ARGENTINA 2018

COMMUNIQUÉ

J20 ARGENTINA

On the occasion of Argentina´s G20 Presidency 2018, the Supreme Court of Argentina has been honoured to welcome the highest Courts of the G20 to the **J20 Meeting: The Judicial Conference of the Supreme Courts of the G20** '*The Role of the Judiciary for Fair and Sustainable Development*'

What is dialogue without consensus? What is power without fairness? What is development without sustainability? These are three questions worth asking. Argentina´s theme, "BUILDING CONSENSUS FOR FAIR AND SUSTAINABLE DEVELOPMENT", aims to open a global conversation across the board about how to achieve this goal.

International policy coordination is a daunting task. And yet Argentina believes that a consensual approach to negotiations is fundamental to enhance international progress. A cohesive network of working groups and regular meetings form the basis of the G20's consensus-making. That consensus can only be achieved if pursued with a sense of fairness, equality and true partnership.

Fairness is a demand from people around the world. It is particularly critical in a rapidly-changing environment in which it is necessary to bring everyone along. Moreover, fairness considerations play a fundamental role in designing and implementing global rules for a wide range of issues. A fundamental lesson learnt over the past two decades is that global agreements that are perceived as unfair are unlikely to prove durable. The G20 must seek outcomes that all members view as fair.

Sustainability is a core value that should serve as a unifying framework to meet economic, social, and environmental goals. Taking care of our common home is in everyone's interest, because the responsibility towards our future generations is shared by us all. Now is the time to act.

Growth that is fair, as well as sustainable, is the pillar of development. This is the vision at the heart of Argentina´s priorities for 2018.

REACHING OUT

Following Argentina´s Presidency overview, the Supreme Court of Argentina has invited the highest courts of Spain, Chile and the Netherlands to attend the J20 meeting. We have also invited the highest courts of the chairs of the Caribbean Community (Jamaica), ASEAN (Singapore), African Union (Rwanda) and NEPAD (Senegal). We are also looking forward to the contributions of the international tribunals of partner international organisations of the G20, including the United Nations (International Court of Justice), the African Union (African Court on Human and Peoples' Rights) and the Caribbean Community (Caribbean Court of Justice).

TOPICS AND GUIDING QUESTIONS

RIGHTS AND FAIRNESS

How should the system of rights contribute to make society a fairer system of cooperation for mutual advantage?

SUSTAINABLE DEVELOPMENT

What are the limits for the Judiciary in the protection of the environment for future generations?

STRENGTHENING THE RULE OF LAW

How judges should help to make the law rule supreme?

JUDICIAL REFORM

What are the changes that should be implemented for the judicial system to be more responsive to the expectations and needs of the people?

THE GLOBAL DEMOCRACY AND THE GLOBAL MARKETPLACE

How Courts and the legal system should interact with each other to expand democracy and the market?

RIGHTS AND FAIRNESS

BRAZIL

RIGHTS AND FAIRNESS

João Otavio de Noronha, President, Supreme Tribunal of Justice of Brazil

First of all, I would like to congratulate Argentina Supreme Court for the unprecedented and laudable initiative of bringing together, in a parallel meeting, the Supreme Court's representatives from the so-called G20 countries –a group that gathers developed and developing countries with the highest projections in world economy.

To get an idea of G20 importance, it is enough to recall that this forum represents approximately 90% of world's GDP, 80% of international trade, and around two thirds of planet population.

Certainly, these are remarkable facts that allow us to humanize and to gauge the complexity of the challenges faced everyday by the member Judiciaries of the so-called J20.

I greet the moderator of this panel, Justice Horacio Rosatti, and extend my salute to the rest of my colleagues in this Conference.

The world we are living is undergoing a worrying transformation. More than ever, our societies are claiming for rights and equity. 21st century Judiciary must pay attention to that request, acting independently and with integrity, while coming closer to the citizen and his social reality.

Brazil, particularly, over the last few years, has faced big challenges that have been handled with institutional pride and solidity.

We recognize that the "picture" of this moment might not be the best, but the quality of the "movie" is what matters —and I firmly assure that Brazil's "movie" is good.

We have recently witnessed scenes of a country that shows democratic strength and whose institutions attempt to respond to the demands from society for more justice, sustainable development and the struggle against corruption, at all levels of the social and political pyramid.

In the film of History there are neither rehearsals nor editions. The film depends on a good script, in this context, the laws, and on good actors, that is to say, the citizens and their institutions.

As representatives of the State and of the Judiciary in particular, we do not do any favour to society when we act ethically, efficiently, coherently and independently. We are just fulfilling a mission and a duty.

In the Brazilian case, the preamble to the Constitution establishes that the democratic State “is meant to guarantee the exercise of the social and individual rights, of liberty, security, welfare, development, equality and justice as supreme values of a fraternal, pluralistic and unbiased society.” The order is broad and clear. These values are not negotiable.

We know well that one of our society’s fundamental demands in relation to the State is respect for the healthy functioning of its institutions, which must act fairly, guaranteeing rights and fulfilment of the duties by everybody, indistinctly.

Another fundamental demand of the citizenry is that the State promote economic and social development, which has to be just and environmentally sustainable at a time.

For this purpose, it is necessary to strengthen and consolidate the Rule of Law, which must have strong foundations, be resistant to time and the vicissitudes of the human experience.

In this meeting, here in Buenos Aires, we intend to debate on the role of the Judiciary in the promotion of sustainable development. Such debate reveals our sense of urgency and our interest in the topic.

It is a big challenge in a world where human interactions are frantic and complex. The pace of the transformations, with its multiple nuances, is not always accompanied by the pen of the legislator. After all, how could he or she predict the specific situations arising from the factual reality?

What is almost an impossible mission for the legislator is an unavoidable necessity for the judge, who in his daily work deals with specific cases and has to make decisions with equity.

Equity is the corrective principle of legal justice. It is adaptable to the rule, in specific situations, in order to observe equality and justice standards.
Equity not only applies to the interpretation of a law, but also fills the gaps of the legal system and avoids the application of a same rule being beneficial or harmful to individuals in a selective way.
In sum, equity completes what the written law does not cover. It is an old lesson the Greeks passed on to the Romans and that today acquires new aspects.

More recently, it is possible to observe a fast growth of the citizenry´s demands in regard of the judges' work, which generates at least two visible consequences in the field of Law. One of them grants a new meaning to the classic civil jurisdiction. The other one establishes new challenges to the application of the criminal law.
With regard to judicial services in civil disputes, judges are being more and more exposed to unusual situations that oblige them to overcome the passivity of the technical application of the rule. As we know, the nature of the law is only disclosed in its concrete use. Thus, the meaning of the rule is integrated by its applicator.
It is precisely in this context that the Judiciary ceases to be a mere technical body of the State and starts to interact as a regulator of major conflicts of interest, indicating the ways the rule has to undergo in order to attain justice.
The old tenet of isonomy lightens up the decision-making process through equity. Every citizen, company, worker, consumer or institution that resorts to the Judiciary wishes to be recognized according to the social role that is being exercised. Distinctions may be deemed acceptable only if appropriately founded on fair and reasonable criteria.
In criminal proceedings, we also observe new developments in applied law. That is to say, the society's non-negotiable demand that all the accused be subject to the same procedural and criminal treatment, no matter how influential they may be or their financial situation, their race, gender or political orientation.

Trust on the Judiciary and its legitimacy depend on its capacity to act with independence and integrity. They depend, as well, on its ability to pacify conflicts within a reasonable time, with transparency, efficiency and social responsibility.

Despite the different realities of the Courts that participate of this Conference, we know that, to some extent, the challenges I have just mentioned are common challenges.

In Brazil, domestic and international commerce conflicts brought before the Judiciary offer a good example of how justices need to be aware of global economy dynamics. This awareness precisely allows us to understand our role as guarantors of legal certainty, which is so necessary in the world of business.

Dialogue between judicial courts, treaties and international cooperation are powerful allies in pursuing these efforts. Thus, it is possible to update the treatment of new ways of social coexistence, consumption, work, commerce, as well as privacy and anonymity notions.

We are convinced that the modernization of judicial institutions is one of the necessary ways to respond to the present expectations of society in regard of rights effectiveness.

Here I open a parenthesis to express that the Superior Court of Justice which I have the honour to chair is trying to rise to the task of the challenges of modernity.

The Superior Court of Justice, created by the Federal Constitution of 1988, is considered the guardian of citizen's rights.

Our Court is responsible of unifying federal law interpretation and, as well, of deciding, in a definitive way, on civil and criminal cases which do not involve constitutional or specialized legal matters.

Due to its wide spectrum of action, with direct influence on people's daily life, the Supreme Court of Justice is known as the Court of Citizens.

The decisions made by the Court guide Brazilian Judiciary and have an effect over all the national territory.

And it was precisely in order to accelerate access to justice for all citizens that the Court has gone through a process of modernization. We are living, for some years now, in an era where judicial proceedings are entirely electronic.

As a result of such efforts, we are today one of the most computerized courts in the world, using even artificial intelligence.

Alfred Whitehead already said in 1925 that “it is the business of the future to be dangerous; and it is among the merits of science that it equips the future for its duties.”
In times of digital revolution, one of the merits of new technologies is equipping the Judiciaries in order to improve the performance of its duties.
While it is true that we are entering a barely known world, with visible risks on political, commercial and environmental levels, it is nonetheless true that technology tools which prove to be increasingly effective are available to offer the kind of justice that societies claim.
In respect of foreign affairs, it is necessary to strengthen judicial multilateralism and invigorate solidarity.
I take this moment to reiterate the commitment adopted by the International Community in relation to the fulfilment of Sustainable Development Goals of United Nations, especially regarding access to justice, reducing corruption and building pacific and inclusive societies.

I am convinced that this first J-20 Conference will establish bonds to build consensus regarding common interests.
For this reason, I congratulate once more Argentina Supreme Court for this initiative. I wish to repeat the experience in future G-20 meetings.
Opportunities like these allow Judiciaries to understand our time from the perspective of citizenship and, conversely, to understand citizenship from the perspective of our time.

CANADA

HOW COURTS AND TRIBUNALS CONTRIBUTE TO THE DEVELOPMENT OF THE LAW IN REGARD TO ENVIRONMENTAL MATTERS IN CANADA

Roger Bilodeau, Q.C. – Registrar of the Supreme Court of Canada

Summary

In Canada, courts and tribunals have filled in legislative gaps and helped ensure that the balances struck between competing rights reflect the values of contemporary society. This has been especially important where legislative change has not kept pace with changing views, emerging scientific consensus, and technological advancements. Courts have taken the opportunity to incorporate emerging principles in some decisions and by extension, into the common law (i.e. the precautionary principle and the ecosystem approach), keeping in mind that those principles have not been incorporated consistently into Canadian environmental statutes. Tribunals, in particular, offer a more accessible and affordable forum for citizens to invoke environmental claims, whether as litigants or third parties with a direct interest in the outcome. Most Canadian environmental disputes will be heard, at least initially, before a tribunal, whose adjudicators have a high level of subject-matter expertise and whose decisions can go on to inform government decision-making at the policy level. In conclusion, courts and tribunals have a very important role to play in a rights-based framework and even more so when legislation is deficient or incomplete in regard to certain areas of activity.

Introduction

Every day, courts and tribunals are asked to balance competing rights and interests and to arrive at fair decisions. In Canada, as elsewhere, we see this balancing act happening more frequently in matters which affect the environment, as economic development goals

come into conflict with environmental and indigenous rights and claims, particularly in the resource extraction industries. Although these types of cases often pose a challenge, the judiciary is used to deciding difficult issues and to balancing competing rights and interests fairly.

In recent years, courts and tribunals have in fact taken on a greater role in developing environmental law and rights in Canada. For their part, litigants have invoked a range of legal rights to advance their claims. By this, I don't just mean constitutional or human rights but also property and common law tort rights, as well as aboriginal rights protected by the Canadian Constitution. In fact, aboriginal rights have arguably resulted in greater fairness regarding environmental issues, especially where there may be no other way to bring forward a given claim.

In regard to the specific theme of this panel, i.e. "rights and fairness", one must keep in mind that rights are only as robust as the institutions that enforce, interpret, and apply them. Fairness flows from the proper application of the law and a balancing of rights. It therefore falls to courts and tribunals to apply existing rights to specific situations, sometimes in the absence of proper legislative guidance. When two or more rights come into conflict, they must be balanced and considered in the context of other societal interests, such as economic development. These interests are essential to a stable and well-functioning society which is predicated on development and growth.

Pour ce qui est du thème particulier de la présente séance, c.-à-d. les « droits et l'équité », il convient de garder à l'esprit que la robustesse des droits qui sont édictés est essentiellement tributaire de la robustesse des institutions appelées à les faire respecter, à les interpréter et à les appliquer. L'équité découle de la bonne application du droit et de la mise en balance des droits en cause. Il revient donc aux tribunaux judiciaires et administratifs d'appliquer les droits existants à des situations particulières, parfois en l'absence de directives adéquates du législateur. Lorsque deux droits ou plus entrent en conflit, ils doivent être mis en balance et examinés dans le contexte d'autres intérêts sociétaux, intérêts tel le développement économique. Ces intérêts sont des éléments essentiels à l'existence d'une société qui soit stable et fonctionne bien, qui puisse se développer et s'épanouir.

The specific question which I will try to address in the next few minutes is the following: how can judicial and quasi-judicial bodies help Canadian society balance reliance on resource wealth for economic growth, on one hand, and long-term environmental protection on the other? By "how," I don't mean what particular balance they should strike. What I really want to talk about is how judicial review and court decisions respecting existing laws can protect rights, even when proper legislative provisions are lacking.

Filling in Legislative Gaps

I submit that courts are and should be the ultimate institutions of fairness and social stability. They do not have agendas (in particular, political agendas) because their mandate is to uphold, interpret and apply the law. As we know, legislatures make laws but courts and tribunals must determine how to apply these laws to specific fact situations.[1] However, they do so in a social context. Their interpretations of the law and their decisions are often coloured by changes and attitudes in the society around them. To the fullest extent possible, they must adapt. When a court or tribunal interprets a law which was adopted by a legislature years or even decades earlier, it can be in the context of a very different social setting than when the law is being interpreted or applied by a court, with very different scientific or technical knowledge at hand. After all, lawmakers don't have a crystal ball. As a result, courts and tribunals must ensure that the interpretation of relevant laws continues to evolve, as needed and based on proper rules of interpretation. As a result, courts often interpret laws incrementally (where applicable),[2] in a way that respects their role as independent arbiters, always aiming for the right balance and fairness.

In the 1970s, both the federal and many provincial governments of Canada took great strides in adopting legislation to protect the environment.[3] These legislative measures became progressively less ambitious in the 1990s, and in recent years, we've even seen

1 Marilyn G. Lee, "How Tribunals and Appeal Boards Are Contributing to Advances in Environmental Laws," 26 J. Env. L. & Prac. 249 (2014), at 251.
2 Ibid., at 259
3 Ibid., at 250.

rollbacks on some fronts.[4] It has also been said that legislative change has not kept up with changing views on environmental issues.[5] At the same time, arguments that environmental protection laws will harm prospects for economic growth seem to have been more successful with legislators.[6] In part, this is attributed by some to the strong influence on government of certain industries, in particular the oil and gas industries,[7] who often have advantages in terms of expertise[8] and by way of regular contact with lawmakers.[9] This has meant a tendency toward regulation, rather than prohibition, of activities that affect our natural environment.[10] As a result, the balance between collective environmental rights and private economic interests in a growing economy has been shifting. For their part, lawmakers have to balance competing environmental, economic and social interests. Unless the public – i.e. voters – support change, legislative reform is almost always very unlikely.[11]

The lack of progress in environmental protection legislation in recent decades means that principles which have emerged in recent years at the international level and which seek to protect environmental rights are not always reflected in Canada's laws. Core principles of environmental law (such as the precautionary principle and the ecosystem principle) can be found in some federal statutes, but have been rarely incorporated into provincial legislation,[12] even though provinces have extensive jurisdiction over the environment.[13] On the other hand, Canadian courts and tribunals are invoking those principles, which means that they are becoming more integrated in Canadian law through case law rather than in statutes. For example, the Federal Court of Canada followed the precautionary approach in the 2015 case of *Haida Nation v. Canada (Minister of Fisheries and Oceans)*,[14] in which it accepted that the science was unclear as to what constituted

4 Ibid.
5 Ibid., at 253.
6 Ibid., at 250.
7 Jason MacLean, "Striking at the Root of the Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture," 29 J. Env. L. & Prac. 111 (2016), at 118.
8 *Ibid.,* at 121.
9 *Ibid.*, at 123.
10 Lee, at 251.
11 Ibid., at 257.
12 Ibid., at 253.
13 Ibid., at 254.
14 [2015] FC 290.

sustainable fishing levels and that the fishing area at issue had significant ecological value. As a result, the court held that there would be irreparable harm if the federal Department of Fisheries and Oceans allowed commercial fishing in that area.[15]

I should also mention that there are very few provincial or territorial environmental bills of rights in Canada.[16] In addition, environmental rights are not explicitly included in our *Canadian Charter of Rights and Freedoms*[17] ('Charter'), the constitutional document which serves as a bill of rights.

If environmental rights had been explicitly included in the Charter, this would have had the benefit of ensuring that they couldn't easily be ignored,[18] for example when economic rights and interests are brought to the fore. In the eyes of many, the decision to not include environmental rights in the Charter was a missed opportunity.

Je me dois aussi de souligner qu'il existe très peu de déclarations provinciales ou territoriales des droits environnementaux au Canada[19]. De plus, de tels droits ne sont pas explicitement garantis par notre Charte canadienne des droits et libertés[20] (la « Charte »), le document constitutionnel qui tient lieu de déclaration des droits. Si des droits environnementaux avaient été expressément inscrits dans la Charte, cela aurait eu l'avantage d'empêcher qu'on en fasse aisément abstraction[21], par exemple lorsque des droits et intérêts économiques sont invoqués. Aux yeux de bien des gens, la décision de ne pas intégrer les droits environnementaux dans la Charte constitue une occasion manquée.

