantly influenced the position of its judiciary in relation to judicial independence. One of the most important of the constitutional laws was the Human Rights Act, which adopted into British law the ECHR. A second significant constitutional law has been the Constitutional Reform Act, which received royal assent in March 2005.

1. The Normative Effect of the ECtHR on Domestic Law

Decisions of the ECtHR with respect to judicial independence, including *McGonnell*,¹⁸² *Procola*,¹⁸³ and *Findlay*,¹⁸⁴ meant that many UK practices were in apparent violation of the ECtHR's interpretation of judicial independence. One of the objectionable practices was the melding of the executive and judicial roles, specifically that of the UK's Lord Chancellor, who simultaneously acted as speaker of the House of Lords, member of the Prime Minister's executive cabinet, and head of the judiciary.¹⁸⁵ It may be recalled that the relevant ECtHR cases held that with regard to judicial independence, involvement in executive functions disqualifies office holders from exercising judicial functions.¹⁸⁶

¹⁸² *McGonnell*, 30 Eur HR Rep at 289.

¹⁸³ *Procola*, 326 Eur Ct HR at 326.

¹⁸⁴ *Findlay*, 24 Eur HR Rep at 221.

¹⁸⁵ For analysis of the office of the Lord Chancellor, see Dawn Oliver, *The Lord Chancellor, the Judicial Committee of the Privy Council and Devolution*, 1999 Pub L 1; Colin R. Munro, *Studies in Constitutional Law* 314–17, 328, 331 (Butterworths 2d ed 1999); Diana Woodhouse, *The Office of Lord Chancellor*, 1998 Pub L 617. See generally Lord Mackay, *The Lord Chancellor in the 1990s*, 44 Current Legal Probs 241 (1991); Lord Hailsham, *The Office of Lord Chancellor and the Separation of Powers*, 8 Civ Justice Q 308 (1989).

¹⁸⁶ See generally Richard Cornes, *McGonnell v UK, the Lord Chancellor and the Law Lords*, 2000 Pub L 166.

As a consequence of these decisions, the Lord Chancellor began to refrain from sitting on appeals in the House of Lords in cases involving the government, in contrast to earlier practice. This de facto change took place without any formal statutory amendments. Rather, it was done based on the concern that if the Lord Chancellor continued to sit on appeals in matters of government involvement, such actions might bring about a challenge before the ECtHR, as some UK counsel indicated that they would do.¹⁸⁷ Hence, international judicial independence jurisprudence had a restraining effect.¹⁸⁸

In 1998, the Human Rights Act¹⁸⁹ was enacted, which finally and formally applied the ECHR into British Law through reference by providing that, as far as possible, legislation enacted both before and after the act would be interpreted and enforced in a manner consistent with the rights protected by the ECHR. This was a significant advancement, formally integrating the international jurisprudence into the domestic realm.¹⁹⁰

2. The Effect of the Human Rights Act

After the Human Rights Act was implemented, three important changes took place in the United Kingdom that impacted the normative effect of legislation on judicial independence. The first was that rights included in the ECHR formally became part of British constitutional law. Secondly, upon the constitutionalization of the ECHR into British law, all authorities were under a duty to respect these rights,¹⁹¹ including courts, which found themselves in a position to review British legislation in light of the ECHR. As part of this reform, the British courts were authorized to issue a declaration of

¹⁸⁷ Prior to the coming into force of the Human Rights Act, there was no concern that the matter would be brought before the British courts. Under English law international treaties do not become part of domestic law unless and until a legislative vehicle so provides.

¹⁸⁸ For details of the sitting of lord chancellors, see the account given in the House of Lords by Lord Irvine in 597 HL Deb 738 (Feb 17, 1999). See generally Brice Dickson and Paul Carmichael, eds, *The House of Lords: Its Parliamentary and Judicial Roles* (Hart 1998).

¹⁸⁹ Human Rights Act 1998, arts 2–4.

