Amendment 1.3A to the Mount Scopus
International Standards of Judicial Independence

As approved in
Jerusalem JIWP conference 4-6 January 2022

The rule of universality and particularity

1.3A (a) The task of creating international standards requires taking into account not only judicial independence but also the other fundamental values of the justice system such as accountability of the judiciary, efficiency of the judicial process, accessibility of the courts and public confidence in the courts.

(b) A central challenge of drafting international standards of judicial independence is to formulate standards which will reflect the values of universal desired standards. At the same time the standards must take into account the particular circumstances of the domestic jurisdictions and the different legal cultures and traditions in the various countries This challenge is met by careful deliberation.

(c) In order to properly analyze compliance with judicial independence[1] in matters of judicial process and judicial terms, we must consider two main approaches, universality and particularity.[2] Universal Theory, or "universality," holds that an independent judiciary is necessarily a shared value of all legal systems, essential to the Rule of Law. Universality calls for defining a universal model of judicial independence, reflected in legal rules and other formal institutional arrangements—including judicial appointments process and the rules for terms of appointment, review, retention, and recall of judges.[3]

[1] Elsewhere this issue is examined in detail in: Shimon Shetreet, *The Rule of Universality and Particularity*, *in*: CHALLENGED JUSTICE: IN PURSUIT OF JUDICIAL INDEPENDENCE, 68-119 (Shimon Shetreet, Hiram E. Chodosh and Eric Helland Eds., Brill 2021.
[2] Ibid., p. 116.

(d) Alongside the universality approach, we must take into account circumstances in each jurisdiction and recognize that, in some countries, it is justified to exempt certain practices from the universal standards. This is what we call the approach of "particularity."

(e) The universality and particularity rule should be qualified so as not to accept legislation or judicial decisions that, when carefully examined, are predominantly motivated by improper aims tointerfere with judicial independence.

(f) Measures taken by government in countries that changed the system of governments [4]must meet the test of predominantly valid aims to prevent actions with predominant improper aims.

(g) Similarly, in the case of long established proctices , if such predominant improper aims can be shown in the use of the long-established practices to the detriment of judges and judicial independence, such measures should be equally declared as being in violation of judicial independence. Being an long established practice cannot be a shield from an adverse judgment regarding actions of the legislature or judicial decision that violate judicial independence.

Explanatory Note

Article 1.3 of the mount Scopus standards recognize the need for respect of domestic fundamental principles by international tribunals. This article was approved as amendment of JIWP in Vienna in 2011. Article 1.3 reads as follows:

> It is vital that supranational and international Tribunals respect the fundamental principles of the legal systems of the Member States and to that end acknowledge the collegiality of the traditions of the courts of both the municipal and extra municipal courts.

It is now necessary to review an amendment which will address the challenge of balancing between universal standards on the one hand and particular circumstances of domestic

[4] Such as the legislation and court decisions in the new democracies in Europe which changed from communist rule to democratic system of government .

jurisdictions. We propose to add article 1.3A in the above draft text which will guide the considerations of universality and particularity.

The task of creating international standards requires taking into account not only judicial independence but also the other fundamental values of the justice system such as accountability of the judiciary, efficiency of the judicial process, accessibility of the courts and public confidence in the courts. A central challenge of drafting international standards of judicial independence is to formulate standards which will reflect the values of universal desired standards. At the same time the standards must take into account the particular circumstances of the domestic jurisdictions and the different legal cultures and traditions in the various countries This challenge is met by careful deliberation.

The question arises how to shape the proper balance between the universal standards of judicial independence, and particular domestic circumstances. The balance has to be struck between the international jurisprudence, and the established standards and treaties on the one hand, and the need to recognize particular legal and historical circumstances in domestic jurisdictions on the other hand.