Some have argued that environmental rights could easily fit into section 7 of the Charter, which guarantees the right to life, liberty, and security of the person,[22] but there hasn't yet been a Canadian court decision which has arrived at that conclusion. Environmental rights also come into play when section 35 of the Constitution is invoked (the Charter is one component of the Constitution; section 35 of the Constitution recognizes the

15 Lynda M. Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2d) 519, at para. 16.
16 Lee, at 254. Quebec, Ontario, NWT, Nunavut, and Yukon have environmental bills of rights (see 255).
17 Ibid., at 254.
18 Collins, at para. 37.
19 Lee, at 254. Quebec, Ontario, NWT, Nunavut, and Yukon have environmental bills of rights (see 255).
20 Ibid., at 254.
21 Collins, at para. 37.
22 *Ibid.*, at para. 21.

aboriginal and treaty rights of Canada's aboriginal peoples). In addition, case law has established that the Crown (i.e. government) has a duty to consult aboriginal groups on matters that may affect their rights, including their rights to pursue traditional activities such as hunting and fishing in territories which they have previously ceded to the Crown.[23]

Certains prétendent que l'existence de droits environnementaux pourrait facilement être dégagée de l'art. 7 de la Charte, disposition qui garantit le droit à la vie, à la liberté et la sécurité de la personne[24], mais aucune cour de justice canadienne n'est encore arrivée à une telle conclusion. Les droits environnementaux entrent également en jeu lorsque l'art. 35 de la Loi constitutionnelle de 1982 est invoqué (la Charte fait partie de cette loi, dont l'article 35 reconnaî les droits existants – ancestraux ou issus de traités – des peuples autochtones du Canada). En outre, la jurisprudence a établi que la Couronne (c.-à-d. le gouvernement) a l'obligation de consulter les groupes autochtones sur les questions susceptibles d'avoir une incidence sur leurs droits, notamment celui de continuer à exercer leurs activités traditionnelles, comme la chasse et la pêche, dans les territoires qu'ils ont antérieurement cédés à la Couronne[25].

Depending on the outcome of such consultations, the Crown may have a duty to accommodate aboriginal groups,[26] for example by preventing environmental destruction that might impact their traditional activities.

It should also be noted that in general, aboriginal groups do not have a right to refuse activities such as oil extraction or mining on their traditional territories.[27] Nonetheless, Canadian courts have stepped in to ensure a proper balance.[28] As the Supreme Court of Canada has stated, "[o[ur common future, that of every Canadian community, depends on a healthy environment… This Court has recognized that (e)veryone is aware that

23 Penelope Simons and Lynda Collins, "Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective," 6 McGill J.S.D.L.P. 177 (2010), at para. 31.
24 *Ibid.*, at para. 21.
25 Penelope Simons and Lynda Collins, "Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective," 6 McGill J.S.D.L.P. 177 (2010), at para. 31.
26 *Ibid.*, at para. 33.
27 *Ibid.*, at para. 31.
28 Collins, at para. 1.

individually and collectively, we are responsible for preserving the natural environment… environmental protection [has] emerged as a fundamental value in Canadian society."[29]

Administrative Tribunals also play an Important Role

Courts have played a key role in filling in some of the gaps found in legislation and have helped ensure, where possible, that the balance struck between competing rights should reflect the values of contemporary society. In addition, we cannot overlook the important role that administrative tribunals play in regard to regulating some environmental matters and in providing to members of the public an alternative, and arguably much more accessible, forum to invoke their rights.

Like courts, administrative tribunals have to consider fact situations that may not have existed when legislation was contemplated or adopted, as well as having the power to apply principles not set out in legislation.[30] In addition, tribunal adjudicators are expected to have a high level of expertise in the subject matter of their respective tribunal (such as the protection of the environment), due to competitive, merit-based appointment processes for the members of such tribunals.[31] This helps ensure that their decisions are comprehensive and prudent.

Most cases involving environmental matters in Canada are heard, at least initially, by an administrative tribunal. Such tribunals handle almost all cases which involve regulatory or administrative matters, simply because they are less costly, more flexible and in general more efficient than the court system. This means that individuals or organizations which have reliable and convincing data can easily be heard and very often make a difference[32] — even if they don't have enormous resources.[33] This is in contrast to mounting a case and seeing it through the court system, which tends to be a much greater undertaking, given the costs and timelines involved.

Administrative tribunals tend to get less attention than courts but, because of their expertise and the fact-specific scenarios which they deal with, they are often quite

29 *British Columbia v. Canadian Forest Products Ltd.*, [2004] SCR 74 at para. 7.
30 Lee, at 252.
31 Ibid.
32 Ibid., at 276.
33 Ibid., at 275.

effective in advancing environmental law and securing environmental rights within the general legislative framework.[34] In applying statutes to very specific fact situations, they have been known to rely on statements of values and purposes found in the preambles of legislation[35] or in ministerial policies and statements, which may not be reflected in the actual provisions of a legislative text.[36] This includes approaches which rely on the precautionary or ecosystem principles. Their reliance on such principles has been approved by the courts,[37] who will often defer to decisions of administrative tribunals and who also seem less willing to apply these principles so as to protect environmental rights as forcefully on their own.[38] As a result, principles such as the two which I have just mentioned are being folded into the considerations which government ministries take into account when they issue environmental certificates and approvals,[39] which further strengthens the protection of rights.

Another advantage of administrative tribunals is the relative ease for third parties to participate in the tribunal decision-making process. In effect, the rights of third parties to challenge environmental decisions which affect them is found in a number of environmental laws.[40] This has contributed a great deal to the development of the law in environmental matters by ensuring that new information and arguments are taken into account.

Conclusion

In conclusion, judicial and quasi-judicial bodies have a very important role to play in a rights-based framework and even more so when legislation is deficient or incomplete in how it protects certain rights. While Canadian courts are well-positioned to fill in some of the gaps found in legislation, it is often administrative tribunals that do much of the work – and who in fact have the expertise – to ensure that environmental rights are protected and balanced with other competing interests that benefit all members of the public in a

34 Ibid., at 260.
35 Ibid., at 261.
36 Ibid.
37 Ibid.
38 Ibid., at 264.
39 Ibid., at 269.
40 Ibid., at 252.

democratic society. Success is ultimately arrived at by balancing competing rights and interests and making decisions that people can ultimately respect and accept, even if they disagree with them. This is what helps to move societies forward, one step at a time.

FRANCE

RIGHTS AND FAIRNESS

Bruno Lasserre[41], Vice-president of the French Council of State (Conseil d'Etat)

Summary

The Council of State is an original public body within the French institutional landscape, being both legal advisor to the Government and Parliament for the drafting of the law, and supreme judge for cases involving public authorities. By means of this double control, the Council of State guarantees the submission of the administration to the principle of legality and the respect of fundamental principles. Through time, it has constantly tried to find a balance between individual rights and freedoms and the general interest. By doing so, it is the guardian of the fairness of the French system of rights. Nowadays, it is increasingly solicited in a context of deep economic, social and technological transformations. As a result, it aims at providing an innovative view that offers appropriate legal remedies while remaining a landmark and the guardian of fundamental republican principle and values.

To the question of how should the system of rights contribute to make society a fairer system of cooperation for mutual advantage, the French Council of State gave an answer that stemmed as much from history than from the French philosophical conception of the State. It is the view of the French Council of State that a fairer system of cooperation must rely on a system of rights ensuring the submission of the administration to the rule of law and the principle of legality. That cannot be the only way to provide for a fairer and more cooperative society. But the submission of the administration to the rule of law is one necessary condition for the establishment of a comprehensive system of rights.

41 Text written in collaboration with Sarah Houllier, administrative judge.

In that sense, the French Council of State has been a core player of the implementation of a system of rights aimed at ensuring a fairer society. But it has done so in a way that is characteristic to the functioning of the French legal and political system, deeply scarred by France's history and its conception of the general interest, which is the cornerstone of our political and institutional system. Indeed, the French Council of State was not created with the view that it would review the legality of administrative acts. On the contrary, the path taken by the Council of State to become an independent administrative judge was neither easy nor predetermined and it took a great deal of pragmatism and self-transformation will to achieve the result we know now. Through a proactive and rather audacious case-law the Council of State managed to develop a deep and comprehensive judicial review system that participates, among other institutional mechanisms, to the building of a fairer and more collaborative society.

To illustrate the intervention of the French Council of State as a guardian of the fairness of the system of rights, I would like to develop two sets of ideas. First, I would like to insist on the fact that the French Council of State has developed, through its case-law and its advisory opinions, a thorough control of legality. Second, I will give three examples highlighting how the Council of State supports a fairer and more sustainable society.

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I. The French Council of State has long worked to ensure the development and stability of a coherent legal system promoting fairness and fundamental rights.

A. The main contribution of the Council of State is its ability to ensure the administration's submission to the principle of legality.

1. The French Council of State realises this control through its dual function of advisor to the Government and the Parliament and of supreme court of the administrative jurisdiction. At the outset, the French Council of State was designed to be an advisor of the Government and had no proper jurisdictional function. The review of legality was only done *a priori* by the Council of State in its advisory capacity. This competence remained and, as such, the Council of State reviews all draft legislations proposed by the Government and the most important draft regulations. Since the last reform of the Constitution in 2008[42], the Council of State is also competent to advise the Parliament on the regularity and legality of a bill proposed by members of Parliament, but only on a voluntary basis. As an advisory body, the Council of State reviews three things. First, it screens the phrasing of the proposal to ensure that its redaction is unambiguous and won't lead to misunderstandings that then feed litigation. Second, the Council of State reviews the substantive legality of the proposal, that is the respect of the hierarchy of norms including the Constitution and international treaties. France being part of the European Union, that also encompasses verifying the conformity to European Union's law. Finally, the Council of State assesses whether the draft bill is necessary to achieve the goals set by the Government or Parliament and how it will be articulated with other existing bills and legislative schemes. This is what we call "administrative opportunity" review[43]. Through this triple analysis, the Council of State aims at providing the Government and Parliament with a complete and precise information of the administrative and legal consequences of proposed legislation. This preventive control is a way to avoid any infringement on constitutional and conventional principles that form the bedrock of our system of rights.

The Council of State also exerts what could be described, by contrast, as a curative control. That is the role of the Council of State as administrative judge through its judicial review competence. Since a law of 24th May 1872 and a case-law of 13th December 1889[44], the Council of State has been a full-fledged and independent administrative

42 Constitutional reform of 23rd July 2008.
43 This phrase was coined by Marceau Long, former vice-president of the Council of State.
44 Council of State, 13th December 1889, *Cadot*.

jurisdiction. As such, its role is to settle cases arising from the action of the administration that is of all activities and functions implying the use of state prerogatives or authority in order to achieve general interest goals or to fulfil public service's obligations. Therefore, the Council of State is the supreme administrative court competent for judicial review of administrative acts and for public bodies' liability suits. Its role is to guarantee a fair balance between the guarantee of fundamental rights and freedoms and the protection of the general interest. In some circumstances, fundamental rights can be restricted in the name of public action's necessities. For instance, when private entities contract with the administration, they must submit themselves to some specific clauses that would not be deemed acceptable in a purely private contract. The safeguard of public order also justifies, under some conditions, that fundamental rights be curtailed.

2. Applying this dual function, the Council of State ensures the respect of the rule of Law and of the hierarchy of norms at the top of which is the Constitution. In this respect, the law expresses and serves the goals of general interest that the French people have set. It covers the protection of fundamental rights and liberties as much as the underlying principles and aims of the social contract that binds the French citizens together. For instance, the Council of State recently settled some very sensitive cases regarding bioethical questions, end-of-life care and freedom of expression in the context of glorification of the holocaust. The intensity of this control has been upheld by the legislator that gave the administrative judge more tools to ensure the effectiveness of its action. It took the form of emergency relief procedures that were created by a law of 30th June 2000[45]. With this prerogative, the judge is now able to suspend the execution of an administrative act deemed contrary to fundamental rights in less than 48 hours. The idea being to avoid that illegal administrative acts start producing legal effects at the expense of fundamental rights when their unlawfulness is obvious. These additional powers were also entrenched in two legislative acts of 1980[46] and 1995[47] that give administrative

45 Act n° 2000-597 of 30th June 2000.
46 Act n° 80-539 of 16th July 1980.
47 Act n° 95-125 of 8th February 1995.

judges the power to impose injunctions and financial penalties to the administration when necessary.

B. Through this *ex ante* and *ex-post* review, the Council of State has aimed at being a landmark, including in times of crisis.

1. Part of the Council of State's role is to guarantee and preserve the fundamental balance endorsed by the French people between the general interest, which is the cornerstone of the French legal and political system. That implies the conciliation of two principles of equivalent value: the need to ensure the effectiveness of administrative action in the name of the general interest and the need to enforce fundamental rights, especially those entrenched in the Constitution and international treaties. The rule of law, the independence of justice, liberty, human dignity and equality before the law are at the core of our constitutional traditions and republican values that we uphold. It is in this spirit that, in the aftermath of the Second World War, the Council of State designed a jurisprudential trend intended to offer a more effective guarantee against authoritarian drifts and abuses. It created what are called general principles of law whose respect binds the administration even when no positive act of law provides for it[48]. Today, we account for hundreds of such principles, some of which having been raised at the constitutional level[49]. They include the rights of the defence, the right to an effective remedy or the principle of equality before the law and public service.

2. The Council of State has therefore supported the transformations of the State and of public action through ages and, sometimes, through turmoil and crises. For instance, during the First World War[50] and during the tensions stemming from the decolonisation

48 The term was first coined in Council of State, 26th October 1945, *Sieur Aramu*.
49 For instance, the freedom of association was entrenched by the Council of State in 1956 (11th July 1956, *Amicale des Annamites de Paris*) and then by the Constitutional Council in 1971 (16th July 1971, *"Freedom of Association"*).
50 During that period, the administration was still submitted to the respect of the rule of law. Yet, the administrative judge agreed to control its acts on the basis of a less stringent principle of legality. It recognised, during that period, a wider discretionary power to the administration than during peace times. (Council of State, 28th June 1918, *Heyriès*; Council of State, 28th February 1919, *Dames Dol et Laurent*).

process[51], the Council of State made sure that fundamental principles and republican values were preserved. That even led to some resounding calls for the dissolution of the institution as a result of unfavourable decisions.

Most recently, the terrorist attacks perpetuated in France in 2015 and 2016 tested the resilience of our system of rights and our ability to guarantee the safety of the people at the same time. In this dramatic context, the Council of State once again showed its willingness to find the most appropriate balance. Each time that it had to advise the Government on bills related to the state of emergency, it committed itself to guarantee that the protection of our country's safety would not be made at the expense of individual rights and vice versa. It thus proposed several changes to some draft bills deemed to overreach in favour of safety at the expense of fundamental rights. The Council of State also acted on this topic in its jurisdictional capacity by developing a very deep and detailed control of all administrative acts taken on the basis of emergency legislation. For instance, an administrative act imposing house arrest to a person suspected of links with terrorist groups had to pass a three-steps test[52]: first, the Council of State would make sure that the intended measure was actually necessary; then, it would verify that it was adequate given the circumstances; and, finally, it would test the proportionality of the measure given, among other factors, the right of the individual to a normal private and family life. Dawn raids were also reviewed against a similarly strict standard[53].

II. As a judge and an advisor, the Council of State is increasingly solicited to ensure that contemporaneous economic, social and technological transformations occur in a fair and sustainable way.

There have indeed been more solicitations of the Council of State than in the past due to economic weaknesses and crises, but also to the added complexity of the law and the disruptive nature of most recent technological evolutions. In such context, people are

51 For instance, Council of State, 19th October 1962, *Canal, Robin et Godot*.
52 Council of State, 11th December 2015, *M. Domenjoud*, for home arrest.
53 Council of State, 6th July 2016, *M. Napol et M. Thomas*, for dawn raids.

more adamant to ask for the intervention of an independent and impartial third-party such as the Council of State. And the Council of State is well aware of its responsibilities and the key mission that has been entrusted in its hands. Following solicitations, it attempts to defuse tensions and offer an external viewpoint as much through its judgments and advisory opinions than through some of the studies it adopts on various topics of general interest.

Let me give three examples to illustrate the Council of State's participation on such matters.

A. The first example tackles the new ways the State and public bodies tend to intervene, especially in the economic sphere.

1. In the administrative decision-making process, there has been, for the past few decades, a growing call for more efficient procedures and an increased participation of the public. And, in a way, the Internet and digital tools have encouraged it by providing new tools for easier consultations. For instance, in 2015, a territorial reform led to the fusion of several French regions together which required that a new name was found for them. The public was naturally eager to participate and one of the newly created regions thus decided to launch a public consultation on the internet. The results were disputed before the Council of State that seized the occasion to confirm the validity of this consultation while asserting some key principles. Such consultations are legitimate and their development should not be hindered but, at the same time, it seems crucial that they respect some fundamental principles of equality, impartiality and neutrality[54]. At the same time, some of the studies of the Council of State were encouraging the development of new ways to associate more closely the public to administrative procedures and the adoption of administrative acts[55]. Among other proposals, the Council of State for instance fostered more open and more secured consultations.

54 Council of State, 19 July 2017, *Association citoyenne pour « Occitanie Pays Catalan »*.
55 Annual Study 2011.

2. Economic upheavals also call for new forms of regulation that the Council of State has intended to accompany. For instance, the disengagement of the State from economic sectors where it used to be a direct participant and the application of stricter rules of free competition created the need for a different kind of economic regulation. As a result, the Council of State has been developing a new jurisprudence intended at regulating economic behaviours while still keeping state interventionism at a low level. The result is a very comprehensive case-law aimed at ensuring that free market does not infringe on the principles of equality and consumer protection while guaranteeing the best possible conditions for economic actors. Most of economic regulation is ensured through independent administrative bodies that do not always have the competence to enact traditional administrative acts but rather rely on soft law instruments. Up until very recently, these acts were not open to judicial review although they could have some significant impact for economic actors. As a result, the Council of State decided to open these acts for review when they have a significant economic impact or when they aim at influencing behaviours in a certain way[56].

B. The second example deals with the development of new forms of communication through Internet, social networks…

The transformations stemming from the growth of the Internet are deep and affect all parts of our economy and society. As a result, it is necessary to create the legal conditions of their regulation to prevent any infringement on fundamental rights such as the right to privacy and data protection but also to ensure that existing regulation does not hinder their economic development. That is the message of the 2017 annual study of the Council of State – Public authority and digital platforms: supporting "uberisation"[57] – that concluded by calling for an adequate regulation of internet platforms that offers a suitable a legal environment for their growth as well as effective rights for customers and the public in general. In its case-law, the Council of State has also been cautious to find the right balance between the right to private life of individuals and the right of internet

56 Council of State, 21st March 2016, *Fairvesta* and *Numericable*.
57 Annual Study 2017, *Public authority and digital platforms: supporting "uberisation"*.

platforms to provide information in the name of free speech and the liberty of communication[58].