¹⁹⁰ Prior to the formal implementation of the UK Human Rights Act, the courts were apt to use the ECHR and its related jurisprudence as a source of domestic law in a number of ways: as sources of public policy (the United Kingdom had signed and ratified the convention), as a source when there was an absence of domestic statutory provision, or when a domestic statute was difficult to interpret.

¹⁹¹ There has also been an effect on UK governmental policy formation. See Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act 4* (DCA UK 2006).

incompatibility if they decided that British legislation was incompatible with the ECHR.¹⁹²

It is important to emphasize that the authority to annul is not in the hands of the courts. However, a declaration of incompatibility by the courts is a means of encouraging Parliament to amend the law so that it will not contradict the domestic Human Rights Act.¹⁹³

The advantage of this model is that it lessens potential frictions between the courts and the political branches. By merely declaring legislation incompatible, the legislature is left with the ultimate legislative decision. This relative detachment of the courts helps avoid public debates that might otherwise adversely affect the courts' position in society.

In the year 2000, the year the Human Rights Act came into force, 4,811 claims were issued at the Administrative Court Office. This number increased to 5,364 in 2001, and to 6,006 in 2002.¹⁹⁴ Since October 2000, English courts have declared numerous provisions of parliamentary legislation incompatible with the ECHR.¹⁹⁵ Most cases were ruled on by the Court of Appeal and a few were adjudicated by the House of Lords.¹⁹⁶

The declarations of incompatibility included cases dealing with mental health, immigrants' rights, reproductive issues, marriage registration for transgendered individuals, anti-terror measures, criminal law, and equality issues between widows and widowers. In most cases, Parliament subsequently amended the statutes that were declared incompatible, in order to make them compatible with the ECHR, including statutes dealing with mental health,¹⁹⁷

¹⁹² Benjamin Goold, Liora Lazarus, and Gabriel Swiney, *Public Protection, Proportionality, and the Search for Balance* 17 (Oxford 2007), available online at <www.justice.gov.uk/docs/270907.pdf> (visited Apr 23, 2009).

¹⁹³ See Human Rights Act 1998, § 20(1). See also Lord Lester of Herne Hill and David Pannick, eds, *Human Rights Law and Practice* 43 (Butterworths 1999).

¹⁹⁴ Varda Bondy, *The Impact of the Human Rights Act on Judicial Review: An Empirical Research Study* 9 (Public Law Project 2003), available online at <http://www.publiclawproject.org.uk/downloads/HumRghts_JRRRep03.pdf> (visited on Apr 23, 2009).

¹⁹⁵ *Review of the Implementation of the Human Rights Act* at 4 (cited in note 191). As of 2006, there were nineteen cases in all.

¹⁹⁶ See, for instance, *Bellinger v Bellinger*, [2003] UKHL 21, nn 193–196 (HL 2003) (UK) (Declaration of Incompatibility in relation to Section 11(c) of the Matrimonial Causes Act 1973).

¹⁹⁷ In *Regina v Mental Health Review Tribunal for the North and East London Region & The Secretary of State for Health*, [2001] 3 WLR 512 (CA 2001) (UK), the court concluded that Sections 72 and 73 of the Mental Health Act 1983 were incompatible with Article 5(1) and 5(4) of the ECHR due to the failure to require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention. In *Regina v Secretary of State for Health*, [2003] UKHL 13 (HL 2003) (UK), the court decided that Section 2 of the Mental Health Act was incompatible with Article 5(4) of the ECHR insofar as it was not attended

detention of prisoners,¹⁹⁸ and matters of privacy and the liberty of the body.¹⁹⁹ The cases that were reversed on appeal dealt with claims of lack of impartiality, consumer protection and the Crown's immunity.²⁰⁰

3. The Dramatic Reform in the Powers of the Lord Chancellor over the Judiciary: The Constitutional Reform Act

The Human Rights Act had a very significant impact on judicial independence in England, including the recognition of the need to separate between the executive and judiciary in matters related to adjudication and judges. As noted above, there were some concerns that the Lord Chancellor sat on

by provision for the reference to a court of the case of an incompetent patient detained under Section 2 in circumstances where a patient has a right to make application to the Mental Health Tribunal but the incompetent patient is incapable of exercising that right; and it was not attended by a right for a patient to refer his case to a court when his detention was extended by the operation of section 29(4).