It is proposed[5] that in order to properly analyze compliance with judicial independence in matters of judicial process and judicial terms, we must consider two main approaches, universality and particularity.[6] Universal Theory, or "universality," holds that an independent judiciary is necessarily a shared value of all legal systems, essential to the Rule of Law. Universality calls for defining a universal model of judicial independence, reflected in legal rules and other formal institutional arrangements—including judicial appointments process and the rules for terms of appointment, review, retention, and recall of judges.[7]

However, alongside the universality approach, we must take into account circumstances in each jurisdiction and recognize that, in some countries, it is justified to exempt certain practices from the universal standards. This is what we call the approach of "particularity." As an

[5]Elsewhere this issue is examined in detail in: Shimon Shetreet, *The Rule of Universality and Particularity, in*: CHALLENGED JUSTICE: IN PURSUIT OF JUDICIAL INDEPENDENCE, 68-119 (Shimon Shetreet, Hiram E. Chodosh and Eric Helland Eds., Brill 2021.
[6] Ibid., p. 116.

illustration, the international standards, first adopted in the New-Delhi Code of Minimum Standards of Judicial Independence 1982 by the International Bar Association in cooperation with the JIWP Association scholars, recognize particularity. And so do the Mount Scopus International Standards of Judicial Independence 2008, which were adopted by the International Association of Judicial Independence on the basis of universal theory but accommodating special circumstances. Thus, the correct approach is to ordinarily and generally expect countries to respect the universal rules, but at the same time, in proper circumstances, allow exceptions to be carved out for particular jurisdictions.

The unique case of judicial appointment in India can serve as a case study for the concept of particularity. The analysis of the historical events that led to the rise of a unique constitutional culture in India. It gave almost exclusive power for appointment of judges of the Supreme Court in India. Particularity in history and domestic circumstances form the basis of a strong claim for the legitimacy of methods of judicial appointment that are much stricter than the universal standards of judicial independence. Particularity justifies the method of almost-exclusive judicial control over appointment of judges to the Supreme Court of India. When the historical developments and the constitutional culture in India are carefully examined, the method of appointments can be judged legitimate even if they are not necessarily warranted by the universal standards of judicial independence.[8]

The rule of universality and particularity is reflected in a number of doctrines, which are followed in domestic and international jurisprudence around the world. In Europe international and supranational courts, for example, the European Court of Human Rights and the European Court of Justice of the EU resort to the doctrine of margin of appreciation or subsidiarity. The jurisprudence of the European Court of Human Rights has long recognized the doctrine of margin of appreciation or the subsidiarity doctrine.[9] According to this doctrine, the court has to pay respect to the judgments of the domestic courts regarding the interpretation of the European Convention of Human Rights and on what constitutes a violation of the Convention.

[8] Ibid., p. 117.
[9] Peggy Ducoulombier, "The Dialogue Between the European Court of Human Rights and Domestic Authorities: Between Respect for Subsidiarity and Deference" in *Judicial Power in a Globalized World*, p. 131

This doctrine is based on the idea that the burden of adjudicating issues of human rights is a shared responsibility of the international tribunals and the domestic top courts. Derived from this is that the international courts must give adequate weight to the ruling and the discretion exercised by domestic courts in each country. This judicial restraint is based on several ideas, such as respect for the democratic principle or respect for institutional competence or expertise.

This school of thought of giving respect to particularity in European jurisprudence in the doctrine of margin of appreciation or subsidiarity continues, albeit under some criticism for deference to domestic jurisdictions.[10] This approach is also evident in the Mount Scopus International Standards on Judicial Independence 2008 adopted by the JIWP association as well as in the New Delhi Code on Minimum Standards of Judicial Independence of 1982. One can refer to the recognition of particularity in the New Delhi Code and Mt Scopus Standards regarding the position of the Lord Chancellor in England before 2005, and the role of the Appeal Committee of the House of Lords as the top court in UK until 2005, the position of the top constitutional tribunal of Belgium and Italy, and the political involvement of judges. [11]