C. Other examples can be cited to show the involvement of the Council of State in public affairs and community life.

To give only one, I want to mention the latest study of the Council of State, published only a few weeks ago. It was dedicated to the vast topic of citizenship and what it means to be a French citizen today. By this study, the Council of State wishes to nurture the debate on this question. First, it offers a diagnosis of the situation in France: is there a real crisis of citizenship? The answer is mixed: there are sources of worries as French citizens are disillusioned with the ability of their model to offer what it promised to. They notice the widening of inequalities and some difficulties to provide a more inclusive society and, as a result, they feel that being a citizen is more an empty shell than an effective set of rights and obligations. While there are tangible proofs of such disillusionment, French citizens have also recently shown a greater interest in new forms of engagement; less organised and of a more individual nature, but still aimed at helping others and serving the community as a whole. This diagnosis being made, the study proposes several avenues for reflexion in various areas of public life: on local elections for instance, but also on the fundamental role of education to citizenship.

In a nutshell, all these examples intend to show the Council of State's willingness to ensure a fairer development of new economic, social and technological conditions. In all of them, it hoped to listen to what society had to say and to pave the way for new beginnings while at the same time reasserting the core of our principles and hoping to remain, modestly, a landmark.

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58 Council of State, 24th February 2017, *Chupin*; Council of State, 19th July 2017, *Google Inc.*

There are many ways in which judicial systems can ensure the rise of a fairer and more collaborative society. In France, all judicial orders, be it that of the *Cour de cassation*, of the *Conseil constitutionnel* or of the *Conseil d'Etat*, contribute to the guarantee of fundamental rights and freedoms. Yet, the peculiarity of the role of the Council of State stems from its dual function that gives it a unique position in the French institutional landscape. By advising the Government, and sometimes Parliament, on a wide array of public policies and by settling cases involving public authorities, the Council of State is ultimately in charge of guaranteeing the durability of our institutional and legal systems and, most importantly, the durability of our system of rights based on fairness and the principle of legality.

ITALY

RIGHTS AND FAIRNESS

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Presentation topic: Rights and Fairness

- Social needs and the Italian Constitution
- Constitutional Court and social rights
- Constitutional judgements and their costs

Social needs and the Italian Constitution

The Italian Constitution was approved in 1947, by which time the democratic form of state had long been established, pursuant to the introduction of universal suffrage (save for the extended Fascist period). The Constituent Assembly was composed of 556 deputies, many of whom belonged to left-wing or Catholic-inspired political parties[59]. The Constitution was approved by a strong majority (458 votes were cast in its favour).

I believe that these historical data shed light on the significance that the Constitution confers upon social needs: the formulation of Article 3, paragraph 2 of the Constitution, which enshrines the general principle of substantive equality[60], is distinctive in

59 Two hundred and seven deputies belonged to the Christian Democratic Party; 115 to the Socialist Party; and 104 to the Communist Party.

60 "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country". See, for example, B. CARAVITA, *Oltre l'eguaglianza formale*, Padua 1984; A. GIORGIS, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale*, Naples 1999; G.P. DOLSO, *Art. 3,* in *S. Bartole – R. Bin (eds), Commentario breve alla Costituzione*, Padua 2008, 33 *et seq*. In Article 3 of the Constitution, the principle of substantive equality goes hand in hand with that of formal equality; substantive equality entails the possibility to derogate from formal equality (by means of the so-called "positive actions"), and tempers and

comparative terms, and the attention paid to each social right[61] is equally remarkable. To draw a comparison with coeval or subsequently approved constitutions, it may be noted that Germany's Basic Law does not address individual social rights[62]. On the other hand, the Spanish Constitution of 1978 does reprise our Article 3, paragraph 2 (see Article 2, paragraph 2 of the Spanish Constitution) and grants social rights much attention; however, the latter are excluded from the scope of application of the *amparo*[63].

In addition to Article 3, paragraph 2, and to the social rights (to health, to education, to social assistance, to welfare support, etc.: Articles 32, 34 and 38) that detail it, we must recall Article 2 of the Constitution (which mentions "the fundamental duties of political, economic and social solidarity"), as well as the limitations that the Constitution places on private economic enterprise[64] and private property[65] for social purposes[66]. In Italy, this set of constitutional provisions is a "foothold" for judges, and especially for the Constitutional Court, as they strive to ensure fair and sustainable development.

Also, the Constitutional Court has identified additional social rights that are not expressly provided for in the 1947 Constitution (such as the right to housing: see, for example, Judgments No. 49 of 1987 and 404 of 1988).

The Constitutional Court and social rights

is tempered by it; the two paragraphs integrate and balance one another. The link between the two provisions is the concept of "equal social dignity", found in the first paragraph.

61 On which see, for example, M. LUCIANI, *Diritti sociali e livelli essenziali delle prestazioni pubbliche nei sessant'anni della Corte costituzionale*, in *www.Rivistaaic.it*, n. 3/2016; E. LONGO, *I diritti sociali nella Costituzione italiana: un percorso di analisi*, in *Riv. dir. sicurezza sociale*, n. 2/2017, 201 *et seq*.; E. CAVASINO – G. SCALA – G. VERDE (eds), *I diritti sociali dal riconoscimento alla garanzia*, Naples 2013.

62 Aside from the general provisions on dignity (Article 1) and on Germany as a democratic, federal and social Republic (Article 20), the *Grundesgesetz* governs welfare by means of organizational provisions.

63 See Article 53.

64 Article 41 of the Constitution: "Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes."

65 Article 42, paragraph 2 of the Constitution: "In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest."

66 Moreover, scholarship (see, for example, M. LUCIANI, *Economia nel diritto costituzionale*, in *Dig. disc. pubbl.*, V, Torino, Utet, 1990, 377 *et seq*.) considers those social purposes that may limit liberal interests (economic enterprise and private property) to be linked to Article 3, paragraph 2 of the Constitution, that is, to the programme indicated in this provision; however, in most cases, the Constitutional Court has matched social utility with the achievement of constitutionally significant interests in general (M. GIAMPIERETTI, *Art. 41*, in S. Bartole – R. Bin (eds), *op. cit.*, 415).

The Constitutional Court's role in safeguarding social rights could be illustrated "by subject", recalling the Court's most important judgments on each right. However, I find another perspective to be far more interesting: one that emphasizes the various ways in which the Court intervenes when it decides upon the constitutionality of laws suspected of encroaching upon social rights.

First, it must be recalled that the constitutional provisions on social rights have to be implemented through legislation, which must identify the addressees of the benefit, the specific modalities of its provision and its amount, balancing social rights with other constitutional rights, financial interests – also with a view to protecting the social rights of its future beneficiaries[67] – and with all other constitutionally protected interests.

The financial interests of the State and of local authorities have gained greater prominence pursuant to Constitutional Law no. 1 of 2012, which introduced the concept of a balanced budget into the Constitution (Article 81[68]). However, the legislator cannot impinge upon the essential core of a social right. Unlike the German Basic Law[69], the Italian Constitution does not expressly define the boundaries of such core. It does refer to the "basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory" (Article 117, paragraph 2, letter m)[70]; however, this is a different concept, used as a basis for the central State's power to reconcile the principle of equality between private actors with the principle of the autonomy of local authorities.

The Constitutional Court is tasked with identifying this core and, where necessary, requiring that necessary benefits be provided if the legislator fails to do it. For example, the Constitutional Court has struck down regional legislation that cast uncertainty on the financing of transportation services for disabled students, noting that the legislator's discretion is subject to an "absolute limit consisting in 'respect for an essential core of guarantees for the individuals affected' (Judgment no. 80 of 2010), which includes school

67 I believe it is preferable to refer to future but existing beneficiaries, rather than to "future generations", because use of the latter term gives reason for objections of a different kind: see, for example, M. LUCIANI, *Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali*, in *Dir. soc.*, 2008, 145 *et seq.*

68 Article 81 paragraph 1 of the Constitution: "The State shall ensure the balance between revenue and expenditure in its budget, taking into account the adverse and favorable phases of the economic cycle."

69 Article 19(2) of the *Grundgesetz*: "In no case may the essence of a basic right be affected".

70 It is one of the matters in which the State has exclusive legislative powers according to the list contained in Article 117, paragraph 2.

transportation and assistance service, as this is an essential element in ensuring the effectiveness of that very right for disabled students" (Judgment no. 275 of 2016, which moreover states that "[i]t is the guarantee of inviolable rights that must condition the budget, whilst conversely the need for budgetary equilibrium cannot condition the requirement to provide such services")[71]. To give another example, Judgment no. 309 of 1999 declared the unconstitutionality of a provision that did not establish "forms of free healthcare" for indigent Italian citizens who were temporarily abroad for reasons other than work. Here, too, the Court emphasized the "hardcore of the right to health".

As may be known, the balancing of interests by the legislator is subject to additional limits, other than the essential core of the right. The balancing must be reasonable and proportionate. For example, Judgment no. 70 of 2015 struck down a provision that, for 2012-2013, excluded larger pensions from the revaluation increase normally accorded to old-age pensions, allowing the full increase only to pensions up to three times the minimum pension. The Court held that the legislator had reached an unreasonable balance between the State's financial interest and the pensioners' interest in an adequate (Article 38, paragraph 2 of the Constitution) and proportionate (Article 36, paragraph 1 of the Constitution) pension, as the exclusion from the revaluation increase was absolute and extended to pensions that were considered not particularly large (over €1,217)[72].

The Court expressly referred to the principles of solidarity and substantive equality enshrined in Articles 2 and 3 of the Constitution. As another example, to mention a case in which a social right was not balanced with the State's financial interest but with other rights, we may recall Judgment no. 58 of 2018. This judgment struck down a provision that authorized the ILVA steel factory in Taranto to continue operations notwithstanding the seizure of its industrial plants by the courts in relation to health and safety offences; according to the Court, the provision unreasonably sacrificed the right to health to that of continuity of production. It bears noting that, in a previous judgment on the same matter, the Court had rejected the argument that the safeguarding of the right to health was

71 On the right to education of the disabled, see also Judgment no. 80 of 2010, on special education teachers.

72 The Court had previously confirmed the constitutionality of provisions that excluded revaluation for larger pensions, for the surplus amount (and not the entire pension), or for only a certain percentage of the pension.

absolute and unconditional in nature compared to other constitutional rights – particularly, employment protection – and stated that it was nevertheless necessary to strike a balance between them.[73]

In addition to the balancing of interests, another important sphere of application of the criterion of reasonableness is the principle of equality, also with reference to social rights: in this context, the Constitutional Court has annulled legal provisions that unreasonably excluded certain parties from enjoying a given benefit. In these cases, two scenarios may arise: the Court's judgment may extend the public benefit, thereby bringing about an increase in public expenditure; or the Court may eliminate discrimination without this leading to an expansion of the benefit.

Examples of the first scenario may be found in Judgment no. 286 of 1987 (which extended survivors' pensions to separated spouses who were at fault for the separation) or 230 of 1974 (on the integration of minimum pensions). Several judgments have nullified legislation that discriminated against foreigners in the provision of social benefits (see Judgment no. 206 of 2008 on carers' allowances; see also Judgments no. 2 of 2013 and 4 of 2013).

The second scenario involves the issue of "territorial discriminations", that is, of those provisions that make extended residence in the relevant State or regional territory a prerequisite for access, or preferential access, to a certain public benefit. The Constitutional Court has declared unconstitutional provisions of this type on several occasions, thus avoiding a situation in which the benefit would be denied to individuals in need, and not to persons who are not as indigent but who have long resided in the relevant territory. For example, Judgment no. 107 of 2018 declares unconstitutional regional legislation enacted by the Veneto region on regulating access to daycare centres for children, because it granted priority to persons who had resided or worked in the Veneto for at least fifteen years, regardless of their economic situation.

73 Judgement no. 85 of 2013 contains a very clear reasoning based on the balancing of constitutional rights: no constitutional right has an absolute nature, but all rights must be balanced against each other; balancing requires a judgment based on reasonableness and proportionality; the result can never consist of the complete sacrifice of one right in favor of others, because the essential core of each right must be preserved.

The costs of the Constitutional Court's judgments

The foregoing considerations shed light on an issue deserving attention: not infrequently, the Constitutional Court's interventions to defend social interests entail greater expenditure on the part of public authorities. These "judgments that cost" may nullify spending cuts established by law, reinstating the benefit to its original extent (as did Judgment no. 70 of 2015 on pensions revaluation), or may "punish" omissions by the legislator, introducing new benefits (as in the case of healthcare expenses incurred abroad). In the latter situation, the judgments are described as "additive" (of benefits), because they add, to the legal system, a provision that was previously missing and constitutionally required.

Scholarship has devoted much attention to the Court's "judgments that cost", and especially on the aspect of their compatibility with the principle of the financial coverage of budget laws (Article 81 of the Constitution)[74].

First, it is noted that, when addressing legislation that curtails social rights, the Court possesses several "weapons" with which it may soften the impact of its judgments. It may issue a "warning" to the legislator, calling upon it to intervene, and deferring the decision on the constitutionality of the new provision. The Court may also issue a judgment that is called "additive of principle", through which it establishes that the benefit is necessary but leaves the tasks of defining the eligible cases and beneficiaries to the legislator (as occurred in Judgment no. 309 of 1999 on healthcare expenses incurred abroad).

In addition, the Court may restrict the effects in time of a declaration of unconstitutionality: it may diachronically delimit the content of the declaration, circumscribing its effects to the time following the judgment, as first occurred with Judgment no. 10 of 2015 on the so-called Robin Tax. In such cases, in the absence of any specific regulation on the issue, the constitutional judge – faced with a fact (the declaration of unconstitutionality) that on one hand protects constitutional interests, but on the other risks impinging upon other interests excessively if it were to be given retroactive effect – itself engages in a balancing of the interests at play, temporally calibrating the effects of its decision.

74 See, for example, E. GROSSO, *Sentenze costituzionali di spesa "che non costino"*, Turin 1991; AA. VV., *Le sentenze della Corte costituzionale e l'art. 81, u.c., della Costituzione*, Milan 1993; S. SCAGLIARINI, *La quantificazione degli oneri finanziari delle leggi tra Governo, Parlamento e Corte costituzionale*, Milan 2006, 35 *et seq*.

Finally, it is recalled that, when deciding upon legislation that grants a social benefit only to a specific category of persons, in violation of the principle of equality, the Court – considering the costs of extending the benefit – may avoid "equalizing upwards" and choose instead to "equalize downwards" (Judgment no. 421 of 1995)[75], eliminating the benefit (raising a question of constitutionality before itself in relation to the benchmark of comparison) or to divide the overall resource allocation among a larger number of beneficiaries (thus reducing the benefit received by each beneficiary).

In light of the above considerations, I now address the objections raised by some scholars regarding the Court's "cost" judgments. It appears to me that extreme positions are to be rejected. On the one hand is the position held by those who deem this type of decision unacceptable because they give rise to a large "free zone" in constitutional justice, often depriving of protection not only from social rights but also "first-generation" civil rights, which likewise entail costs. On the other hand equally unconvincing are the arguments submitted by those who deny that the problem exists at all, given that the principle of financial security enshrined in Article 81 of the Constitution applies to budget laws and not judgments. In fact, judgments entailing costs have an impact on legislation, giving rise to a legal situation that contrasts with Article 81 of the Constitution because while the benefit is "inserted" into the law, the corresponding funding is not. Furthermore, the judgment may indirectly affect other constitutional interests, the protection for which may be weakened because of the financial imbalance brought about by the Court's judgment.

The correct answer can only lie in moderation. Article 81 of the Constitution enshrines a principle that the Court must take into consideration; however, this principle is not absolute, in that it too must be balanced with the other constitutional principles. It is also necessary to draw a distinction: while, in some cases, the Court is called upon to decide "only" on a violation of the principle of equality (in that the legislator grants a benefit at its discretion, unreasonably excluding certain parties), in others, it must address the failure

75 In this case, the Court noted that "the evolution of the social conscience, increasingly hostile to corporatist pressure on public powers, and the serious crisis of public finances, which makes it increasingly difficult to sustain the costs of judgments expanding eligibility for special treatment, require […] a more diffuse and incisive examination of the constitutionality of the privilege-creating provision indicated as the standard". Raising the question of the constitutionality of such provision before itself, the Court then declared it to be unconstitutional.

to provide benefits that are crucial for safeguarding fundamental rights. In such cases, therefore, it should be considered that the Court introduces expenditure mandated by the Constitution, and that its work is to be completed by the political bodies, which have the responsibility to retrieve the necessary resources.

This issue certainly raises the need, for the Court, to estimate the financial consequences of its judgments: from this point of view, it is important to ensure optimal use of the tool of investigations, as well as to enhance the transparency of the reasoning behind judgments by including references to the relevant accounting information.[76]

Conclusions

While it is no longer disputed that all rights – including "first-generation" civil rights – entail costs, such that all rights are "*juridically* scarce resources (in the sense that their enjoyment is not unlimited), conditional upon the availability of *economically* scarce resources (in the sense that budgetary decisions define the opportunities to enjoy rights)"[77], it is clear that this is particularly true with regard to social rights, the immediate object of which is a service provided by a public authority. For this reason, spending cuts affect them in a more evident manner, and it is for this reason that the protracted financial crisis, which intensified the need for such policies, gave rise to an often bitter conflict between the need for financial stability and the need for welfare.

In this context, the Constitutional Court has been cast into an extremely sensitive and "risky" realm, in which national policies, at times prompted by the European Union, collide with the needs of broad sections of society, and in which the legislator's restricting decisions often conflict with the claims advanced by the Regions, which have competence in the fields of healthcare and social assistance.

Moreover, the Constitutional Court is not the only party involved in the judicial protection of rights: recently, social rights have been gaining importance in the European Union (see the Charter of Rights, which has had equal force as the Treaties since 2009 and includes social rights; see also Article 3(3) TEU), such that the Court of Justice of the European

76 On this, broadly, see M. D'AMICO, F. BIONDI (eds), *La Corte costituzionale e i fatti: istruttoria ed effetti delle decisioni*, Naples, ESI, 2018.
77 M. LUCIANI, *Diritti sociali*, *op. cit*., 8.