¹⁹⁸ In *Regina v Secretary of State for the Home Department*, [2005] UKHL 14 (HL 2005) (UK), the court ruled that Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) on the ground that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court. In *FHR v Secretary of State for the Home Department*, [2002] UKHL 46, the court decided that Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the secretary of state decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on license. In *Regina v Secretary of State for the Home Department, ex parte Uttley* [2004] 1 WLR 2278 (HL 2004), the court concluded that Sections 33(2), 37(4)(a), and 39 of the Criminal Justice Act 1991 were incompatible with the claimant's rights under Article 7 of ECHR on the ground that they provided that he would be released at the two-thirds point of his sentence on license with conditions and be liable to be recalled to prison.

¹⁹⁹ In *Re McR's Application for Judicial Review* (unreported), available online at <http://www.courtsni.gov.uk/NR/rdonlyres/3948996D-EBF1-4F1C-B30E-1AFA7F4DBC47/0/j_j_KERF3576.htm> (visited Apr 21, 2009), the court concluded that Section 62 of the Offences Against the Person Act 1861 (attempted sodomy), which continued to apply in Northern Ireland, was incompatible with Article 8 of ECHR to the extent that it interfered with consensual sexual behavior between individuals.

²⁰⁰ In *Regina (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, [2003] 2 AC 295 (HL 2001) (UK), the court ruled that the Secretary of State's powers to determine planning applications were in breach of Article 6(1), on the ground that the Secretary of State was policymaker as well as the decisionmaker. A number of provisions were found to be in breach of the principle of impartiality, including the Town and Country Planning Act 1990, §§ 77, 78, and 79 (1990) (UK). In *Wilson v First County Trust Ltd (No 2)*, [2004] 1 AC 816 (HL 2003) (UK), it was held by the court that Section 127(3) of the Consumer Credit Act 1974 was incompatible with Article 6 and Article 1, Protocol 1 of the ECHR because it resulted in unjustified restriction on a creditor's enjoyment of contractual rights, but the House of Lords reversed the declaration. In *Matthews v Ministry of Defence*, [2003] 1 AC 1163 (HL 2003) (UK), which dealt with the Crown's immunity in tort, it was decided that Section 10 of the Crown Proceedings Act 1947 was incompatible with Article 6 of the ECHR for the reason that it was disproportionate to any aim that it had been intended to meet.

appeals in the House of Lords while still a member of the cabinet, and that this was in contravention to ECtHR jurisprudence, including *McGonnell*, *Procola*, and *Findlay*.²⁰¹ In response to these concerns, the Constitutional Reform Act enacted a new judicial order in the United Kingdom.

The major changes introduced by the Constitutional Reform Act include limiting the Lord Chancellor's powers by entrusting him solely with authority over administrative and executive matters, not judicial. All of the Lord Chancellor's judicial functions and responsibilities were transferred to the Lord Chief Justice, clearly separating executive from judicial functions.²⁰² The act also created the Supreme Court of the United Kingdom, replacing the House of Lords as the court of last resort and passing the latter body's entire jurisdiction onto the former. In addition, it introduced a major reform in the method of judicial appointments, establishing judicial panels and a nominating commission that selects the public members that will serve on the commission and devise a list of recommended judges. The Lord Chancellor now heads the Department of Constitutional Affairs and appoints judges from a recommended list proposed by the judicial panels for judicial appointments.

