# JUDICIAL INDEPENDENCE IN TIMES OF CRISIS: INTRODUCTION

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The post-Colonial Era has brought a new awareness and immediacy to the role of the judiciary. The rule of law is critical to the safety and welfare of any society. In the past decade, almost every nation in the world has faced crises of one sort or another. Several nations are attempting to recover from a crisis of mass violence or trying to escape a pattern of violence. Less volatile developing nations may be experiencing economic and social crises while making the transition into the global economy. Meanwhile, developed nations have hit roadblocks involving both economics and security. In all of these instances, the judiciary is a critical player, and judicial independence becomes a major concern.

The articles in this Symposium address various aspects of the role of the judiciary in times of crisis. Most of them speak from the perspective of a specific country—the United Kingdom, United States, India, Iraq, and Israel. The sixth article draws on the author's experience with the former Soviet republics and the Middle East to make the point that many governments are in transition, just as the United States was in transition for much of its history. It might not be immediately clear why the current experiences of developed countries such as the United Kingdom and the United States are considered times of crisis compared to the struggles of post-Ba'athist Iraq, or how the comparatively well-established but still maturing judiciaries of Israel and India relate to the others. The details of those correlations will emerge later, but for now, it will suffice to say that the judiciaries of all of these countries have faced challenges to their autonomy and authority, while the countries themselves have faced challenges to national security and economic stability.

These articles discuss countries that are in crisis for at least three different reasons. Two countries are faced with violent threats to their population from nonstate actors: the United States and Israel. Two are in transition to new judicial models: the United Kingdom and India. Some are founding new governments: Iraq and the former Soviet countries.

In the past decade, the West has mounted Herculean development efforts in a variety of settings: emerging economies (primarily in southern Asia, Africa, and South America), the former Soviet bloc, and countries embroiled in violence. In all of these settings, judges face the daunting task of achieving impartiality, maintaining their independence, and simultaneously providing some measure of accountability for their own actions.

As emerging nations have struggled both politically and economically, a dominant theme has been the need for developed nations to lend expertise to developing nations.[1] Among the assumptions inherent in that theme are the



[1] A particularly helpful volume is from the Carnegie Endowment for International

following. The developing nations in particular need complementary economic and legal systems; neither can exist without the other. The health of the people necessitates a functioning and at least minimally fair economic system—without which there is no point in attempting to build other systems. The operation of an economic system requires a credible legal system, one that is also functioning and at least minimally fair—without assurance that disputes will be resolved by the rule of law, little investment can occur and therefore very little productive work can be performed. Simultaneously, infrastructure needs civil engineering, food provision needs agricultural expertise, and so on.

Because neither an economic nor a legal system can thrive in the chaos of wartime, there is a dilemma posed by violence and the rule of law. A justice system can hardly operate effectively in the midst of chaos, but chaos is difficult to forestall without a functioning justice system. That reality may bedevil U.S. efforts in places such as Afghanistan, but it also confronts many judges on a daily basis in societies facing lesser levels of violence.

The stereotype of the judge sitting solemnly above the fray and detached from reality has opened the judiciary to some ridicule, and even some harsh attacks. While there is some merit in the stereotype, judges themselves are aware of the need to maintain connection to the real world.

For example, the highest tribunals of both the United Kingdom and the United States have dealt with aspects of the so-called "war on terror" by having demands made on them for deference to the judgments of the executive. Compare these two statements—the first, an opinion by Lord Hoffman of the U.K. House of Lords and the second, a dissent by Justice Scalia of the U.S. Supreme Court:

> There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom . . . . This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. . . . Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.[2]

> America is at war with radical Islamists. . . . [Today's opinion] will almost certainly cause more Americans to be killed. . . . What

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Peace: PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006); *see also* CTR. FOR LAW AND MILITARY OPERATIONS (CLAMO), RULE OF LAW HANDBOOK (2007); BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

[2] A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [95]–[96] (appeal taken from Eng.).

> competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.[3]

In contrast to Justice Scalia's words, in an earlier era, the U.S. Supreme Court dealt with a similar military judgment that American security demanded "exclusion" of Japanese-Americans from the West Coast.[4] Foreshadowing the assessment of Lord Hoffman quoted above, Justice Jackson said in his dissent:

> I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional.[5]

As Chief Justice Marshall said two centuries earlier, "It is emphatically the duty and province of the judicial department to say what the law is."[6] Lord Hoffman and Justice Jackson both made judgments on matters of legal standards that were different from the judgments of fact and expediency made by the executive. Judicial independence is implicated in the degree to which judges are willing to defer to the normative judgments of the executive as opposed to the factual judgments. As Justice Jackson said, factual assessments of the degree of risk are not determinative on the legal judgment.[7]

Amnon Reichman's article deals directly with this phenomenon.[8] He starts with the tension between the judicial desire to assert its role in maintaining the separation of powers in a democracy and the need for consolidation of power in a time of emergency. Consolidation and coordination are components of the arguments for deference to executive judgments. But deference can only be achieved through sacrifice of some basic judicial functions, primarily the protection of minority rights, the checking of institutional bias in the executive,

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[3] Boumediene v. Bush, 553 U.S. 723, 827–32 (2008) (Scalia, J., dissenting) (internal citations omitted).

[4] In *Korematsu v. United States*, 323 U.S. 214, 217 (1944), Justice Black's majority opinion pretended that all it needed to decide was exclusion of certain persons from certain locations, a purely security-driven concern. *Id.* at 223. That avoided the reality that the program in question was a forced relocation on the basis of race, later condemned by human rights conventions and ultimately known as part of "ethnic cleansing."

[5] *Id.* at 245.

[6] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[7] *Korematsu*, 323 U.S. at 244–46.

[8] Ammon Reichman, *Judicial Independence in Times of War: Prolonged Armed Conflict & Judicial Review of Military Actions in Israel*, 2011 UTAH L. REV. 63.

and the fostering of sober reflection. "[E]mergency times, and war in particular, present a dilemma. During such times, judicial independence is both a liability and an asset because it is both a possible impediment to the war effort and a possible cure to the war's collateral damage."[9]

Studying the actions of the Israeli courts over the past several years, Professor Reichman describes a number of instances in which the judges have yielded to the blandishments of the security forces, but many other instances in which they have stood firm against the wishes of the government. In this, he finds an important lesson—the judges will be subject to the consequences of their own decisions, which gives them a tremendous degree of credibility. In this context, Professor Reichman stresses the importance of the transnational dimension of judicial independence. Whereas external pressures may threaten judicial independence (especially in times of war, when the state may be at odds with the international community), judges may nonetheless "harness[] the presence of the international audience"[10] as a sort of shield from local pressures in their quest to persuade others of the need to protect democratic processes and values.

Meanwhile, in nearby Iraq, a fledgling nation is going through some familiar growing pains in the midst of unique patterns of violence. Professor Haider Hamoudi provides this optimistic summary of the early stages of the post-Ba'athist judiciary: "[Its] *emerging practice does not differ from contemporary scholarly accounts of the history of the United States Supreme Court*. Or, better stated, the differences are of degree rather than quality."[11] Professor Hamoudi speaks from an insider's personal experience, as a personal acquaintance of key players as well as a representative of the U.S. Government in constitutional negotiations during the years 2009–2010. During that time, the Iraqi Federal Supreme Court decided important cases about the validity of election results and the formation of a government after those elections. Was the Court aware of the political impact of its decisions? Surely so. Was the Court "uninfluenced by external political forces?"[12] It would be difficult to keep politics out of such important decisions. But was the Court able to reach decisions without answering to executive pressure or fear of adverse consequences to itself? Professor Hamoudi clearly believes so and illustrates this with some holdings that went against the interests of the current executive.

He goes on to point out that the Iraqi Federal Supreme Court proceeds cautiously and indeed would be confronted with some very real threats of noncompliance if it were to step too far out of line. However, the current chief justice's reputation as a "survivor" clearly aids his ability to tread cautiously in turbulent settings, which Professor Hamoudi regards as a virtue much like the political awareness displayed most of the time by the U.S. Supreme Court.

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[9] *Id.* at 66.

[10] *Id.* at 95.

[11] Haider Ala Hamoudi, *The Will of the (Iraqi) People*, 2011 UTAH L. REV. 46, 46 (emphasis added).

[12] *Id.* at 50.