Union is also often called upon to decide issues relating to their safeguarding[78]. Furthermore, social rights, although almost wholly unaddressed in the ECHR, have also gained significance in the ECtHR's case law[79].

This being said, it may be noted in conclusion that, particularly with regard to redistributive policies[80], the Constitutional Court's role is a central one: one performed to defend not only the weakest parties but also the democratic order itself, because such order presupposes the full and conscious participation of all, and thus the safeguarding of not only freedom but also substantive equality. As a great Italian jurist, Piero Calamandrei, wrote, at the end of the Second World War shortly before participating in the work of the Constituent Assembly: «Without the support of social rights, traditional political freedoms can actually become a means of oppression by a minority against the majority, so that it can be said in conclusion that social rights are the precondition in order to ensure that all citizens enjoy effective political liberties»[81].

78 Cfr. P. Bilancia, *La dimensione europea dei diritti sociali*, in *Federalismi,* 2018, in specie 12 ss.

79 On social rights in the EU and the ECHR, see, for example, D. TEGA, *I diritti sociali nella dimensione multilivello tra tutele giuridiche e crisi economica*, in E. CAVASINO – G. SCALA – G. VERDE, *op. cit.*, 67 *et seq*.; A. GUAZZAROTTI, *Giurisprudenza Cedu e giurisprudenza costituzionale sui diritti sociali a confronto*, E. CAVASINO – G. SCALA – G. VERDE, *op. cit.*, 379 *et seq*.

80 The CJEU and the ECtHR intervene especially to protect the prohibition on discrimination.

81 P. Calamandrei, *L'avvenire dei diritti di libertà*, prefazione alla ristampa di F. Ruffini, *Diritti di libertà*, Firenze, La Nuova Italia 1946, ora in *Opere giuridiche*, vol. III, Napoli, Morano, 1965, p. 183 ss.

MEXICO

PARADIGMS OF JUDICIAL SCRUTINY IN SUPPORT OF A MORE FAIR AND INCLUSIVE SOCIETY (THE CASE OF MEXICO)

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Smmary

In order to promote a more equitable cooperation system for mutual benefit, a system of rights must produce due rules, properly interpreted by the judiciary with a sense of social justice in society. It is necessary that the recipients of rules understand them clearly, so that based on the confidence created in democratic institutions, it will be foreseeable that those rules will be implemented. This requires desirable balances between social majorities and minorities, aimed at mitigating scenarios of possible conflict, as well as its reasonable solution when those cannot be prevented. Social justice, requires higher standards of constitutional scrutiny. Therefore, the role of judges acquires greater relevance involving that they need to see to themselves as promoters of peace and social justice. These documents, illustrates how the Mexican Supreme Court of Justice has solved relevant constitutional cases in defense of economic, social and cultural rights.

Keywords: Conflict resolution; fairness; inclusive societies; judicial efficiency; just societies; peace; peacebuilding; system of cooperation; system of rights; sustainable development; role of judges; social justice.

We have all been invited to explore and discuss how courts from our different economies might play a more active role in addressing today's most pressing social, financial and political challenges faced by humanity; and specially, how can we better interact and

work together in order to enhance our opportunities to positively impact sustainable and inclusive global development.

This is a promising event that unite us to demonstrate the essential role of the judiciary in economic and social development of societies, the power of judicial decisions in the construction of more fair and sustainable societies; as well as to prove the need for justice as the only foundation under which societies of free and independent individuals can exist.

Within the framework of this first panel, dealing with **“Rights and Fairness”**, we have been asked to answer the following question: **How should the system of rights contribute to make society a more equitable cooperation system for mutual benefit?**

This is not an easy enquiry, as any possible answer involves taking in account the different existing perspectives that prevail in political philosophy around fundamental questions on the state, the government, politics, liberty, justice and the rule of law.

Before answering the question, I would like to provide two relevant clarifications:

The first one, is that references I made on this document to the "system of rights", are aligned with those of Professor Rex Martin[82], whose perspective of such a system, goes beyond the set of norms of basic rights, and also considers the efficacy of rights, the shared expectation that those will be respected, as well as the set of rules and institutions arranged so that rights are duly enforced.

The second elucidation that needs to be made, is that my idea of a system of cooperation, considers John Rawls views. He explains that a society is a more or less self-sufficient association of persons who, in their relations to one another recognize

82 Martin, Rex. A system of rights. Clarendon Press, 1997. Political Science. p. 303.

certain rules of conduct as binding and who for the most part act in accordance with them. According to him, these rules specify a system of cooperation designed to advance the good of those taking part in it, so a society is marked by, both, conflict of interest and an identity of interest.[83]

Rawls believes that the principles of social justice provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.

Considering the above, we can assert that the interaction between the terms “system of rights” and “system of cooperation”, leads us to the following statements:

1. We require a system of due rules produced by a democratically legitimated legislature and a model of proper constitutional interpretation working together to achieve social justice.

2. It is necessary that the recipients of rules understand them clearly so that based on the confidence people have on the public institutions in charge of enforcing them, it will be foreseeable that those rules will be implemented.

3. The foregoing requires efforts for the democratization and legitimation of justice, implying broad participation by different members of the society. This also requires desirable balances between social majorities and minorities, aimed at mitigating scenarios of possible conflict, as well as its reasonable solution when those cannot be prevented or avoided.

4. Social justice, requires higher standards of constitutional scrutiny (strict scrutiny), as the interpretation model to construct more inclusive and fair societies.

83 Rawls, John. Teoría de la justicia. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, [1999]. 1Primera edición en 1971. p. 4.

5. The role of judges acquires greater relevance involving that they need to see to themselves as promoters of peace and social justice.

There is no doubt that since the beginning of political philosophy, peace has been considered to be a high, if not one of the highest ends of political action.[84]

Indeed, a number of ancient and contemporary political philosophers, share the view that a society without peace becomes an unrest society where disorder and unhappiness reign.

In this context, the idea of peace, is not necessarily understood in relation to its opposite concept: war.[85] Nor is automatically the absence of conflict, as basically, peace involves a sense of freedom, an ideal scenery for personal human growth and a human state of mind in which anyone can achieve any personal goals in harmony with the interests of other members of society.

It has actually been said that peace does not mean an absence of conflict, and that differences among people will always be there; still, it is how we solve these disagreements that we might achieve positive or negative outcomes in human coexistence.

Certainly, if we use dialogue, education, knowledge and common sense for solving our differences, a climate of freedom will be achieved. In contrast, if we use revenge, aggression and retaliation, generalized violence will follow.

84 McKillop, Kirsten. The Philosopher's Peace: Lasting or Final? Kant and Democratic Peace Theory. Institute for Human Sciences. Available at: http://www.iwm.at/publications/5-junior-visiting-fellows-conferences/vol-xxiii/kirsten-mckillop/ [Accessed: 2018-Sep-29]
85 Rummel, R.J. Understanding Conflict and War: Vol. 5. The Just Peace. University of Hawaii System. Available at: http://www.iwm.at/publications/5-junior-visiting-fellows-conferences/vol-xxiii/kirsten-mckillop/ [Accessed: 2018-Oct-01]

This explains why, justice and peace are always together, as the first sign of peace comes when we learn as members of society, to treat with consideration, kindness and respect our fellow citizens, even if we do not agree with their views or actions.

Furthermore, peace comes when we see all humanity as equal, and when we see for other people´s development as well as our own. Peace can only exist when people are capable of exercising freely their own rights, and without it, justice has no meaning.

True peace goes hand in hand with justice, or, as the philosopher Baruch Spinoza wrote: **“peace is not the absence of war, but the presence of justice”.**

Peace, as Professor Sam Hardy explains, is (1) the ability to manage conflict constructively, as an important opportunity for change and increased understanding. (2) Peace is a commitment to understanding, celebrating and learning from difference. (3) Peace is a commitment not to harm, but also to nurture, all individuals.[86]

And we unquestionably need peace and justice at the center of our societies, because it is only when people are able to solve their conflicts without violence that a fertile ground exists for social cooperation and development. This is a nuclear base to create more equal communities and promote the improvement of the quality of everyone´s life.

So justice and peace work better together when they manage to influence societies in such a way, that everyone lives in safety, without fear or threat of violence; when no form of violence is tolerated in law or practice; when everyone is equal before the law; when systems of justice are trusted, when fair and effective laws exist to protect people´s rights; when everyone is able to participate in shaping political decisions and the government is accountable to the people.

86 Hardy, Sam. What is Peace? Available at: https://peacerevolution.net/wall/topic-380/what-is-peace#/ Access: 2018-Sep-01

Justice and peace are also relevant, because working together it is easier to build the capability to create opportunities for everyone to have fair and equal access to the basic needs for their wellbeing -such as food, water, shelter, education, healthcare and a decent living environment.
Furthermore, when justice and peace prevail, everyone has an equal opportunity to work and make a living, regardless of gender, ethnicity or any other aspect of identity. These all are goals shared by individual citizens, by governments, by international fora, by the academic community and by relevant non-governmental organizations that separately or jointly, work in order to make of peace their priority.

The organization “International Alert”[87], by example, has precisely these notions on peace that I am quoting and also defines peacebuilding, as the process about dealing with the reasons why people fight in the first place and supporting societies to manage their differences and conflicts without resorting to violence.

What is expected for by peacebuilding, is to prevent the outbreak, escalation, continuation and recurrence of conflict. Peace is important, we must insist, because without peace there is no room for development, and neither for just and inclusive societies. So at all reasonable cost, we must make of peace our priority and judges have a major responsibility in peace-building.

Judges are compelled to understand that their essential role in society is not just to interpret the law, to guard the constitution or to decide cases. Additionally, the judiciary has a responsibility in building peace and the public expects from judges more than just legal opinions.

The test of judiciary efficiency is the absence of violence in society as a resource for conflict resolution; therefore, the success of the judiciary must not be measured in terms of the number of cases solved or on the visible evidence of judiciary action, but in terms

87 International Alert: Peace is within or power. Available at: https://www.international-alert.org/ [Access: 2018-Sep-30].

of public trust in the system of rights as the legitimate mechanism to mitigate, solve and prevent conflict in society.

All this is relevant for our today´s discussion, because it is not in doubt whether if the judiciary might or not contribute to equal and sustainable development, but how that can be done, and it is unquestionable that the best contribution that courts of justice might make to the goals of the G20, consists is administrating justice in the best possible way, so as to ensure that every case solved, within the limits of the Constitutions and laws that govern our rulings, will have an impact in peacebuilding. This, I believe, has tremendous and multiple implications for judges and judicial branches of all latitudes, but also for other political authorities.

It is within this context, that the Mexican Supreme Court of Justice has been concerned to strengthen the bond between the jurisdictional function and the promotion of equity, which has led to a growing generation of jurisprudence on economic, social, cultural and environmental rights aimed at mitigating the shortcomings that affect individuals and communities, by offering them better perspectives for a personal and collective development project.
This has been possible as a result of the constitutional reform on human rights that took place in Mexico in 2011, which conducted to the maximization of rights and of their protection; as well as due to the escalade of intensity under which the analysis of constitutionality has been carried out since 2004.

Thus, in multiple constitutional cases, the Mexican Supreme Court of Justice, in accordance with similar efforts carried out by high courts of other nations, has argued that in the case of conflicts that directly affect human rights, it is necessary to conduct strict scrutiny -and not ordinary- of the distinctions or classifications contained in legislation.

A sample of these decisions is described in the following lines:

Regarding **“Equality and Non-Discrimination”**, the following failings stand out:

• In 2007 the reinstatement of a member of the Mexican Army was decided, as he was illegally removed from his position for being infected with HIV-AIDS.

• In 2012, it was declared unconstitutional a rule that prevented marriage between people of the same sex.

•In 2015, a decision was made granting unmarried people living under the legal figure of “coexistence societies” their right to adoption.

Regarding rights in **“Health”**:

• In 2014, the Supreme Court ordered the National Institute of Respiratory Diseases to provide the highest level of medical care, in terms of facilities and equipment, to various patients infected with HIV-AIDS.

Regarding **“The Right to Work”:**

• In 2015 it was declared unconstitutional a normative provision that established a period of only two months for workers to file a claim demanding reinstatement or compensation for unjustified dismissal.

Regarding **“The right to Higher Education”:**

• Based on the principle of progressivity, in 2016 the Supreme Court denied a University the possibility to charge student fees, taking in account that a local constitution was amended to enforce the right to free tertiary education.

Regarding **“Housing”:**

• In 2014 a ruling benefited a family that had to abandon their home given the crime rates of the area. The purchase agreement was rescinded.

Regarding **“The use of water”:**

• In 2014 the Court ruled the obligation of the government to guarantee access, disposal and sanitation of water for personal and domestic consumption.

In matters of **"Social Security":**

• The Supreme Court protected a woman who had requested the registration of her spouse of the same sex, as a beneficiary of the Institute of Security and Social Services of State Workers.

Regarding **"Protection of Children":**

• The judgment issued in 2010, determined that in the case of procedures that could affect rights of minors, even in the case where the claim omits to raise facts that its resolution can be harmful to infants, such omission should not deprive the judge of examining the existing material evidence.

Finally, there are other relevant criteria that have been issued by the Supreme Court in terms of "Torture" and many others in order to favour due process.

High Courts of our nations do face complex challenges such as terrorism or drug trafficking, and we certainly are responsible to better react to these problems and contribute to its solution; however, even in complex times where international organized crime compels societies to strengthen their security schemes, human rights and liberties

must not be sacrificed, as history has proved that excessive restrictions on rights do always bring as consequence prolonged conflicts and not durable solutions.

Over the course of this presentation, I have talked on the importance of peace in the construction of fair and inclusive societies. I have also described the need for judges to take into account that our mission goes further than just legal interpretation, and that our core mission lies in building sceneries of peace and social justice.

However, the key message of my presentation, is that our conscience and judicial operation must be adjusted to the needs of a contemporary society that claims for better results from justice, so we are obliged to react in more intelligent and creative forms.

Overall, we must center our efforts in the achievement of more palpable results of justice, so that society, might better appreciate the positive impact of our decisions. This demands a reconstruction or at least some tuning in the system of rights, in order to transcend ideals and materialize the peaceful societies that we require as fertile ground for economic, political and social development.

RUSSIA

APPLICATION OF THE PRINCIPLE OF JUSTICE (FAIRNESS) IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

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Summary

The presentation consists of three parts with the first one discussing certain philosophical and methodological aspects of application of the principle of justice in the Constitutional Court of Russian Federation adjudication regarding human rights issues. The second and the third parts regard examples of the Court's legal positions in respect of application of the said principle to a number of legal areas and to consideration of cases in the field of socio-economic rights protection respectively.

Key words

Constitutional Court of the Russian Federation, the principle of justice, socio-economic rights

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1. Thousands of books have been written about the concept of justice, hundreds of scientific studies and publications have been carried out on this issue, but have we come closer to an understanding of justice and to its recognition as a universal value? This question is not that easy to answer. It is impossible to deny the contribution that previous generations have made to development of global thought, it is also impossible to deny our past, including the past of Russia, with all its experiments, many of which, perhaps, were also aimed at seeking justice in its highest sense.

The problem of determining *the just* preoccupied the mankind from ancient times. Take, for example, the "State" of Plato, whose "formal purpose", as Bertrand Russell pointed out, was to define the concept of "justice". According to Plato it is easier for us to see the whole than a part, thus, it is much easier to determine what a state of justice is than to determine who is a just man. The Platonic definition of justice can hardly be adequate to the realities of the day. Plato wrote that justice triumphs when everyone is in his place and performs worthily the work prescribed by the class, sex, origin - in such a sense we cannot dwell on equality of people from the point of view of nature or some kind of the inherent biological equality, which would be absurd, but we can talk about formal equality, that is, equality in human rights. Thus, from a rather narrow understanding of Plato's justice, we can take an important idea about the need to ensure legal equality.

Turning back to discussions on relations between law and justice, we can reasonably note that in the history of law there are still some things that will obviously be considered as an absolute evil or as phenomena that cannot be justified, for example, serfdom in the states of XIX century, including Russia, segregation laws elsewhere or racial laws of the Third Reich. But we must not forget the following: these examples illustrate the formal legal approach to law as a positivist phenomenon, as a will of the state formulated in law. However, if we consider the law from the point of view of the postulated idea that law is *ars boni et aequi* (art of good and justice), our examples will be an illustration of another phenomenon - the substitution of law by "technical" legislation, which contradicts the very spirit and essence of law. Accordingly, these phenomena will not be legal in nature, and therefore will not be just and fair!

Legal postmodernism argues that what is understood as absolutely unacceptable in 2018, for example, the enslavement of a free man, which in particular violates the peremptory norms of *jus cogens* of international law, some 200 years ago was considered as an acceptable phenomenon or, say, slave in principle did not have subjectivity in law during antiquity, thus, they claim, it is impossible to derive any unambiguous and certain truths for the law to be found. However, it is not true. And here again the principle of justice helps us. Firstly, the existence of a phenomenon in antiquity, even if the overwhelming majority of people agreed therewith, does not in itself mean that

such a phenomenon corresponds to the natural order of things. Secondly, the principle of equality and formal legal equality is not identical to the principle of justice, ideally these principles should approach each other as closely as possible, but not merge.

2. These arguments represent only a small part of the philosophical basis guiding the Constitutional Court of the Russian Federation in making its decisions.
Further, I would like to dwell on the refraction of this principle in the decisions of the Constitutional Court of the Russian Federation in relation to various aspects.
- in the criminal legislation: "the question of applying a new criminal law and bringing the punishment in line with its provisions should be resolved by the court, taking into account the norms of such law, both improving and worsening the situation of the convicted person; another would lead to the application of a new criminal law in violation of the principles of equality and justice" – said the Court in its Decision of 29 May 2012 No. 1045-O;
- in civil legal relations: "... due to the constitutional principle of justice, manifested, in particular, in the need to ensure the balance of rights and obligations of all free market actors, freedom of entrepreneurial and other economic activities, as well as the legal protection they hay shall be balanced (especially those who occupy a dominant position in one sphere or another) with the requirement of a responsible elations to the rights and freedoms of those affected by their business activities" - Judgment of the Constitutional Court of the Russian Federation of 24 June 2009 No. 11-P;
- in the field of taxation: "The non-application of Article 113 of the Tax Code of the Russian Federation in its constitutional legal sense, as identified by the Constitutional Court in Judgement No. 9-P of 14 July 2005, in the "Yukos Oil Company " case while the latter’s prosecution for tax violations - especially in a specific situation of unprecedented tax evasion and in conditions of acute need of the state in budgetary funds to exit from the economic crisis and the implementation of much-needed social protection measures and support for a significant part of citizens would mean, in fact, not only suspension of Article 57 of the Constitution, dealing with the obligation to pay taxes, but also a violation

of the principles of equality and justice emanating from other Articles of the Constitution - Judgement of the Constitutional Court of 19 January 2017 No. 1-P).