A further change is that the Constitutional Reform Act imposed a duty on all ministers of the government to uphold judicial independence by way of Section 3, which provides that "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary" and that the "Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary." Finally, the Constitutional Reform Act also established a Judicial Appointments and Conduct Ombudsman for judges.²⁰³

In England, many of these changes stemmed from the normative impact of international law and its surrounding jurisprudence. The ECtHR and its jurisprudence were significant factors in the enactment of the United Kingdom's

²⁰¹ See generally Cornes, *McGonnell v UK, the Lord Chancellor and the Law Lords* (cited in note 186).

²⁰² Colin Turpin and Adam Tomkins, *British Government and the Constitution* (Cambridge 6th ed 2007); David Pollard, Neil Parpworth, and David Hughes, *Constitutional and Administrative Law: Text with Materials* 44–49 (Oxford 4th ed 2007). For earlier comments, see A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* 388 (Longman 14th ed 2007); Diana Woodhouse, *The Constitutional and Political Implications of a United Kingdom Supreme Court*, 24 *J Legal Studies* 134, 135 (2004); Woodhouse, *Office of Lord Chancellor* 15–38 (cited in note 185).

²⁰³ Section 7 of the Act deals with the powers of the Lord Chief Justice. Among these powers is the ability to hold the position of President of the Courts of England and Wales. He serves as the head of the judicial branch—all judicial powers of the Lord Chancellor were transferred to him. He is in charge of representing the views of the judiciary of England and Wales before Parliament.

Human Rights Act and Constitutional Reform Act, which in turn have had an even more dramatic domestic impact.

B. THE IMPACT OF INTERNATIONAL LAW JURISPRUDENCE ON SCOTLAND

The case law and legislation in Scotland dealing with the position of judges and their independence has also been significantly influenced by the ECtHR and its jurisprudence, particularly with regard to the right to be tried before an independent and impartial tribunal under Article 6 of the convention.

In the case of *Starrs and Chalmers v PF Linlithgow*,²⁰⁴ the Court ruled that an appointment dependent on the discretion of the minister of executive government renders the judge not independent and violates the ECtHR, following *McGonnell*.²⁰⁵ In *Starrs*, the Court ruled that temporary appointments of judges deny them independence since their evaluation and the continuance of their service depend upon the discretion of the executive branch. In *Clancy v Caird*,²⁰⁶ the Court distinguished the ruling in *Starrs* and ruled that the judicial appointment for temporary, set periods is acceptable and not a violation of Article 6 since judges are called to service when needed by the judicial branch and not by the executive one.²⁰⁷

Later, legislation attempted to implement the conclusions from both of these cases regarding temporary judges in Scotland. According to the law, it is legitimate and proper to appoint a judge for a set period. At the end of that period he may be reappointed. The law also sets limits on the number of temporary judges and on the process of transfer of a judge from one position to another.²⁰⁸

Hence in Scotland, as in England, there was a normative effect on domestic legislation due to international law.

C. THE IMPACT OF DOMESTIC LAW AND THE ECtHR JURISPRUDENCE ON AUSTRIA

Austria's situation is helpful in demonstrating how a culture of judicial independence can be developed through the intertwining of domestic and

²⁰⁴ *Starrs and Chalmers v PF Linlithgow*, [2000] JC 208 (Scotland).

²⁰⁵ *McGonnell*, 30 Eur HR Rep at 289.

²⁰⁶ *Clancy v Caird*, [2000] SC 441 (Scotland).

²⁰⁷ *Id.*

²⁰⁸ Bail, Judicial Appointments, Etc. (Scotland) Act 2000, asp 9 (2000), available online at <http://www.opsi.gov.uk/legislation/scotland/acts2000/asp_20000009_en_1> (visited Apr 23, 2009).

international law. The Austrian experience varies from that of the United Kingdom in that Austria boasts a professional judiciary and a written constitution that explicitly provides for judicial independence. However, as in our case study of the United Kingdom, the ECHR has had a significant impact on the domestic implementation of judicial independence standards in Austria. It is instructive to consider how this framework, similar in some ways and varied in others from that of the United Kingdom, has influenced the Austrian creation of a culture of judicial independence.