One very interesting point that emerges from this review is that the Iraqi Federal Supreme Court has been brought front and center into the political fray of an emerging nation. By contrast, we would be hard pressed to find any significant judicial activity from other nascent judiciaries of recent times, such as in Bosnia-Herzegovina, Afghanistan, or Russia. Similarly, the U.S. Supreme Court disclaimed any interaction with the political branches until Chief Justice Marshall pushed aggressively forward with the notion of judicial review more than a dozen years after formation of the new government.[13] As the dust settles, so to speak, it will be interesting to look at other factors in the Iraqi experience, such as the degree to which the two-millennium history of Iraqi jurisprudence and the relatively high level of education within the Iraqi decision-making elites contribute to the apparent politically savvy independence of the Iraqi judiciary. In particular, the political savvy of the current Iraqi Federal Supreme Court chief justice may be in some degree a product of much larger forces at work and a harbinger of future stability.

Continuing further east, we find ourselves in India with Professor Shimon Shetreet's discussion of the attempt to craft a "uniform civil code" in matters of personal law.[14] The India Constitution promised in 1949 that the "State shall endeavor to secure for its citizens a uniform civil code throughout the territory of India."[15] This provision on its face contrasts sharply with federalist-type structures of the United States and European Union, which leave the governance of daily lives of its citizenry in the hands of constituent units. In contrast, India committed to harmonize the law of contracts, torts, and property across all its provinces. That alone would be interesting, and might shake the common acceptance that there is some reason why Nevada should have different laws than New York. The real issues, however, are not about daily commercial life but about religious and cultural understandings. The law of "personal status" may include norms of marriage, divorce, child custody, descent and distribution of property at death, and even questions regarding who is entitled to live with whom. These are issues of critical dimension in the cultural identity of many people, particularly those of minority ethnic or religious groups. Professor Shetreet describes the experience of several other nations in trying to secularize the judicial system while accommodating the norms of religious groups. Turkey, Israel, Nepal, and even European Union experiences with similar issues are explored and lead to some firm recommendations.

First and foremost, the crafting of a uniform civil code of personal status for India is a legislative task, but the judiciary can contribute to the process by demonstrating its ability to be attentive to cultural norms while promoting predictability of decisions. Second, the implementation of the uniform civil code should be done gradually, topic by topic. Third, Professor Shetreet suggests that

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[13] Marbury v. Madison, 5 U.S. 137, 173–74 (1803).

[14] Shimon Shetreet, *Academic Blueprint for the Implementation of a Uniform Civil Code for India*, 2011 UTAH L. REV. 97.

[15] INDIA CONST. art. 45.

the religious law should remain an applicable parallel to the uniform civil law that will be applied as the binding general law of the land. Fourth, Professor Shetreet proposes that mediation will be employed on the inter-community level in formulating the reforms as well as on the individual level after the introduction of the uniform civil code. Professor Shetreet extols the virtues of mediation, both in crafting a code among the contending communities, and also between individuals when confronted with a clash of cultures. Meanwhile, all of this must take place in a booming economy while facing serious political and moral challenges, such as problems of corruption and wide social gaps. Professor Shetreet's suggestions offer a concrete plan of action for the nation.

Turning to the Anglo-American setting, the nominal birthplace of judicial independence, we find societies in transition. The British system is moving into an entirely new phase of judicial independence with the separation of the U.K. Supreme Court from the House of Lords, while the U.S. courts are struggling with the intersection of judicial review and national security.

Professor Neil Andrews takes on some of the basic issues relating to the creation of the U.K. Supreme Court.[16] The British gave rise to the notion of judicial independence and are just now in the process of implementing it, while at the same time experiencing serious reactions to ceding of judicial autonomy—some would say sovereignty—to the European Union and European Court of Human Rights. Professor Andrews challenges whether the U.K. Supreme Court was necessary when it would have been possible merely to eliminate the Law Committee of the House of Lords and leave the Courts of Appeals as courts of last resort. Demands for uniformity, credibility, and prestige seem to have overtaken considerations of efficiency in this development. In addition, he questions the eligibility requirement for justices who must have prior judicial experience before appointment to the U.K. Supreme Court. Again, the credibility and prestige of the Court seem to be the overriding considerations. All of this plays into the realization that a court with newfound judicial review power will need as many trappings of prestige as it can find to make its presence felt. After all, judicial independence is not a tangible "thing" but an attitude of shared understandings within a political system.