3. The category of "justice" is of particular importance in consideration of cases in the field of socio-economic rights protection - an area in which Russia has centuries of history and practice.

The Constitutional Court of the Russian Federation in its decisions repeatedly pointed out that when implementing legal regulation, including the sphere of social protection, "the legislator must observe the constitutional principle of equality, by virtue of the requirements of which the differences in social rights are permissible, if they are objectively justified and pursue constitutionally significant goals, and the legal means used to achieve these goals are proportionate to it; and on the contrary, the introduction of differences that do not have an objective and reasonable justification for persons belonging to the same category (in the same or similar situations) violates the principle of equality and contradicts Article 19 of the Constitution of the Russian Federation (Decision of 1 April 2008 No. 479-O-P).

In order to ensure the fair distribution of public goods and realisation of the purposes and principles of the Constitution, the Constitutional Court in its Judgement No. 4-P of 11 April 2011 noted, for example, that "Article 40 of the Constitution of the Russian Federation, fixing the right of everyone to housing and the inadmissibility of arbitrary deprivation of someone dwellings (Section 1), at the same time obliges state authorities and local self-government bodies to create conditions for the exercise of this right (Section 2), including citizens needing housing - providing the property free of charge or at an affordable price from the state, municipal and other housing funds in accordance with standards established by law (Section 3). This constitutional model of meeting the housing needs of citizens, due to the need to establish a legal framework of the single market in the Russian Federation and the transformation of property relations, requires an appropriate legal regime that guarantees protection of the interests of citizens by the state, including fixing the procedure for acquiring and exercising the right to use dwelling" (Judgement of the Constitutional Court of 11 April 2011 No. 4-P).

One can also cite another example from the practice of the Constitutional Court concerning labour legal relations and guarantees of the right to rest: "in the employment relations an employee is an economically weaker party, which predetermines the obligation of the Russian Federation as a social state to provide adequate protection of his rights and legitimate interests" (Decision of the Constitutional Court of 12 April 2012 No. 550-O-O).

In the Judgement No. 2-P of 9 February 2011, it was noted that "the normative provision of Part 8 of Article 325 of the Labour Code…, considered in the current legal regulation, presupposes the obligation of employers not belonging to the budgetary sphere and carrying out entrepreneurial and (or) other economic activities in the regions of the Far North and similar regions, to compensate their employees for the cost of travel and baggage transportation to the place of the leave and at the same time allows to establish the size, conditions and procedure of this compensation on the basis of balance of interests of the parties to the employment contract, taking into account its specific purpose (to facilitate at a maximum the travel of an employee beyond the adverse natural and climatic zone), and taking into account real economic opportunities of the employer, which, however, cannot be a basis for the complete refusal of compensation or its unjustified understatement. It is in such a constitutional-legal sense that this normative provision does not contradict the Constitution of the Russian Federation. "In the same Judgment the Court noted: "declaring the right of everyone to rest and health protection, the Constitution of the Russian Federation proceeds from the premise that human health is the highest inalienable good, without which many other goods and values lose their meaning and, consequently, its preservation and strengthening play a fundamental role in the life of society and the state. This predetermines the nature of the obligations of the state which recognises its responsibility for maintaining and strengthening people's health and, accordingly, the content of the legal regulation of realisation by citizens of these constitutional rights, which in the sphere of labour demands the legislator in addition to establishing measures aimed at protecting the health of workers directly in the process of labour activity, to introduce for those of them who carry out labour activity and live in

adverse natural climates additional guarantees designed to compensate for the impact on their health of the factors" (Judgement of 9 February 2011 No. 2-P).

As an advantage of Russian legal system we can note that the standard for ensuring social and economic rights was formulated by the Constitutional Court in a number of its decisions on the basis of the principle of equality being a constitutional-law precondition for the principle of justice. For example, in Decision No. 550-O-O of 12 April 2011, the Court noted that "the observance of the principle of equality guaranteeing protection against all forms of discrimination means, *inter alia*, prohibition of introducing such differences in the rights of persons belonging to the same categories that do not have an objective and reasonable justification (prohibition of different treatment of persons in the same or similar situations); under equal conditions, subjects of law must be in an equal position; if the conditions are not equal, the federal legislator has the right to establish for them a different legal status; the constitutional principle of equality, assuming an equal approach to formally equal subjects, does not necessitate the establishment of equal guarantees to persons belonging to different categories, and equality before the law does not exclude actual differences and the need for them to be taken into account by the legislator." (Decision of the Constitutional Court of 12 April 2012 No. 550-O-O)

Back in 1999, the Constitutional Court also addressed the system of compulsory medical insurance in Russia: "in accordance with the Constitution, every citizen of the Russian Federation has all rights and freedoms and bears equal duties provided for by the Constitution [...]; labour and human health are protected in the Russian Federation [...]; everyone has the right to health protection and medical care, which is provided free of charge to state and municipal health institutions at the expense of the appropriate budget, insurance premiums, or other sources [...]. These provisions create the constitutional basis for financing medical assistance provided to citizens by state and municipal health institutions free of charge. One of the constitutional guarantees of such assistance is compulsory medical insurance. " (Judgement of the Constitutional Court of 23 December 1999 No. 18-P).

4. Moreover, we shall not forget that the emergence of international obligations in the field of human rights protection, as well as the creation of the World Labour Organization after World War I was not motivated solely because of recognition of the importance these human rights or giving priority to the natural theory of human rights, or other idealistic considerations - the socialist revolutions of the 20th century, the successes of the Bolsheviks in Russia, played a role here, that is, *purely pragmatic considerations*[88]. However, even such considerations should not detract from the far-reaching consequences of building a human rights protection system in the last century, since, having set a certain direction in this area, states have allowed other players for whom protection of human rights, is the main or even the only function: human rights organisations, groups of activists or even individual applicants who, having the right to handle their individual problems and the alleged rights violations in supranational bodies, move the practice on a global scale. Let us recall in this connection the resonant case of the UN Committee on the Elimination of Discrimination against Women against Russia, in which it was established that the applicant *Svetlana Medvedeva* was unlawfully refused employment as a motorist-helmsperson (captain of a small river boat). In 2017 this conclusion was supported by the colleagues from the Supreme Court of the Russian Federation.

When considering the complexities of socio-economic rights protection, it is necessary to highlight another problematic issue, which Aristotle drew attention to in the Nicomachean Ethics (Book 5): what is the ultimate goal of justice - restoration or distribution? Putting this question on the plane of the present discussion, one may ask what is the purpose of judicial protection of socio-economic rights – is it restoring the violated justice ("playing a restorative role in the exchange between people") or redistribution of social benefits from some in favour of others (which manifests itself " in redistribution of honours or money, or other items among those who *have the right* to receive such benefits "). One can argue which modern legal system is more applicable to this or that approach, to recall the words of the Blackstone, a prominent English lawyer, that the law can be effective and

88 See e.g.: P. Alston, Critical Appraisal of the UN Human Rights Regime, in P. Alston (ed.) The United Nations and Human Rights: Critical Appraisal (Oxford: Clarendon Press, 1992). P. 1-21.

protected only when the injured person (the subject of this right) has an effective legal remedy for it protection, that is, in fact, a judicial mechanism of protection.

At the same time, the "restorative" approach, with its obvious importance, is one-sided. It does not give an answer to the question of how to act in a situation when there is some primordial social injustice against which in the above-mentioned paradigm there is no judicial remedy? In this case, the principle of justice must come to our aid, which will serve as the basis for applying the second "redistributive" concept.

The combination of both approaches to the proper degree in the practice of bodies of constitutional control can lead to positive results or to a certain progressive development.

TURKEY

RIGHTS AND FAIRNESS

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Key Words: Justice, Mustafa Kemal Atatürk, Rights, Transparency, Court of Cassation, Republic of Turkey, Legitimacy, Civilization, State of Law, Pluralist, Fairness

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FAIRNESS

I would like to express my the joy and honour of being presence on behalf of my country at "The J20 Judicial Conference of the Supreme Courts of the G20" organized by the Supreme Court of Argentina.

Through the human history, it is no coincidence that the states that succeeded in becoming fair and established a strong justice system are long-lived and can survive for centuries. Court of Cassation of the Republic of Turkey was founded in 1968. Today, we celebrate the 150th anniversary of CoC and the main theme of the anniversary events is "justice". So, On this opportunity, presenting issue of "rights and fairness" in the conference, is become more important for us.

In todays world, the unique legitimacy of the administrations is that the sense of lawfulness and sanctity of justice is well-established in society. The fundamental difference that comes from the creation between human being and the other creatures is just a sense of justice. Justice is the spiritual bond between society and the state. Great civilizations have risen with justice, gone by the disappearance of the sun of justice.

Fairness is one of the oldest aspirations of mankind. For this reason, it also composes one of the oldest subjects of philosophy. What is justice? Fairness, which is the opposite of the persecution, is to give everyone the right. Most of the time used synonyms of right.

Founder of Republic of Turkey, the Great Leader, Mustafa Kemal Atatürk said "Independence, future, freedom, justice, everything exists with fairness."

We, the legal experts, read new words every day about justice; and highlight these words with a red pencil. Sometimes we hang the frame on these words, on the most beautiful corners of our rooms. "Justice is a basis of the state" expression is written at the entrance of the courthoses and the courtrooms of the Republic of Turkey. Throughout history, many philosopher, scientist, religious functionary, leader have have thought, talked and wrote about the concept of justice. It was easier to answer "What is the justice in the centuries when social and economic relations was not so complex, and the concepts of good and bad were separated by sharper lines? the question. In today's world, with the concept of justice preserving its importance as a value and virtue originating from the people, but the concise remarks about the justice are insufficient.

How do we know what's fair? The ideology of justice in a world where the state organization has a place like a network, where people can easily reach even the most intimate ones, will only be possible with a system that is as detailed and precise as a state, organized by reason and science. Justice is respect of human and requires a heart-searching. However, the period of distribution of justice based on intuition remains very far behind. Today, even personal conviction has to be controllable and justifiable. A well-organized legal system that will satisfy society's sense of justice in maximum will be able to dispose of the sense of sanctity of justice in society by organizing life relations.

It is proved by wisdom and science; a quality justice service lies on the basis of the social, economic and scientific development of an country.

Justice in developed societies despite social, economic and cultural diversity, state organization and methodological differences; it is model in which pluralist, participant, individual-centered, respecting human rights, not punishing, correcting, judicial independence is internalized, tenure of judges is not a privilege is considered to be a necessity, the state is formulated by law, there is not other opinion, the basis of freedoms, the pattern of prohibitions.

This judiciary model’s sine qua non is based on democratic administration. Law is the science of the will of human communities, which are organized with the desire to live

together, to achieve the purpose of justice by regulating social life relations. I would like to emphasize that the treacherous attack carried out by the terrorist organization FETÖ / PDY has been prevented by our people for our democracy, national unity and integrity, human rights, the rule of law and all universal and common values that make us human on July 15, 2016. Unfortunately i must inform you that; This treacherous attack on July 15, 2016 was not condemned by our Western friends in a timely and powerful manner and has caused disappointment in this regard. This disappointment makes it difficult for these organizations to consider the statements of human rights, democracy and the rule of law as sincere and well-intentioned statements to protect the rights of those who attempted a coup. In addition, it damages Turkey's effort in this area.

Elitist judicial models that can not be controlled by democratic methods and are not based on public are not legitimate. These are indispensable for contemporary democracies; democratic elections based on the people, pluralism, participation in governance at all levels, equality, social justice, management respecting human rights, principles of rule of law. Judicial independence must be evaluated within the rule of law. The judicial body involved in state organization must also be strictly bound by law. The opposite aspect can be considered arbitrariness. Within the context of these explanations, we shall define every management approach based on the above principles as a democracy in principle.

In contemporary and democratic societies, high courts are the places where the files appealed. At the same time, high courts demonstrate openness and sensitivity in the terms of society's expectations about the justice. High courts, which are the final place where many problems arising from the functioning of the judicial system are knotted down, are at the same time having the most accurate and rich information about the general functioning of justice and are in a position to make the most accurate observations They should contribute to justice policies by sharing these information and proposals for solutions to the general functioning of the law with all the justice actors and the society. For this reason, the Court of Cassation has made an intensive effort to ensure that the justice system operates more efficiently and efficiently in accordance with the additional roles that high courts have undertaken in the historical process. On this

oppotunity, I have also shared with you the views on the effectiveness and efficiency of the judiciary, with the awareness of the responsibility of high courts to be trainer and guidance.

The greatest reward for judicial services made with great sacrifice, day and night, all over the world; confidence in the judiciary in society. This confidence can only be possible if and only if scale justice is equal.

Today, the principle of transparency is accepted as a fundamental element of the judiciary in every state which depends on the principles of human rights and the rule of law; “The İstanbul Declaration on Transparency in Judiciary Process" was signed in order to ensure the transparency of justice, establishment and the judiciary on June 4th, 2016 with the participation of thirty thousand supreme court president, hosted and lead by the Court of Cassation.

In addition, within the scope of this, the 4th Highest Courts Summit on Transparency in Judiciary will be held in Istanbul on 11-12 October 2018, hosted by Court of Cassation. At this meeting, 29 countries will participate as high court presidents. I believe that we will have the opportunity to introduce the Istanbul Declaration to this wider geography and legal system at this summit.

RIGHT

In the Constitution of the Republic of Turkey, *Freedom To Claim Rights* titled in Article 36 regulated that “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.” And also in the second paragraph of Article 40 of our Constitution entitled in *Protection Of Fundamental Rights And Freedoms* “The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications.” is clearly indicate that the necessary measures are taken rather than the recognition of the right to liberty in the context of rule of law.

In order to protect the freedom to claim rights and to ensure that the remedies can work effectively, many institutions are working in our country.

It is an undeniable fact that the main task of these institutions is to make the rights, rights awareness and culture of society more open to all kinds of actions and operations of the administration by giving the individuals the rights and to make great contributions to the establishment of equality between the administration and citizens.

Establishment of a fast and effective functioning claim right system which is the strongest guarantee of right and justice, depends on human rights, human love, democracy and the upbringing of individuals who are closely linked to the rule of law.

We have to work for justice if we want the rights to be distributed to justice all over the world. We must use a significant proportion of our resources, energy and time to strengthen justice. It is not possible to develop in a matter where we do not spend any effort, do not make effort, and do not allocate time and resources. With these thoughts, we will continue to show great efforts as a country for the strengthening of justice, for both the members of the judiciary and the principles of virtue in society.

I would like to conclude with the summary sentences "The fact that we lost everything when we lost justice."

AFRICAN UNION

UPHOLDING FAIRNESS IN HUMAN RIGHTS ADJUDICATION: THE AFRICAN COURT'S CONTRIBUTION

Sylvain ORE, President of the African Court on Human and Peoples' Rights

This presentation deals with how the African Court has contributed so far to upholding fairness in adjudication human rights in Africa. The postulate may raise questions bearing in mind that fairness in itself is a human right. And I wish at this point to borrow Professor John Dugard's proposition that the right to a fair trial has acquired the status of international customary law.[89] Having said that, it is my view that fairness stretches beyond fair trial rights *stricto sensu* to encompass a large set of principles and procedures applied in human rights adjudication.

I propose to share with you the experience of the African Court in upholding fairness while dealing with three main issues, which are fair trial rights, social rights and political participation, and freedom of expression. I will close my remarks by raising some of the main challenges facing the judicial protection of human rights in Africa. But allow me to begin with a very brief statement on the African Court and its mandate to protect human rights in Africa.

1. The African Court and its mandate

The African Court was created by a Protocol adopted in 1998 in Ouagadougou, Burkina Faso, which entered into force in 2004. The first batch of judges were elected in 2006 and the Court started its operation first in Addis Ababa, Ethiopia before moving to its seat in Arusha in 2008. After delivering its first judgment in 2009, the Court has since received more than 170 cases and delivered several judgments and other decisions. The

89 J Dugard *International law: a South African perspective* (2001) 241.

concerned cases involved 8 states which have made a special declaration allowing individuals and NGOs to directly access the Court but also matters brought by the African Commission on Human and Peoples' Rights. In some of its major pronouncements, the African Court had held that domestic law that provided for a majority age lower than the regional standards violated women's rights;[90] that an national electoral commission that is composed in majority of members of the ruling coalition did not meet the requirements of independence and impartiality;[91] and that sentencing a journalist to time in jail for publications that are critical to a public authority did not meet the standard of proportionality and violated freedom of expression.[92] While the Court has faced issues with implementation of some of its judgments, states have generally so far respected its decisions and the African Union has provided the body with continued support to uphold human rights justice as an African value and political commitment.

In discharging that mandate, the Court has made several pronouncements that are relevant to the topic that I am called to address you on today, that is how fairness is paramount to human rights justice.