Austrian courts provide legal protection for individuals by giving individuals the constitutional right to have their disputes adjudicated by a properly constituted court of law. The Austrian judiciary is staffed with professional judges whose functions, legal status, and procedures for appointment removal are defined in the Austrian Constitution (Articles 86,²⁰⁹ 88²¹⁰ and 88(a)²¹¹).

²⁰⁹ Austrian Const, art 86:

(1) Save as provided otherwise by this law, judges are appointed pursuant to the proposal of the Federal Government by the Federal President or, by reason of his authorization, by the competent Federal Minister; the Federal Government or the Federal Minister shall obtain proposals for appointment from the chambers competent through the law on the organization of the courts.

(2) If a sufficient number of candidates is available, the proposal for appointment to be submitted to the competent Federal Minister and to be forwarded by him to the Federal Government shall comprise at least three names, but if there is more than one vacancy to be filled at least twice as many names as there are judges to be appointed.

²¹⁰ Austrian Const, art 88:

(1) The law on the organization of the courts will prescribe an age limit upon whose attainment judges will be put on the permanently retired list.

(2) Otherwise judges may be removed from office or transferred against their will or superannuated only in the cases and ways prescribed by law and by reason of a formal judicial decision. These provisions do not however apply to transfers and retirements which become necessary through changes in the organization of the courts. In such a case the law will lay down within what period judges can without the formalities otherwise prescribed be transferred and superannuated.

(3) The temporary suspension of judges from office may take place only by decree of the senior judge or the higher judicial authority together with simultaneous reference of the matter to the competent court.

²¹¹ Austrian Const, art 88a:

The law on the organization of the courts may provide for posts of substitute judges assigned to a higher court. The number of such posts may not exceed two per cent of the number of judge posts assigned to the subordinate courts. The duties of the substitute judges in charge at subordinate courts shall in accordance with the law on the organizations of the courts be determined by the competent chamber of the higher court. Substitute judges may be entrusted only with the substitution of judges of subordinated courts and only if these judges are prevented from the discharge of their responsibilities or are

Articles 87²¹² and 88 guarantee the independence of the judiciary. The Austrian judiciary is not bound by previous decisions (there is no tradition of legal precedent), although judges must issue decisions that pay obeisance to the principles of legal certainty and equity. Judges are also free to ignore political pressure in issuing their decisions. Judges are assigned permanently to a court and the constitution provides for their removal through retirement only, or else as “prescribed by law and by reason of a formal judicial decision,” or through court reorganizations.²¹³ The Austrian mandatory retirement age for judges is sixty-five.

Judicial independence is given great protection by the fact that judges are not transferable to another judicial post without their consent and by the crucial role of the judiciary’s personnel panel in the judicial appointment process. This process of self-administration and self-discipline by the judiciary is required for ensuring its independence. Cases are allocated through a case distribution plan, in which a judge may be prevented from hearing an assigned case.²¹⁴ This distribution plan helps to preserve the independence of individual judges by assuring an objective and impartial method of appointing judges to adjudicate a particular case.

The separation-of-powers principle of the Austrian Constitution ensures that no judge may concurrently serve in an administrative or legislative capacity. Judges may be prevented from participating in a specific proceeding if there is a potential conflict of interest. Furthermore, judges are automatically excluded if they are a party to the dispute, if a family member or professional associate is party to the dispute, or if a judge has previously served as either representative or judge in a previous matter involving one of the parties. Section 88(a) of the

unable to cope with their duties, due to the extent of these, within a reasonable time.

²¹² Austrian Const, art 87:

(1) Judges are independent in the exercise of their judicial office.

(2) A judge is in the exercise of his judicial office during the performance of any judicial function properly his by law and the allocation of business, though to the exclusion of the judiciary’s administrative business which in accordance with the provisions of the law shall not be discharged by chambers or commissions.