The jurisprudence of the European Court of Human Rights gives greater allowance to long-established practice in older democracies. There is recognition that particular practices from old democracies that deviate from universal standards of judicial independence can be acceptable (such as with the case of the Lord Chancellor in England, the *Thiam case* in France[12] or the *Nunez case* in Portugal).[13] But one can see that there is more suspicion toward new democracies adopting similar practices (such as in the *Volkov case* in Ukraine).[14] A detailed analysis of all the cases involving petitions to the European Court of Human Rights of judges from old democracies and from Eastern European countries that changed from communist rule to democratic rule point to the same conclusion.[15]

[10] Sheetreet, supra note 5, p. 111.
[11] SHIMON SHETREET, CHALLENGED JUSTICE: IN PURSUIT OF JUDICIAL INDEPENDENCE, 73-74 (Shimon Shetreet, Hiram E. Chodosh and Eric Helland Eds., Brill 2021.
[12] Ramos Nunez de Carvalho e Sá v Portugal [gc], no, 55391/13, 06/11/2018
[13] Ramos Nunez, § 158.
[14] Oleksandr Volkov v Ukraine, no. 21722/11, § 130, 09/01/2013
[15] Kevin Aquilina, "The Independence of the Judiciary in Strasbourg Judicial Disciplinary Case Law: Judges as Applicants and National Judicial Councils as Factotums of Respondent States" in *Judicial Power in a Globalized World*, 1.

The question arises, how do we use the universality and particularity to help resolve the issue of standards of judicial independence in old democracies versus new democracies? And how can one justify the different approach? The answer we suggested here is that there is less inclination by the court to recognize particularity in countries that had communist rule for a number of decades and moved to democratic rule. At the center of the consideration, even if it is not said explicitly, is that in old democracies, even with questionable practices, the approach is to recognize particularity and not invalidate such seemingly doubtful practices. As an example of such practices, one can mention the composition of the French *Consiel Constitutionel*, and the top constitutional tribunal in Belgium, and—though not adjudicated but generally accepted—the unique position of the Lord Chancellor in England until 2005 (combining legislative, executive and judicial functions). All these institutions are long established and are not suspect of being tailored to attack the independence of the judiciary or consciously control judges. This cannot be said of the newly democratic system of governments in former communist countries. The changes introduced in these countries, when carefully examined, may be found to be consciously aimed at interfering with judicial independence and taking control of the judges and judicial terms of office. The cases discussed in the ECtHR from Hungry or Poland clearly show that they are not a result of long-established democratic tradition. In such countries, the actions in fact and in appearance unjustifiably violate judicial independence. The same reasoning may apply to examination of measures taken in Turkey in the aftermath of the attempted coup.

We propose that within the model of universality and particularity we can argue that the difference lies in the familiar "dominant improper consideration" test. In old democracies, where practices have existed for many years, we may view these democracies as having passed the test and shown that the dominant consideration test or the primary purpose test in implementing the practices are not the improper ones, and therefore room can be made for legitimacy of the particular practice. On the other hand, in new democracies, the practices have not passed such a test, and it is not clear that the improper consideration of a desire by the executive to control the judiciary is not the dominant one. In such cases, there is less room for acknowledging particularity.

This approach to examining the main or dominant purpose of legislation is adopted in the United States in the constitutional adjudication, as illustrated in cases dealing with the

Establishment Clause in the First Amendment using the primary secular purpose test and in cases dealing with the Equal Protection Clause examining the legislative intent on questions of equality.

The universality and particularity rule should be qualified so as not to accept legislation or judicial decisions that, when carefully examined, are predominantly motivated by improper aims. This has been more evident in the legislation and court decisions in the new democracies in Europe. Similarly, in old democracies, if such predominant improper aims can be shown in the use of the long-established practices to the detriment of judges and judicial independence, such measures should be equally declared as being in violation of judicial independence. Being an old democracy cannot be a shield from an adverse judgment regarding actions of the legislature or judicial decision that violate judicial independence.