2. Fairness as inherent to fair trial rights protection

It is widely accepted that fair trial is a fundamental principle of democratic societies. Article 7(1)(c) of the African Charter on Human and Peoples' Rights (African Charter) provides for the right to defence. In the matter of *Alex Thomas v Tanzania*, the African Court held that free legal aid is a right implied from the right to defence. The Court grounded its position in two requirements that may also be read as fairness indicators: an applicant may be eligible for the right to free legal aid where he or she is an indigent person or when granting such right serves the interest of justice.[93] Notably, the Court has replicated its position in the *Thomas* case in dealing with subsequent legal aid related

90 *APDF and IHRD v Mali* (2018).
91 *APDH v Côte d'Ivoire* (2016).
92 *Konaté v Burkina Faso* (2013).
93 *Alex Thomas* (2015).

matters brought before it. Legal aid has indeed featured prominently in adjudication before the African Court as a systemic issue in the operation of domestic courts.[94] It is important to stress that, while Article 7(1) of the African Charter dealing with fair trial rights does not explicitly provides for many specific rights, the Court has taken a progressive and flexible approach to interpretation by borrowing from the more elaborated Article 14 of the International Covenant on Civil and Political Rights.[95]

Another illustration of how fairness can be used in examining fair trial rights violations is given in instances where the African Court considered that ordering retrial in domestic courts would lead to double jeopardy. For instance, in the case of *Alex Thomas* cited earlier, the Court declined to order retrial on the ground that doing so would result in double jeopardy bearing in mind that the Applicant had served 20 of the 30 years sentence at the time of the judgment.[96] This position has consolidated in the subsequent case of *Abubakari* also referred to above.[97]

Finally, fairness has also featured centrally in instances where the Applicant requested the Court to order his release alleging that domestic processes were marred with fair trial rights violations. In such cases, the Court has so far taken the view that it can grant such relief only in "special and compelling circumstances". The Court did so for instances in the cases of *Alex Thomas*,[98] and *Abubakari* and consistently in a number of other cases subsequent to the two leading ones. Having found so, the Court pursued its fairness approach by strengthening the selective standard adopted under the double jeopardy theory. For instance, when called to interpret the scope of measures that the Respondent was required to take in the *Abubakari* judgment, the Court held that releasing the Applicant could be a measure to be considered by the Respondent.[99] The Court had actually, as a caveat to its initially firm position, stated that such pronouncement does not

94 *Kennedy Owino Onyachi v Tanzania* (2017) and *Mohamed Abubakari v Tanzania* (2016).
95 *Abubakari*, *op. cit.*; and *Anudo Ochieng Anudo v Tanzania* (2018).
96 Para 158.
97 Paras 236, 242.
98 Para 157.
99 Abubakari (Interpretation, 2017) para 38.

preclude the Respondent from adopting whichever measure it believes is fit in the circumstances including releasing the Applicant.[100]

Without wanting to breach the confidentiality oath, I can indicate that, in a number of similar cases being considered, the Court is relentlessly studying issues arising around the application of fairness in determining circumstances in which it should or not order specific remedies such as retrial and release. For instance, it could be considered that where the procedural rights violations are so grave that the outcome of domestic proceedings would have been different, the poisonous tree theory must apply. This standard would imply that the very sentencing of the Applicant will fall against the gravity of the fair trial rights breached found by the Court. We await to see how this cristalises in future pronouncements of the African Court.

3. Fairness in upholding social and political rights

Meanwhile, permit me to discuss fairness in upholding social and political rights. Here, I will refer to two leading judgments of the African Court. In the case of *Reverend Christopher Mtikila v Tanzania*, the Court has held that provisions of the Constitution of Tanzania that impose on candidates to local, parliamentary and presidential elections to be sponsored by a political party violate both freedom of association and the right to political participation. The Court consequently ordered the Respondent State to amend its Constitution and bring it in line with the African Charter.[101] As you might be aware, similar provisions exist in the legal framework of many countries around the world, including Africa. The approach taken by the Court in that specific context was to balance the individual right to political participation against the purposes of the said provisions of the Constitution. The Court took the view that the historical purpose of national unity could not outweigh the necessity of the enjoyment by individuals of their right in the African Charter. In a continent like Africa, but also anywhere else in democratic societies around the world, participating in the public affairs of one's country has become central to the

100 *Abubakari* (2016).
101 *Mtikila v Tanzania* (2013).

enjoyment of social rights. Applying fairness in adjudicating related issues therefore becomes important to uphold the rights of individuals and groups.

A similar approach is taken by the Court in the judgments it delivered in the matter of *Association pour le Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*. In this case, the Court found that an electoral commission composed in a wide majority of members of the ruling coalition, or members of cabinet or appointed by the executive does not meet the requirements of an independent and impartial body set out by the African human rights Charter and the African Charter on Democracy.[102] The very idea of elections to public positions demands that fairness be applied as a basic requirement. Again, free and fair elections, and post electoral violence and tension is a common quandary to many democracies around the world. Recent events show that finding effective solutions to related issues is current and critical in affirming the fragile democratisation processes in Africa. Against this background, it can be said that, by applying fairness, the African Court has intervened as an agent of social change at the regional level.

4. Fairness and proportionality in protecting freedom of expression

Whether and to what extent should speech be restrained is the issue that the African Court was called to decide in the case of *Lohé Issa Konaté v Burkina Faso*. In its judgment delivered in the matter, the Court relied on proportionality as a feature of fairness in assessing the extent to which freedom of expression should be limited in a democratic society. The Court took the view that imprisonment is a disproportionate response to the publication in a newspaper of pieces that are critical to a public authority, namely the public prosecutor. While it has none gone all the way to a complete decriminalisation of press offences, the African Court has taken a major step towards a fair dispensation of freedom of expression mainly for journalists. Against the standard of fairness, the Court positioned itself as agent of change in the arena of governance on the

102 *APDH v Côte d'Ivoire*, *op. cit.*

principle that persons holding public offices should be subjected to a greater level of criticism than ordinary citizens by virtue of the public functions that they perform in a democratic society.

Having shared with you some of the major interventions of the Court in the field of fairness and human rights, I would like to close my remarks by alluding to some of the challenges being faced by the African Court in protecting human rights in the continent.

5. Challenges to judicial protection of human rights in Africa

As recalled earlier, the African Court has been functioning only for a decade. As much as it has yielded significant success across the continent, the Court has faced challenges relating mainly to its limited scope of intervention, state compliance with its judgments, reforms within the African Union, and lack of human rights culture in Member States.

With respect to its limited scope of intervention, only 8 of the 54 Member States of the African Union have recognised the jurisdiction of the Court to adjudicate cases filed by individuals and NGOs. Bearing in mind that interstate adjudication of human rights has seldom proved effective in the international sphere, there is clear indication that most Africans and entire regions of the continent will remain uncovered regarding the grave and massive violations of human rights that occur in the continent. The Court has been active in engaging with states to the effect of obtaining wider adherence to its jurisdiction. State compliance with judgments of the Court has also been another issue in light of the position of some Respondent States that the Court would be acting a tribunal of first instance or an appeal court by considering cases already adjudicated by domestic courts. The Court has constantly held that a matter is properly before it as long as violations alleged therein concern rights that are protected in instruments ratified by the Respondent State. The Court has also remained in constant interaction with domestic courts and other authorities of Member States through means such as the continental judicial dialogue to explain further the mandate of the African Court. Finally, as any other

similar body, the Court operates in an environment that requires a conducive national framework in favour of human rights and democracy. In African countries grappling with human rights and the rule of law, it remains a challenge for a regional court to find echo within the municipal sphere. I can assure you that the African Court is striving to play it part in that process.

INTER-AMERICAN COURT OF HUMAN RIGHTS

"THE ULTIMATE PURPOSE OF JUDICIAL ACTIVITY IS TO REALIZE JUSTICE BY MEANS OF LAW"[103]

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Abstract

Inter-American Court of Human Rights – Development of key concepts as rule of law, justice, equity and cooperation for progressing towards sustainable development – Equity as a form of justice – access to justice in the rule of law and judicial system's role for achieving sustainable development by cooperating and realizing common good – Ethical aspects.

Keywords: Human Rights – Equity – Justice – Cooperation – 2030 Sustainable Development Goals – Judicial Systems

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1. Introduction

The objective pursued is to respond to the challenge of deciding how the system of rights should contribute, through cooperation, to build a more equitable society in view of mutual benefit.

103 Article 35 of the Ibero-American Judicial Code of Ethics.

I will address the subject from the standpoint of an elected Justice of an international human rights court.

The international community and each State recognize as a fundamental objective to respect and ensure the free and full exercise of human rights to all persons, without any discrimination[104].

The obligation of respecting and ensuring those rights requires that the International Community, as well as each State, adopt appropriate measures, either legislative or of another kind, in order to ensure every human being the enjoyment of his or her rights and freedoms[105].

In this regard, G20 is expected to assume a key role for encouraging the appropriate processes in order to guarantee human rights fulfilment, beyond economic and financial limitations. Achieving this aim depends on the cooperation between the most developed countries.

G20 is a forum of both developed and emerging leading markets made up by 19 countries and the European Union. Their economy represents 85% of world's GDP. G20 constitutes a cooperation and advisory platform in which member States try to find common solutions to global problems. More specifically, its task involves finding solutions to international economic issues in a coordinated way.

2. Inter-American Court of Human Rights

The Inter-American Court of Human Rights was established on September 3th, 1978. It was instituted as a treaty body, after the entry into force of the American Convention on Human Rights that took place on July 18th, 1978.

The Statute of the Inter-American Court of Human Rights provides that the Court is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.

In accordance with Articles 3 and 4 of the Statute, the seat of the Court is San José, Costa Rica, and it consists of seven judges, nationals of the member States of the Organization of American States.

104 Article 1 of the American Convention of Human Rights.
105 Article 2 of the American Convention of Human Rights.

Judges are elected by member States of the American Convention by secret ballot and by an absolute majority, during the session of the OAS General Assembly immediately prior to the expiration of the term of the outgoing judges. They are elected from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates. Judges' term of office is of six years and they may be re-elected only once.

Among the 35 States that constitute the OAS, 20 of them recognize the adjudicatory jurisdiction of the Court —Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Surinam and Uruguay.

Thus, Court's jurisdiction covers from Mexico to Argentina and practically every OAS member State, including the Caribbean countries. Specifically, it exercises adjudicatory and advisory jurisdiction, issues interim orders and wields control over those cases in which a State has failed to comply with the Court's ruling.

The year 2018 marks the 40th anniversary of the American Convention and the Court's creation. Since then, Inter-American Court's decisions have been applied by national courts in conventional control processes, and its judgments have been cited by the European Court of Human Rights and the African Court on Human and Peoples' Rights.

Today, in this meeting, I represent the Inter-American Court of Human Rights in my capacity as elected Justice. For this reason, my words invoke the human rights that, as based on human dignity, constitute the ground from which the States and the International Community organize their work.

3. Key concepts

Rule of law

We will provide some characteristics of the rule of law as described by the World Justice Project Rule of Law Index, 2017-2018, for the purpose of taking into consideration concepts that are accepted by the majority of the international community.

As it stands in the text, effective rule of law reduces corruption, combats poverty and disease, and protects people from large and small injustices. It is the foundation for communities of peace, opportunity, and equity, underpinning development, accountable government, and respect for fundamental rights. The rule of law is not just the rule of lawyers and judges —all members of society are stakeholders.

Characteristics:

1. Accountability

The government as well as private actors are accountable under the law.

2. Just laws

The laws are clear, publicized, stable, and just; are applied evenly and protect fundamental rights, including individuals' and property security and certain core human rights.

3. Open government

The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.

4. Accessible and impartial dispute resolution

Justice is delivered timely by competent, ethical, independent and neutral representatives who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

Equity – Justice

Equity can be considered from different points of view, but, as it stands in the heading sentence of this article, I intend to define it as "impartiality, equanimity, spirit of justice"[106] . Ontological definitions tend to identify equity with justice, because they consider, in Aristotelian terms, that one who acts with equity is inspired by the principle of giving to each that which is his due.

This subject has been discussed by many authors, such as John Rawls in *A Theory of Justice*[107]. Rawls proposes a social scheme based on a fair and ideal society. This social scheme is grounded on a unanimous and transcendental agreement, regulated, in the

106 Couture, E. J. *Vocabulario jurídico: con especial referencia al derecho procesal uruguayo*. Buenos Aires: Depalma, 1991, p. 257.

107 Rawls, J. *Teoría de la justicia*. México: FCE, 1979

first place, by the principle of equal liberty guaranteeing, first, civil liberty, and then, liberty of participation, which constitutes democracy's foundation. In case of conflict, civil liberty prevails. As defined in the second principle, the difference principle, inequalities can only be justified if fair equality of opportunities is guaranteed for the less favored.

According to more recent theories within this century, such as Amartya Sen's *The Idea of Justice*[108]*,* States participation is necessary in the pursuit of justice. Sen's inquiry concerns the subject of social justice at a global level. Democracy's legitimacy derives from the fact that the democratic system allows the protection of civil liberties and is capable of guaranteeing greater social equality: "Democratic freedom can certainly be used to enhance social justice and a better and fairer politics"[109].

Within this framework, Sen notably emphasises the importance of human rights and, specifically, economic and social rights at a global level: "The removal of global poverty and other economic and social deprivations has thus come to centre-stage in the global engagement with human rights", which allows to "integrate ethical issues underlying general ideas of global development with the demands of deliberative democracy, both of which connect with human rights"[110].

Cooperation

In order to realize justice, focus must be put on both national and international cooperation as a means to integrate the efforts of each State with those of the International community in a collaborative partnership.

Cooperation allows overcoming the challenges of what Robert Axelrod identifies in *The Evolution of Cooperation* (1984) with the Prisoner's Dilemma, which concludes in the viability of cooperative solutions for the good of human beings.

5. 2030 Sustainable Development Goals (SDGs)

On September 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development.

108 Sen, A. K. *The idea of justice*. Harvard University Press, 2009. [Sen, A.K.. *La idea de la justicia*. Taurus, 2010].
109 *Ibid.*, p. 351.[*Ibid.,* p. 383].
110 *Ibid.,* p. 380, 381.[*Ibid.,.* p. 413].

As established in the Preamble, the “Agenda is a plan of action for people, planet and prosperity. (…) All countries and all stakeholders, acting in collaborative partnership, will implement this plan (…) to shift the world on to a sustainable and resilient path”.

Furthermore, “the 17 Sustainable Development Goals and 169 targets seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls”.

People, human beings and the realization of human dignity are the main interests of SDGs, as well as, among others, the consolidation of peace and the promotion of “peaceful, just and inclusive societies which are free from fear and violence”, because “there can be no sustainable development without peace and no peace without sustainable development”.

The accomplishment of such goals is related to a process that recognizes the importance of the judicialization of rights as well as the role of judicial systems at a global, regional and domestic level. Thus, not only rights but also the duty of cooperation between States and the international community can be guaranteed.

The 2030 SDGs bind equally on all countries, regardless of their level of development. Moreover, these global goals go beyond the previous Millennium Development Goals.

The 2030 Agenda provides a framework of action. Meetings like the one we are having today, as representatives of G20’s judicial systems, encourage the realization of the Agenda.

One of the main innovations of the document consists in the inclusion of the judicial systems as contributors in the realization of the Development Agenda, as established in Goal 16.3.

It is necessary to define the ways of cooperation, the goals to accomplish, as well as to set clearly defined deadlines, relying on trustworthy information.

From October 2018, we have only twelve years ahead.

These goals involve all countries in the world, not only G20 members.

The document defines, among others, the following objectives:

- End poverty in all its forms everywhere (Goal 1).
- End hunger (Goal 2).

- Ensure healthy lives (Goal 3).
- Ensure inclusive and equitable quality education (Goal 4).
- Achieve gender equality and empower all women and girls (Goal 5).
- Promote decent work for all (Goal 8) and secure the prohibition and elimination of the worst forms of child labour (Goal 8. 7).
- Reduce inequality (Goal 10).
- Promote peaceful societies, provide access to justice for all and build effective institutions at all levels (Goal 16); the true access key to the other goals.

The following goals [under article 16] must be particularly stressed:

- Significantly reduce all forms of violence and related death rates everywhere (Goal 16. 1).
- End abuse, exploitation, trafficking and all forms of violence and torture against children (Goal 16. 2).
- Promote the rule of law at the national and international levels, and ensure equal access to justice for all (Goal 16. 3).

In short, this document represents the commitment of all humanity to make the world a place without corruption, bribery, hunger and extreme poverty, in order to safeguard the interests and needs of future generations.

Regarding the cooperation required for accomplishing 2030 Agenda, the Goal 17 (strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development) lays the foundations for cooperation in order to fulfil the action plan settled in the previous goals.

6. The role of the courts

Courts' role consists in guaranteeing and protecting people's rights while ensuring common good, in collaboration with the society and the State.

Human rights can only be fulfilled when there is a commitment of the State to such end as well as an independent and impartial Judiciary, capable of realizing justice, in

assertion with the rule of law and with the indispensable cooperation of the International Community.

Human rights are universal, interdependent and indivisible.

None of them can be fully enjoyed without the others and, moreover, they must be guaranteed for all equally.

People's participation in decision making and in the building of sustainable development policies is necessary and constitutes a key factor. Furthermore, it is fundamental to have inclusive and transparent institutions, which includes the judicial system.

Access to justice is the key that leads to justiciability and to ensuring human rights fulfilment.

The judicial system acts in an environment of peace and is itself the guarantor of peaceful conflict resolutions.

In this sense, it must act focusing on the human being and its dignity, the basic pillar of sustainable development.

Justice shall be conceived in everyday terms in order to be accessible to the common citizen.

When applying human rights, judges find themselves responding to the spirit of Goal 16.

It is necessary to ensure the exercise of transparency, equity, diligence, integrity and courtesy within the Judiciary.

Citizens have the right to demand that justices act in accordance with appropriate ethical principles without which it is impossible to end poverty, hunger, violence and organized crime.

In addition, transparency and freedom of information is necessary to effectively end corruption.

7. Conclusions

Rule of law is the principle whereby people's human rights are guaranteed and realized through justice.

It allows adequate cooperation in order to fulfil equity and justice in law.

To respect and guarantee human rights requires concrete answers and actions from the International Community and the States. In this sense, G20 meetings are of immense importance in the promotion of cooperation to fulfil 2030 SDGs Agenda, the plan of action that all nations have adopted because of its adequacy to achieve the objectives pursued.

Judicial systems play a role of utmost importance in guaranteeing the realization of human rights. In this sense, Goal 16 (promote peaceful societies, provide access to justice for all and build effective institutions at all levels) tends to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

In response to the stated goal, it is possible to assert that human rights, as universal, interdependent and indivisible rights, are fulfilled through the cooperation of States, gathered together in the International Community.

Rule of law and its principles constitute the legal framework in which cooperation allows to fulfil common good and realize human rights —SDGs propose a plan of action to do so.

We have twelve years ahead to achieve 2030 SDGs.

SUSTAINABLE DEVELOPMENT

BRAZIL

SUSTAINABLE DEVELOPMENT

Cármen Lúcia Antunes Rocha, Justice, Supreme Federal Court of Brazil

Summary

Introduction. 1. The environment and political economy: vectors for a constitutionalism whose centrality is in human dignity. 2. Contemporary constitutionalism and sustainable development: human dignity and the principles of solidarity and responsibility. 3. The principle of solidarity between generations and the contemporary different humanities. Conclusion.