(3) Business shall be allocated in advance among the judges of a court for the period provided by the law on the organization of the courts. A matter devolving upon a judge in accordance with this allocation may be removed from his jurisdiction by decree of the judiciary’s administrative authorities only in case of his being prevented from the discharge of his responsibilities or his being unable to cope with his duties, due to their extent, within a reasonable time.

²¹³ Austrian Const, art 8, §§ (1), (2).

²¹⁴ W. Rechenberger, *The Impact of the ECHR Judicature on the Austrian Practice in the Field of Judicial Independence*, Proceedings of the Jerusalem Conference (2008).

Austrian Constitution makes provisions for “substitute” judges to higher courts, but only so long as they do not make up more than 2 percent of subordinate court judicial posts.

Austria, like other countries in Europe, also has a constitutional court, which examines the constitutionality of parliamentary legislation, the legality of ministerial regulations, and investigates alleged constitutional infringements of individual rights by the state. The constitutional court also tries jurisdictional questions with regard to other courts, resolves disputes between the federation and its member states, and sits on impeachment proceedings involving the federal president.

Hence it can be seen that in Austria there is a written constitutional judicial independence framework in place. In addition, as is the case in the previous case study of the United Kingdom, a normative effect on internal judicial independence is created by international law. Whenever procedural guarantees found in Article 6 of the ECHR are violated—in other words, where a tribunal’s formation are held not to follow the appropriate standards of independence and impartiality—a decision may be reversed. Austria thus strives to fulfill its obligations under the ECHR by following its precepts and by amending noncompliant domestic laws.

An example of this was *Sramek v Austria*, where Austria was accused of violating Article 6 because the authority adjudicating real estate transactions, *Tiroler Landesgrundverkehrsbehörde*, did not appear to be an independent and impartial tribunal. Since, and on account of, this ruling, the *Tiroler Landesgrundverkehrsbehörde* has been separated from the government.²¹⁵

D. THE IMPACT OF INTERNATIONAL JURISPRUDENCE ON THE CANADIAN DOMESTIC LAW OF JUDICIAL INDEPENDENCE

Like Austria, Canadian constitutional documents provide the domestic framework for judicial independence. These documents include sections 96 through 100 of the Constitution Act 1867, which provided for the appointment of superior court judges, their financial security, and security of tenure. The preamble of the Act also provided for a constitution “similar in Principle to that of the United Kingdom,” thus incorporating by reference UK principles of judicial independence dating back to the 1701 Act of Settlement.

In addition, various Canadian Supreme Court judgments have strengthened the principle of judicial independence by giving a broad reading to these

²¹⁵ *Sramek v Austria*, 84-I Eur Ct HR (ser A) (1984).

constitutional provisions.²¹⁶ One of the main constitutional principles with regard to judicial independence states that judges are subordinate only to the law itself.²¹⁷ In *Re Provincial Court Judges*, the importance of judicial independence was explained:

Judicial independence is valued, because it serves important societal goals—it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal, served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.²¹⁸

Judicial independence has been given concrete form in Canada through its case law and government declarations. An example dating back almost five decades occurred in 1961, when the Prime Minister declared that no minister save for the Minister of Justice is permitted to make any contact with a judge regarding a pending judicial case.²¹⁹

One of Canada's early pivotal cases regarding judicial independence was *Valente v the Queen*. In its judgment, the Supreme Court of Canada listed the three main components of judicial independence²²⁰—security of tenure, financial security, and institutional independence.²²¹ Importantly, the Court held that judicial independence needs to be considered not only from an objective perspective, but also subjectively. The subjective perspective looks at whether a common person would believe in any particular situation that judicial independence exists.²²² This dual objective and subjective perspective is common in many of the professional standards on judicial independence and demonstrates how international and national laws create normative standards common to both.