On the other side of the pond, while the U.S. courts are struggling with review of executive decisions in the context of the misnamed "war on terror," Professor Entin explores some of the limits of judicial independence in a modern society.[17] The U.S. Constitution mandates that "Judges . . . shall hold their Offices during good Behavior, and shall . . . receive . . . a Compensation which shall not be diminished during their Continuance in Office."[18] The framers thought a guarantee against reprisals from the political branches through tampering with judicial

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[16] Neil Andrews, *The United Kingdom's Supreme Court: Three Skeptical Reflections Concerning The New Court*, 2011 UTAH L. REV. 9.

[17] Jonathan L. Entin, *Getting What You Pay For: Judicial Compensation and Judicial Independence*, 2011 UTAH L. REV. 25.

[18] U.S. CONST. art. III, §1.

salaries was important enough to provide explicit assurance in the Constitution, but what does the provision really mean two centuries later? The courts have thus far refused to hold that the compensation clause guarantees them protection against inflation, so there is no constitutional requirement of a cost-of-living increase. But if all other officials are receiving cost-of-living increases, then failure to provide them for judges could be a discriminatory and arguably punitive measure.

The compensation issue looms even larger in many other societies. Furthermore, in today's world there are many other threats to the ability of judges to perform their functions satisfactorily. Do judges have assurances of sufficient work space, clerical and legal assistance, equipment, and personal security?[19] Markus Zimmer has had extensive judicial administration experience in numerous settings, including the former Soviet bloc and throughout the Middle East. Building from his base with the U.S. federal judiciary, he has worked as an international advisor to transition and reform efforts. Challenging political folklore, which sources the lower federal courts' independence in the Constitution, Zimmer documents that the federal judiciary came to manage its own affairs and achieve self-governance much later, around the time of the New Deal. During the intervening 150 years, the lower federal courts were overseen and managed by a succession of executive branch departments, most recently by the Department of Justice, which carried oversight to the micro level until 1939. Zimmer has advised fledgling judiciaries globally on a variety of topics, including how to organize for self-governance. He advocates that meaningful judicial independence anticipates strict accountability, self-governance, administrative autonomy, rule-making authority, and a statutory structure to assure stability during periods of political fluctuation. The details of these arrangements may vary widely, but the rule of law cannot exist without attention to these elements.

In conclusion, this Symposium contains articles from experts who have had personal experience with judiciaries in three different kinds of crises: (1) coping with threats of violence against the civilian population (2) building foundations in newly emerging governments, and (3) dealing with transitions.

In all cases, the dilemma for judicial accountability can be summed up this way: judicial freedom is necessary to avoid tyranny but judicial accountability is necessary to avoid collapse of the system through loss of credibility and authority.[20] Thus, judicial independence must thrive in the face of various accountability mechanisms:

1. Decisions may be overturned by new legislation or even constitutional amendment.

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[19] Markus B. Zimmer, *Judicial System Institutional Frameworks: An Overview of the Interplay between Self-Governance and Independence*, 2011 UTAH L. REV. 121.

[20] Judicial tyranny is not really a problem for the reasons given by Hamilton in the Federalist Papers discussion of the "least dangerous branch." THE FEDERALIST NO. 78 (Alexander Hamilton).

2. Administrative requirements make judges ultimately dependent on the political branches for the necessities of life—workspace, salaries, security.
3. In some countries, there will be ministry oversight of assignments and promotions within the judiciary.
4. Popular opinion is a far more powerful influence than is obvious at first glance. Particularly in those countries where judicial action is supposed to conform to a code and where commentators have the role of elaborating on precedent, judicial decisions are regularly critiqued. But the impact of politics in and on the U.S. Supreme Court has been a matter of significant debate throughout our history.
5. There is always lurking the prospect of executive defiance of court orders. The judiciary may be the expositor of the law but the executive is the executor.

In light of all these possibilities, judges will inevitably be part of a governance system—they will be political actors and will have to give to get. They must be politically savvy while staying true to the judicial role. As Professor Hamoudi says of Chief Justice Medhat, it will be important for judges to be survivors.[21]

[21] Hamoudi, *supra* note 11, at 59–61.