Introduction

In awarding the Nobel prize for economics to Nordhaus, a pioneer in addressing the economic impact of climate change, and to Romer, for his work on the role of politics in fostering technological innovation, in the same day a UN panel on climate change releases a report on the dire consequences of these changes and the urgent need for governments to act in response to these results, the Royal Swedish Academy of Sciences recognized yesterday, October 8, 2018, what human beings already know: who destroys the world, destroys itself. The deconstruction of the environment is a way of disinheriting mankind in his perfected and proclaimed humanity as the civilizational landmark conquered and under the pallium of which we still live, trying to advance in these achievements, even though much of the political framework in the world seems to demonstrate that we are, at some points, stuck when not receding.

In Brazil, the day begins with news headlines emphasizing two themes: candidates for the Presidency of the Republic who will contest the second round of elections, on the

28th, promise to comply with the Constitution, if elected; the UN report and its warning signs.

As for the first item, it might seem inexplicable. In the Democratic State based to the Rule of Law, governors submit to the Constitution. In the time that we live, guaranteeing respect for the in vogue Constitution, as well warned this morning the President of the Supreme Court of Argentina, is no small matter. To remove any fear, in a world of so many fears, is necessary. Even being the fear for the law or about the law. But beyond the law there is no salvation; without democracy, there is no security, no freedom.

As for the second item, it is not only possible to explain the issue of the sustainable environment and the imperative that it imposes on governments, as it is also a matter, which is a sign of mature sensitivity in terms of this important progress. In his message, Gorat K. Hansson, Secretary General of the Royal Academy of Sweden, said that "it is necessary for countries to cooperate globally to resolve some of these important issues". The message is clear, direct and urgent.

That is why this Meeting is relevant and we need to form consensuses and objective solutions to the issues and problems in this area.

1. The environment and political economy: vectors for a constitutionalism whose centrality is in human dignity

Constitutionalism has been affirmed as a system whose main vectors are based on the principle of human dignity.

And the identified or identifiable human being is no longer placed as the sole holder of rights, if not the human condition itself.

From this emerges the principles of solidarity, responsibility and commitment between generations. What will come after me matters as much as what lives with me. I disagree in part when someone only focuses the view that leads to an intergenerational solidarity on the future. I make the present to guarantee to those who come after me the future that will be their present. But I am well aware that without the guarantee of an immediate solution of very serious environmental issues, there will be no preserved future for those who arrive later.

As I am also aware that, without effective public policies, actions that require social and economic-financial resources and conditions will not thrive to guarantee the fundamental rights of each and everyone.

It is not excessive to emphasize that human rights have come to remind us and ensure the liberating coexistence between people. That without them there is no freedom and without it there is no dignity respected.

Social rights demand positive action from the states and need to be supported.

Economic policies aimed at and developed for the benefit of the human being have to be the foundation of the economic model adopted. In Brazil, the Constitution prescribes, in its art. 170, that "the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice", establishing the founding principles of capitalist dynamics accepted as legally legitimate.

Not by chance, but rather the result of intense debates that took place exactly thirty years ago, the Brazilian Constituent Assembly included the care for the economic and financial order and, in the sequence, the social order (tít. VIII), in which chap. VI included, for the first time in Brazilian constitutionalism, the treatment of the environment, with explicit reference to the principle of solidarity between generations and to the duty of the public power and the community to comply with and make effective the constitutional obligation: "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations".

Preservation is important for everyone and for the world. Because first you kill a tree. And then the act of killing is trivialized. Then what would live from the tree is killed or prevented from living. And then what destruction originated is exterminated: the community installed in areas where there was devastation does not live without the memory of the destroyed.

2. Contemporary constitutionalism and sustainable development: human dignity and the principles of solidarity and responsibility

The responsibility between generations and the duty of effective defense of the environment to guarantee a healthy present and future quality of life proved to be the mature fruit of a new way of living with the other.

The law stopped to be thought and institutionalized in its binary form and came to be conceived as a normative result of consensuses that form and legitimate the actions of citizens and the government policies.

The present and future common interest abandoned its old layer of abstraction, in the specific theme, becoming a result, obtained or not according to the goals sought by the implementation of the legal-normative system and the construction and joint actions for the specific benefit of the other.

It was concluded that it was necessary to act so that we could keep the often-quoted biblical phrase that one generation passes and another generation will succeed to it, but the earth always remains stable. The sun also rises and returns to where it came from. The earth has proved itself - it is not always stable by fate or fatality, but for our construction. And construction is common, permanent and urgent.

Each of us, contemporary citizens, does not respond by what we do only to ourselves. We respond to others and we must be responsible to others.

Societies integrate or disintegrate. They are not stable by divine law or by insurmountable determinism. And, as far as the environment is concerned, it is to be taken for granted that its deterioration has physical, psychic and social consequences, so law has had to be rethought and redone according to new paradigms so that the common interest can become effective.

The environmental economy equation brings challenges, for sure. And the constitutional judge is instigated for sometimes dramatic choices.

In 2011, I filed a lawsuit in the Federal Supreme Court of Brazil (AOPF 101), which discussed the possibility of importing of used tires to Brazil. The activity would destroy the environment, infect populations, but generate jobs.

The decision was in the sense that life can not be priced and compensate, even though work can be compensated with salary. But you don't receive a salary for health, life and the environment.

The importation of tires was considered as unconstitutional, adopting as a paradigm the duty of preserving the healthy quality of life of present and future generations. Without judicial activism, observing the limits of constitutional norms and its principles, the Federal Supreme Court concluded that it was not legally legitimate to accept an activity that made environmental waste a social luxury. Work is not luxury, it is a right; but balanced environment is not a choice, it is a standard.

3. The principle of solidarity between generations and the contemporary diverse humanities: beyond equality, the action to make equal

The worldwide recognition of the harmful consequences of climate change and the perversities committed against the environment raises the matter that integrates the same framework of concern that is included in the theme: the diversity of humanities that people have lived within this period of history. This is not an unprecedented situation. But I do not live out of my own time. My time is today and in it I see people who walk thousands of kilometers of devastated land underneath a consuming burning sun, with nowhere to stop nor what to eat, at the same time that others people throw food away. Some walk by feet through paths without roads; others, still running on their bare feet. Some knock down forests; others have nowhere to reap the fruits from which they fed.

The environmental issue can't continue to be addressed without the subject of substantial equality between people and between States.

.The change of constitutional matrix for the realization of the principle of equality must take into account that it is necessary to make it equal, not just recognize equal.

We have always learned to enforce the principle of equality by the equal treatment of the equals and unequal treatment of the unequal. But some remain unequal because they have not had equal opportunity to achieve the same equality. And in environmental matters, peoples are treated differently without paying attention to the necessity to make it equal in order to guarantee, therefore, respect for the equality won.

Perhaps it's time to reflect on affirmative actions in environmental subjects and in the space of nations.

Democracy will be preserved when the majority, if not possible to guarantee the totality of state experiences, abide by and observe its principles. And there is no democracy when it charges differently for some in in comparison to others. Applies to the people, applies to the State.

Equal treatment to the environmental matter to ensure an ecologically balanced environment for all will certainly ascertain a world in which the commitments to the common good are more effective and human rights are more respected.

To this purpose, the question of environmental ethics should be introduced as a starting point for the care of the topic and the definition of institutes, including legal ones, designed to achieve the principle of legal certainty.

The destruction of the environment in the world was largely due to corruption carried out in practices that have benefited and still profit a few in the detriment of others and, even worse, in opposition to the rights of future generations.

But ethics a duty of every human, not just the state. It is also a primary obligation of each public servant, be it a governor or an administrator.

the citizen must assure its ethical performance. Corruption is unacceptable as private and as public behavior. It is either the ethics or the disorganization and disbelief in law and socio-politics.

But corruption, as well as the environmental destruction, depends, mostly, of the State and not least on each and every citizen too.

Not for any other reason is it necessary to reach the objective of transforming the framework in which we find ourselves, in terms of observing the principle of solidarity between generations, in the specific matter of the environment, we must think of education as a trigger factor for the environmental cultural to change.

This transformation seems to me to pass through the civic awareness that leads to the permanent and active citizen participation, in the sense of restraining and proposing actions, those particular and governmental, that lead to the full compliance with the constitutional norms and assumed in international treaties and conventions.

Without citizens' education, it may be more difficult to legitimize the public policies needed for the concretization of constitutional and international rights and obligations assumed by States and to be effectuated for the benefit of all. Emphasis should be placed on the need for ethics between national states and respect for the human, without which the norms won't be anything but well-intentioned proposals, but this doesn't guarantee the needed changes for those who live today and for those who will come later.

Conclusion

As a proposal, therefore, I propose that state actions consider the imperative of adopting effective and common measures among the peoples on environmental education, with programs that determine the exchange of knowledge and allow the view of the other as a new light under which new visions of the different are added, for it to become equal.

It also seems to me that environmental crimes are effectively and corrupts in environmental matters are responsible for their acts, so that education through ethics and for the ethics transmigrates to the individual field; and the belief in the common interest emerge as the only effective way.

Without responsibility there is no commitment. And without this commitment, assumed by the citizen, the state is delegitimized. Without legitimacy there is neither understanding nor adherence.

I conclude by quoting Albert Camus's speech when he received the Nobel Prize for Literature in 1957, in which, coming from the generation after World War II, he pointed out:

“Each generation doubtless feels called upon to reform the world. Mine knows that it will not reform it, but its task is perhaps even greater. It consists in preventing the world from destroying itself. Heir to a corrupt history, in which are mingled fallen revolutions, technology gone mad, dead gods, and worn-out ideologies, where mediocre powers can destroy all yet no longer know how to convince, where intelligence has debased itself to become the servant of hatred and oppression, this generation starting from its own negations has had to re-establish, both within and without, a little of that which

constitutes the dignity of life and death. In a world threatened by disintegration, in which our grand inquisitors run the risk of establishing forever the kingdom of death, it knows that it should, in an insane race against the clock, restore among the nations a peace that is not servitude, reconcile anew labour and culture, and remake with all men the Ark of the Covenant. It is not certain that this generation will ever be able to accomplish this immense task, but already it is rising everywhere in the world to the double challenge of truth and liberty and, if necessary, knows how to die for it without hate”

Our generation knows that it can not want to die for truth and freedom: it prefers to live by these supreme values. Even because we’ve walked a long way. If it is true that the path is long, it is still certain that it is worth it. For me, for the other.

FRANCE

WHAT ARE THE JUDICIAL LIMITATIONS TO PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS?

Pascal Chauvin, Chamber President of the Court of Cassation of France

In France, judges faces obstacles to the effectiveness of environmental law, resulting on the one hand, from the specifics of environmental issues and environmental law itself, and, on the other hand, the institutional particularities stemming from the organisation and functioning of the courts.

I.- The difficulties inherent to the specifics of environmental issues and environmental law.

A.- *Environmental law: a changing, cross-cutting discipline.*

First of all, as we know, environmental law is necessarily an evolving and cross-cutting discipline, due to its high dependency on the developments in scientific knowledge and technological developments, as well as in economic and societal issues.

We therefore see:

- A dispersion of laws in diverse codes: Environmental Code, Rural and Maritime Fisheries Code, Forestry Code, Mining Code, Urban Planning Code, Construction and Housing Code, Civil Code (which appears in the Biodiversity Act), Public Health Code, etc.

- A mix of specific general principles of law (derived from international law and European Union law, which are inscribed in French law in the Environmental Charter that has

constitutional status, as well as in Article L. 110-1 of the Environmental Code), in legislative texts in a multitude of fields and in complex technical regulations.

An example of a problem related to the complexity of the applicable legislation is provided by a ruling of the Criminal Bench of the Court of Cassation: in a waste-trafficking case, an appeal court had acquitted the defendants on grounds that the applicable legislation *"making multiple references that cross and overlap, to the point of constituting an obscure maze,* did not satisfy the constitutional requirement of clarity and precision for a bill of indictment; the Court of Cassation overturned the appeal court's decision on the grounds that *"Article L. 541-40 of the Environmental Code refers, for its application, to a directly applicable EU regulation, the technical nature of which is inherent to its purpose and which determines, in a clear and precise manner, based on the type of waste, the essential elements of the offense being prosecuted"* (Cass. Crim., 22 March 2016, Appeal No. 15-80.944, Bull. crim. 2016, No. 96).

Particularly in the case of environmental criminal law, the judge faces a considerable number of offences (approximately 17,000), most often punishable by fine, which may be prosecuted as such or may serve as grounds for offenses under general criminal law (involuntary manslaughter or injuries (see AZF case) or endangering the lives of others): therefore, we agree in considering that this situation results in a relative inefficiency of environmental criminal law and therefore convictions handed down for the general crime of damaging natural resources (Article L. 415-3 of the Environmental Code) are infrequent and, luckily,- Article 421-2 of the Criminal Code, which deals with a single environmental crime, namely the act of ecological terrorism - has never been applied. Consequently, there is currently a discussion regarding the decriminalisation of offenses that are not severe or rarely prosecuted, increasing penalties for some offenses, creating new offenses that directly deal with the environment (the crime of endangering the environment), taking into consideration aggravating circumstances (such as acting as an organised group, for increasing the effectiveness of the fight against the traffic of waste or animal species) or establishing additional penalties suited to this type of criminality.

Under these conditions, it is the judge's role to create precedent that enables one to ensure the effective application of environmental law.

The judge must thus determine the applicable law, while simultaneously respecting the hierarchy of legal norms, the principles of interpretation (by seeking a preliminary ruling where appropriate, as happened in the Erika case (Cass. Civ., 3rd, 28 March 2007, Appeal No. 04-12.315; CJEU, 24 June 2008, case. C-188/07, municipality of Mesquer v. Total France SA and Total International Ltd.)) and the objectives of environmental legislation.

The judge is therefore faced with a law that is complex, because it is often technical (law on waste, classified installations, water, etc.) and consists of legislation of varying rank and nature (international declarations with no normative force; for European countries, European Union legislative texts that apply either directly (regulations) or via implementation (directives); national texts).

For their application, the texts often require either interpretation with respect to EU law (which may give rise to a preliminary ruling) or European law (e.g., with respect to proportionality) or articulation with common-law provisions that are also applicable (e.g., with regard to the assignment or leasing of polluted land, articulation with sales law or lease law).

Moreover, the judge will be frequently called upon to strike a balance between environmental and health law, the public interest and fundamental individual rights, such as freedom of enterprise or freedom of movement and property rights.

Example: with regard to soil, there is not one single text regarding the protection and restoration of soil; there are rules scattered throughout various legislation, both at the EU and domestic levels, that takes soil into account based on the uses (economic aspect

through administrative policing laws on waste and classified installations) or the cleanliness thereof (sale, lease), which forces the judge to forge the bond between these various legal norms whilst ensuring the balance between the three pillars of sustainable development, environmental protection, economic development and social progress, all while reconciling the fundamental individual rights in this field (notably property rights) with the collective interest supported by special public policy texts aimed at environmental protection (in this context, the rulings by the third civil bench of the Court of Cassation making the remediation obligations of a seller operating a classified installation take precedence over the guarantees that must be provided by the seller of real estate and the limitations thereof (16 March 2005, Appeal No. 03-17.875, Bull. III, No. 67).

Depending on the environmental issues involved, the judge therefore needs to make traditional legal concepts evolve.

This was the case with regard to causal links: courts were brought to switch from the concept of *certain* causality to the concept of *probable* causality and to accept that evidence of the causal link may result from serious, accurate, and corroborating presumptions, thus following the precedent of the European Court of Human Rights (27 January 2009, Tatar v. Romania, No. 67021/01): a court of appeal thus attributed the death of a horse to the spreading of sludge from a sewage treatment plan over a plot of land located near animal pastures, for the reason *"that no other cause* [...] *could explain the death of the mare"*(Caen, 24 sept. 1996, No. 95-00.246) ; but, in a case in which a GAEC farming group, which stock farmed on land located under or near a very high voltage power line, had sued the electrical supplier, the Court of Cassation upheld the decision of the court of appeal which, after having noted “that *serious, divergent and contrary elements opposed existing indicators as to the potential impact of electromagnetic current on stock farms, so there are noteworthy uncertainties regarding such an impact”,* found that the existence of a causal link was not sufficiently

demonstrated and that the GAEC's claims for compensation should therefore be rejected (Cass. 3rd, 18 May 2011 Appeal No. 10-17.645, Bull. III, No. 80).

The same is also true in terms of damages: it is now accepted by case law that environmental risk constitutes *per se* a compensable damage.

The recognition by case law, in the Erika case, of ecological damage *per se*, independent of the damages that may be caused to humans due to environmental harm (Cass. Crim., 22 September 2012, Appeal No. 10-82.938, Bull. crim. 2012, No. 198) was recently validated by the legislator: the law regarding "*the recovery of biodiversity",* adopted by the French Parliament on 20 July 2016, acknowledges ecological damage and the arrangements for compensating same; environmental damage is defined in Article 1247 of the French Civil Code as *"significant harm to the elements or functions of ecosystems or to the collective benefits drawn by humans from the environment"* and a general principle of liability with regard to the environment was laid down in Article 1246 of the same code, which states that *"any person liable for ecological damage is bound to remedy same".*

Lastly, it appears necessary to change the principles governing liability or to create new ones, such as the general obligation of vigilance mentioned by the Constitutional Court when examining a priority constitutionality question regarding the compatibility of a provision in the Construction and Housing Code with Articles 1 and 2 of the Environmental Charter (QPC decision 2011-116 of 8 April 2011).

B.- *Environmental law: a discipline situated at the fringes of science and technology.*

Next, the judge is often placed in the heart of a conflict between science and law: yet science, driven by research, is perfectly satisfied with uncertainty, which is not the case for the law (in order to be compensated, damage, while it may be in the future, must be

certain all the same): the law responds to an objective of security that obliges it to provide answers, even when science has doubts.

For the judge, the result is the need to include scientific uncertainty *per se* as an element of his/her legal reasoning.

Furthermore, the fundamental place of science and technology creates difficulties in the conduct of legal process and in decision-making.

With regard to *locus standi*, particularly in order to claim compensation for ecological damage, should we admit any citizen, since Article 1 of the Environmental Charter provides that *"each person has the right to live in an environment that is balanced and respectful of health"* and Article 2 that *“every person has the duty to take part in the preservation and improvement of the environment”* or should we only admit persons or entities specifically vested with an environmental mission or with proof of skills in this field?