²¹⁶ See, for example, *Valente*, [1985] 2 SCR 673 (Canada), and *Re Provincial Court Judges*, [1997] 3 SCR 3 (Canada).

²¹⁷ See Shetreet, *Judges on Trial*, ch 1 (cited in note 1). This is an element of substantive independence, provided for in the *Mt. Scopus Standards*, § 2.2.2 (cited in note 4) (“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.”).

²¹⁸ *Re Provincial Court Judges*, [1997] 3 SCR 3 (Canada).

²¹⁹ See Russell, *The Judiciary in Canada* at 35–39 (cited in note 20). See also Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* 513–18 (Cambridge 2002); Shetreet, *Justice in Israel* (cited in note 89).

²²⁰ *Valente*, [1985] 2 SCR 673 (Canada).

²²¹ *Id.*

²²² *Id.*

Consider section 18 of the *Mt. Scopus Standards*, which uses the objective test in dealing with the grounds for this qualification of judges in cases of suspicion of bias.²²³ Other sections such as 16,²²⁴ 17,²²⁵ 21,²²⁶ 22,²²⁷ and 23²²⁸ include subjective parameters.

In the case of *Ell v Alberta*,²²⁹ the Canadian Supreme Court ruled that life tenure is a crucial component in judicial independence; that judicial independence is an important value for all judges, regardless of their position or the place of their service; and that all judges are entitled to the same amount of independence.²³⁰

²²³ *Mt. Scopus Standards*, § 18 (cited in note 4):

Section 18.1:

Judges shall not serve in a case in which they have previously served as agent, counsel, advisor, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute or in a case where they had previously commented or expressed an opinion concerning the subject matter in a manner that is likely to affect or may reasonably appear to affect their independence or impartiality.

Section 18.2: “Judges shall not serve in a case with the subject matter of which they had other forms of association that may affect or may reasonably appear to affect their independence or impartiality.”

²²⁴ *Id.*, § 16.1: “Judges shall enjoy freedom of expression and association. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.”

²²⁵ *Id.*, §17: “Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.”

²²⁶ *Id.*, § 21.1:

Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisors, and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect the judge’s independence and impartiality.

²²⁷ *Id.*, § 22.1: “Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.”

Id., § 22.2: “Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party that may affect or may reasonably appear to affect their independence or impartiality.”

²²⁸ *Id.*, § 23.2: “Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relations to any particular case.”

²²⁹ *Ell v Alberta*, [2003] 1 SCR 857 (Canada).

²³⁰ *Id.*

Canada is an example of a country providing strong protection to judicial independence through domestic law and jurisprudence, and is instructive in demonstrating how a strong constitutional basis to judicial independence creates an upward spiral whereby judicial independence is further and further reinforced.

VIII. CONCLUDING REMARKS: A DYNAMIC DEVELOPMENT IN THE FUTURE

In this study, it is evident that national law has had a strong influence on international law (the first phase). Later, in the second phase, international law gained force of its own through treaties, conventions, regional arrangements, and extensive jurisprudence. Later, in the third phase, this international law began to influence national laws, such as in the UK, where the concept of judicial independence began.

This Article has explored the rich culture of judicial independence, showing how the concept has moved from its first phase of domestic development, such as in England with the 1701 Act of Settlement; through its second phase, by the seeping of these concepts into the international scene, influencing international and regional laws; and onto the third phase by the re-domestication of newly reformulated international principles of judicial independence. It has shown how countries have gradually been influenced by the international law on judicial independence. The United Kingdom, Austria, and Canada have all proven to be good illustrations of this movement.

Gradually, with the normative impact and interrelationship of national and international law, an ever-firmer culture of judicial independence has flourished. Both encouraging this construction, and also in response to it, have been the working and reworking of domestic and international law regarding judicial independence, and the development of professional standards on the subject, including the 2008 *Mt. Scopus Standards*, the contemporary revision of standards for both national and international judges. The development of the *Mt. Scopus Standards* was necessitated by the absence of a recent, thorough revision of standards. In order for standards to remain current and relevant and to continue to act as cornerstones for the substantive protection of human rights and a healthy economic state, it is critical that they also be contemporary. We have examined the impact of international professional standards over the last decades and their normative effects on the culture of judicial independence.

The United Kingdom is a model example of the normative effect of the cross-pollination and fertilization of domestic with international law. The first phase of judicial independence began with the 1701 Act of Settlement, which began to create in England the culture of Judicial Independence. In its second phase, these laws moved into the international arena, having a normative effect

on judicial independence not only in the international and regional realms, but also in other domestic environments. In its third phase of judicial independence, these normative principles, concepts and doctrines seeped back into the United Kingdom, creating dramatic changes in its judicial independence fabric, including the enactment of the significant Human Rights Act and Constitutional Reform Act.

It is wise to extrapolate from these examples and question what other changes this interrelationship between the international and the national will bring in the realm of judicial independence. One area that may soon be affected is that of administrative tribunal judges and administrative judges that hear cases in administrative agencies. There is an ongoing debate in the United States on what is referred to in England as “tribunal judiciary” and in the United States as “administrative judges.” The issue is to the extent to which the existing practice of administrative judges acting within administrative agencies can be defined as impartial and independent.²³¹ It is possible that other jurisdictions will follow the United Kingdom’s lead in the form of its legislation providing that judicial independence must be guaranteed to “tribunal judiciary.”²³²

Scholars should pay heed to the issue of judicial independence not only as it applies to the high level judiciary, which is the level most relevant to the rule of law and human rights, but also to lower court judges, tribunal judges, and administrative judges, and other judicial officers. This is critical, for 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. It seems that the development of the culture of judicial independence is moving in this direction.²³³

The idea of normative cycle of national law and international law in this paper focuses on judicial independence; however, this is only one significant illustration of this normative cycle. The same normative cycle can be found in other areas of modern life, where one can observe a process of internationalization of national laws. Other illustrations are in the area of money

²³¹ See Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 Admin L J Am U 589, 613–17 (Fall 1993/Winter 1994); James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 Admin L J Am U 629, 641 (Fall 1993/Winter 1994).

²³² Tribunals, Courts and Enforcement Act 2007, ch 15 (2007) (UK), available online at <http://www.opsi.gov.uk/ACTS/acts2007/ukpga_20070015_en_1> (visited Apr 23, 2009). Section 1 amended the Constitutional Reform Act 2005 (cited in note 16).

²³³ *Suratt v Attorney-General of Trinidad and Tobago*, [2007] UKPC 55 (UK).

laundering,²³⁴ anti-corruption in corporate activities,²³⁵ copyright and intellectual property rights,²³⁶ and criminal trials by international tribunals.²³⁷

²³⁴ See, for example, EC Directive 2001/97/EC of the European Parliament of the Council amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ 2001 L 344/76 (2001); UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances L326/24/11/1990/57 (1990); AND Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS 141 (1990). For an overview see, UN Office on Drugs and Crime, *An Overview of the UN Conventions and Other International Standards Concerning Anti-Money Laundering and the Countering of Finances of Terrorism* (Jan 2007), available online at <http://www.imolin.org/pdf/imolin/Overview%20Update_0107.pdf> (visited May 18, 2009).

²³⁵ See, for example, Council of Europe Civil Law Convention on Corruption, ETS No 174 (1999); Council of Europe Criminal Law Convention on Corruption, ETS No 173 (1999); United Nations Declaration against Corruption and Bribery in International Commercial Transactions, A/RES/51/191 (1996).

²³⁶ See, for example, WIPO Copyright Treaty, 36 ILM 65 (1997); Berne Convention for the Protection of Literary and Artistic Works, WO001EN (1971); Convention Establishing the World Intellectual Property Organization, WO029EN (1967);

²³⁷ See Rome Statute of the International Criminal Court, 37 ILM 1002 (1998).