It must be noted that case law has extended access to the courts to associations, even non-accredited ones, to the extent that the defence of the environmental interests concerned is part of their remit.

In Article 1248 of the French Civil Code, the legislator has chosen to listthe persons with*locus standi* to obtain compensation for ecological damage: the French State, various institutions, communities, and associations.

With regard to the search for and production of evidence, the damages resulting from an act to the environment are often revealed long after the operative event, thanks to the development of scientific knowledge: this was the case in the past for asbestos and it is the case now for pesticides or endocrine disruptors.

We also discover new phenomena, such as the cocktail effect (some substances become hazardous when they coexist).

Thus, on 9 October 2002 (Union nationale de l'apiculture française, No. 233876), the Council of State cancelled the marketing authorisation for the pesticide *Gaucho* : *“Bynot taking into account the visitation of corn by bees, for the purpose of removing the pollen that the plant produces in abundance, and by researching neither the exact scope of the pollen removal by bees, nor the nature and intensity of the direct or indirect effects of contact by bees with pollen contaminated with imidaclopride, the Minister did not examine all of the elements necessary to evaluating the harmlessness of the product,”* so that the Minister’s *“decision, as it concerns corn, must therefore be regarded as tainted by an error of law”.*

With regard to proceedings with court-appointed experts, the often decisive element for ascertaining liabilities and for defining compensation measures, there are different types of problems:

- Difficulty stemming from the appointment of the expert: in some scientific or technical fields, experts are rare and have often worked for the manufacturers concerned by the substance in question (which enabled them to obtain their sought-after knowledge): we then observe either a lack of experts or the risk of a conflict of interest, including within the government bodies tasked with giving an opinion to the competent authority.

In this context, one may reflect on the recent controversy regarding the composition of the European Food Safety Agency (EFSA), which issued an opinion contrary to that of the International Agency for Research on Cancer (IARC) regarding the dangerousness of glyphosate when the European Commission examined the renewal of the marketing authorisation of the substance: it is now required that an expert appointed by a judge inform the parties, as of the first expert evaluation meeting, of the possibility of a conflict of interest due to his/her current or previous activities.

- Difficulty resulting from the drafting of the expert's mission and its organisation in the event of frequent necessity to consult different specialists and where it is necessary to consult multiple experts.

- Difficulty stemming from the cost of proceedings, advancing expert evaluation fees, which are very high, and generally payable by the victims (except in criminal matters), who will bear them entirely should their action fail, even though the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed on 25 June 1998 by thirty-nine States, requires facilitating access to justice.

Lastly, a need is emerging for new tools, better suited to understanding and compensating new damages: for example, defining ecological damage required the establishment of multi-disciplinary working groups (scientists, lawyers, economists, insurers, non-governmental organisations, etc.) that developed an "eco-nomenclature," as well as scientific groups to determine in particular the indicators of the proper condition of an environment or remediation methods.

II.- Institutional difficulties resulting from the organization and functioning of courts.

A.- *Environmental law: a discipline that generates a multitude of legal actions.*

One initial difficulty resides in the fact that different courts may be petitioned for the same environmental damage: the Erika and AZF cases are two topical examples of this.

The proceedings are long and costly, and may result in contradictory decisions.

With regard to the industrial accident at the AZF plant (which claimed 32 lives):

- A decision from the Council of State (French Supreme Administrative Court) dated 17 December 2014 (No. 367202) ruled out the French State's liability, 13 years after the plant exploded, by considering that the French State was not in violation of its policing authority regarding installations classified for environmental protection.

- A decision from the Paris Court of Appeal dated 31 October 2017, ruling on a referral back after cassation of a previous ruling by the court of appeal, sentenced the former plant director for involuntary manslaughter and injuries to fifteen months suspended imprisonment and a 10,000 euro fine, ordering the site’s management company to pay the maximum fine allowed, 225,000 euros, with it being noted that an appeal was filed in the French Court of Cassation against this ruling, since arguments have from the beginning essentially been focused on the cause of the explosion, a complex, technical problem, on which each court petitioned had to first rule before establishing liabilities.

Furthermore, we should not overlook the use made of the duration and cost of proceedings by polluters with the sole aim of discouraging victims and leading them to accept settlements (thus, in the Erika case, several disaster-stricken towns, faced with the length and cost of proceedings, eventually came to terms and dropped their suit).

The possibility of simultaneous suits before the administrative courts and criminal courts for the same offenses needed to be evaluated with regard to European texts (European Human Rights Convention and the EU Charter of Fundamental Rights) and French constitutional law; it is currently allowed.

For example, take the case of a scallop fisherman who had been brought before both administrative court and criminal court for maritime fishing in a prohibited area; based on the same texts in the Rural and Maritime Fisheries Code, (Articles L. 946-1 and L. 946-2), he received an administrative suspension of his fishing license, which he appealed in the administrative court, and was subject to prosecution in the criminal court, in which he

raised the unconstitutionality of the texts with regard to the principle of *non bis in idem* (double jeopardy); he asserted that he was likely to be punished twice for the same offense, since the possible administrative fine could largely exceed the maximum amount of the criminal fine that could be imposed; for this offence, the legislator did in fact provide for a criminal offense punishable by imprisonment, a fine, and additional punishments, such as a prohibition on performing a professional activity and, *"independent of criminal penalties that may be instituted",* multiple administrative penalties, including a fine set not at a maximum amount, but at a multiple of the value or of the quantity of the goods seized, in addition to the suspension or withdrawal of any fishing license (with regard to the administrative penalty, the legislator thus specified that *"administrative fines are proportional to the severity of the facts found and notably taking into account the value of the harm caused to the fisheries resources and to the marine environment concerned")*.

Fully consistent with the decisions by the Constitutional Council (2014-453/454 QPC and 2015-462 QPC of 18 March 2015; 2016-545 QPC of 24 June 2016; 2016-556 QPC of 22 July 2016), the criminal bench of the Court of Cassation ruled that such legislative provisions were not in violation of the fundamental principles laid down by European Union law and constitutional law: on one hand, the principle that only the law can define a crime and prescribe a penalty does not prevent these same crimes, committed by the same person, being the subject of different prosecutions for administrative or criminal purposes, in accordance with the separate set of rules specific to their branch of law, examining the same interests, according to the same procedures; on the other hand, the constitutional requirement of proportionality requires in any case that the overall amount of fines not exceed the higher of one of the fines risked (5 August 2015, Appeal No. 15-90.007).

Both penalties thus appear complementary: the criminal penalty (imprisonment, rarely imposed, and a fine) remains the prerogative of the criminal judge and has an obvious impact on the offender regarding his/her image in social and professional terms; the

administrative fine may be adjusted to the harm caused to the objective pursued in accordance with European Union law, namely the sustainable conservation of fisheries resources.

In a recent law dated 8 August 2016 called the “Biodiversity Act,” the legislator, in Article 1249, paragraph 3 of the Civil Code, did however attempt to ensure compatibility between the measures that could be taken by the administrative authority in the application of the law on environmental responsibility, and the ecological damage compensation measures ordered by the civil judge.

This text thus provides that *"the evaluation of the harm takes into account, where applicable, the compensation measures already carried out, in particular in the context of the implementation of Title VI, Book I of the Environmental Code”.*

On this same topic, we may cite the disputes brought before administrative courts and before civil courts following the installation of mobile telephone relay antennas, which resulted in a petition to the Jurisdiction Court, which established the respective areas of jurisdiction of both courts (14 May 2012, No. C3844).

The same problem came up with regard to wind turbines: the first civil bench of the Court of Cassation ruled that the civil-law judge should not get involved in the performance of the special administrative policing governing this type of installation, but that this judge does have jurisdiction, through the awarding of damages, to compensate the damage sustained by a third party because of the installation (25 January 2017, Appeal No. 15-25.526, Bull. 2017, I, No. 28).

It is important here to recall that criminal offenses, like civil fault are very often founded on the violation of an administrative regulation, which explains the need for a coming together between the administrative-law judge and the civil-law judge regarding the

interpretation and application of such regulations, often technical and derived from European Union law.

2.- *Environmental law: a discipline that requires enhanced training and dialogue between judges.*

A second difficulty is tied to the lack of training and dialogue between judges.

In France, there is no environmental court nor specialised training within the courts.

There is also no technical assistance regarding these questions within the courts.

The only possible training is provided via further education for magistrates.

Dialogue between judges is essential: dialogue between the civil judge, the criminal judge, and the administrative judge on a national level, but also dialogue between these judges and the judges of the European Union Court of Justice, the judges of the European Union Human Rights Court, and the judges of supranational courts.

Currently, this dialogue takes place informally through associations or networks of judges, cooperation or exchange agreements between supreme courts and on the occasion of major international conferences under the aegis of the United Nations and, while the problems arise on a global level, their resolution via comparative law is almost non-existent.

Interdisciplinarity is also essential in this matter. In order to avoid handing down decisions that are legally correct but inapplicable in practical terms, these issues should avail of the cross-cutting expertise of lawyers, scientists, sociologists and even philosophers - their intervention often enables the revelation of fundamental ethical or social questions

underlying commonly-used concepts – in addition to civil-society stakeholders (manufacturers, associations, field practitioners, etc.).

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In conclusion, it seems important to underline the need to attain an *effective* application of environmental law, despite all its complexity, a law inspired by specific fundamental principles, which have constitutional status in France (and many other countries as well) such as the precaution principle, the prevention principle, the polluter/payer principle, as well as the principle of integration in public policies, as well as that of public information and public participation in decision-making, the general trend - oh how, reassuring - still being to take refuge behind “traditional” law, better known and mastered, to resolve environmental issues.

Lastly, I would like to point out that the abundance of legislative and regulatory texts led to the adoption of laws of simplification in France (particularly with regard to permits or prior government authorisations), which roused environmental-law specialists and led the legislator, via the aforementioned Biodiversity Act of 8 August 2016, to add the principle of non-regression to the general principles mentioned in Article L. 110-1, 9°, of the Environmental Code, *"according to which environmental protection, ensured by legislative and regulatory provisions regarding the environment, can only be the subject of constant improvement, taking into account the scientific and technical knowledge of the time".*

INDIA

TOWARDS SUSTAINABLE DEVELOPMENT

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Summary

Our celestial planet is an ever-dynamic web of intricate systems subsumed by our fetishes of competition and profit. The brazen defiance of laws of nature has led to the dystopia we are living in. The conspicuous absence of environmental sustainability from our current economic growth model is the cause of our universal feelings of gloom and despair.

Luckily, for us the zeitgeist of our times is a shift towards a future that is neither precarious, nor driven by emotions and actions that corrode the tapestry of biodiversity.

The Courts in India have galvanized this pursuit for a more vibrant future by the recognition of sustainable development as a part of a citizen's fundament rights, and grant of status of legal personalities to natural bodies like rivers. Uninhibited by the lack of knowledge and unpredictability of the outcomes of technology, we must pay heed to the forebodings of our planet and persevere towards a future where man and nature are entwined in a harmonious embrace.

Keywords: Legal personality, Gross National Happiness, Ecocide, Chipko movement

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Introduction

India's narrative on sustainable development has roots that run deep in antiquity. In the Arthshastra, India's legendary treatise on economic strategy and statecraft, the King was tasked with the responsibility of improving the Empire's ecology. He was 'not only to keep

in good repair, timber and elephant forests created in the past, but also set up new ones.' The Mauryan Empire (322 BCE – 185 BCE) was dedicated to the cause of conservation and protection. Doctors were employed and the punishment for killing animals, was grave. Slaughtering and maiming an elephant (for instance), invited execution as punishment. Protected in equal sacredness was verdure; trees, plants, foliage. Punishment was specific to the extent that the quantum depended upon the importance of the part of the tree that was extirpated.

Sustainable Development and the Supreme Court of India

1. The amendment of the Constitution of India to incorporate the Directive Principles of State Policy (DPSP) marked a significant, environmentally conscious shift in Indian Jurisprudence. Article 48A of the same mandates that,

"The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

Article 51A(g) of the Constitution which casts 'Fundamental Duties,' enjoins that it shall be the fundamental duty of every citizen of India, *inter alia,*

"to protect and improve the national environment including forests, lakes, rivers, wildlife and to have compassion for living creatures."

2. These two Articles are fundamental not only to the governance of the country but also in drafting legislation[111]. Although the Supreme Court, as a matter of law, does not direct the Parliament and Governments to enforce DPSP or Fundamental Duties, it often relies on these yardsticks to interpret laws and test the validity of State/citizens' actions. They provide valuable guidance and aid to the resolution of Constitutional and legal

111 2 Aravind Datar, Constitution Of India, 600 (2nd ed. 2007)

issues. To this extent, the Supreme Court of India has managed to gather some ground. Its involvement in protection of wildlife in sanctuaries and national parks, restrictions on fishing in National Park areas, preservation and improvement of lakes[112], segregation of chemical industries, directions to tackle vehicular pollution are consecrated efforts in this direction.

3. The most significant of these steps by the Supreme Court was its adoption of the principle of Sustainable Development, from the Brundtland Report, 1987, into the Fundamental Rights as a part of Article 21 that protects Life and Liberty. The uniqueness of the adoption lies in its accessibility since Sustainable Development violations can be made enforceable at the instance of any citizen of India.

Precautionary Principle

4. A balance must be struck between economic development and the environment. Judicial embrace of the Precautionary Principle is most advantageous to achieve even a modicum of this equilibrium. In a petition filed in public interest regarding discharge of untreated effluents by tanneries, the Supreme Court observed that notwithstanding the vital importance of the leather industry in generating foreign exchange and providing employment avenues, its activity could not be at the cost of public health, destruction of ecology and degradation of environment, thereby inducting the principle into Indian environmental jurisprudence.

Polluter Pays Principle

112M.C. Mehta (Badhkal and Surajkund Lakes matter) v. Union of India, (1997) 3 S.C.C. 715 (India)

5. Indian Supreme Court has extended the Polluter Pays Principle to not just the absolute liability of polluters in victim-compensation, but also restoration and remediation pursuant to development induced environmental atrophy.

6. In a case[113], where private companies operating chemical factories had failed to install toxic-effluent treatment equipment before discharge due to which aquifers and sub-soil pollution endangered lives, the Supreme Court imposed heavy costs on the companies to remedy the damage. The judgement paved way for a plethora of cases that emphasised the importance of absolute liability in similar circumstances[114].

Intergenerational Equity

7. In the state of Himachal Pradesh in northern India, 'Katha' (a derivative of Khair[115] tree) manufacturing units were sought to be established. However, only the heart of trunk was required for such production and hence the manufacture of 'Katha' required copious felling of 'Khair' trees which perceivably had cataclysmic ecological consequences. In the Writ Petition[116] filed, seeking a restrain on the Government of Himachal Pradesh from granting permission to such units, the Supreme Court observed,

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113 Indian Council for Enviro-Legal Action v. U.O.I. (1996) S.C.C. (3) 212

114 In *M.C. Mehta v. Union of India*, where highly toxic effluents were being discharged by tanneries in Kolkata, the Court held *"It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts."* The tanneries were ordered to pay compensation to the victims and for the loss caused to ecology, and subsequently relocate. Similarly, industries that consumed coal, emitting toxic fumes an polluting surrounding area, were asked to shift their energy consumption to natural or petroleum gas based sources or to relocate. This was particularly significant for not only the damage to residents of the Taj Trapezium but also the resultant acid rain that corroded the marble of the Taj Mahal.

115 *Senegalia catechu*, called Khair in Hindi, is a deciduous, thorny tree. Various parts of the tree have traditionally been used food, fodder, folk medicine and firewood. Its heartwood extract is also used in dying, leather tanning and oil drilling.

116 Filed before the Indian Supreme Court under the sanction of Article 32 of the Constitution of India

"The present generation has no right to impede the safety and wellbeing of the next generation or the generation to come thereafter.[117]*"*

8. Environmental jurisprudence in India, founded on this principle has reckoned several milestones. Addressing intergenerational and intra-generational equity vis-à-vis villagers affected by unauthorized, illegal mining in the Doon Valley of Uttarakhand, the Supreme Court appointed various Commissions that inspected the mines. Concurring with the recommendation of the Commissions that the limestone quarries in the Valley must be brought to a permanent halt, the Court ordered closure of three operating mines. Citing the scriptures, the court observed,

"In the Adharva Veda (5.30.6) it has been said: 'Man's paradise is on Earth. This living world is the beloved place of all; it has the blessing of Nature's bounties; Live in a lovely spirit.'"

9. The Court also observed that mining operations could be made contingent upon certain requirements including, but not limited to, an undertaking submitted to a Monitoring Committee that *"all care and attention shall be bestowed to preserve ecological and environmental balance while carrying on mining operation."* Another condition that *"25% of the gross profits of the three mines shall be credited to the Fund in Charge of the Monitoring Committee in such manner as the Committee may direct and the Committee shall ensure maintenance of ecology and environment as also reforestation in the area of mining by expending money from the fund."*

117 State of Himachal Pradesh v. Ganesh Wood Products (1995) S.C.C. (6) 363

Public Trust Doctrine

10. Under the Public Trust Doctrine, the Supreme Court of India has declared the rivers, the forests and all the natural resources meant for public use and enjoyment as being held in public trust. The Court said that, as a trustee, the State is under a legal duty to protect the natural resources which cannot be converted to private ownership. It has recognized the legal personality of a river and has held an action by it maintainable through a next friend. This is in line with the legal personality extended by the courts to deities and minors who need natural guardians.

Limits on the role of the Judiciary

11. The myriad of social, economic and ecological issues created a need for the courts to strike a balance between development and preservation of environment, however by the very nature of their roles their functions have some inherent limitations. The courts are not in a position to assess whether a potentially harmful technology should be introduced or a hazardous industry should be allowed. The judiciary cannot control the pollution arising from cars or direct the production of alternative fuels and engines. Neither can the judiciary reasonably know which new technology will affect the environment in which way. These limits become even harder where some technology has justified itself, as meant for the benefit of the poor. Besides, courts that concern themselves with the repercussions and ramifications of such 'beneficial' technology is often seen as judicial aggression.

12. In a case where the Court was considering the safety and ecological aspects of construction and implementation of Tehri Dam (Uttrakhand), it was argued that the area

was not seismically safe. The Court refused to interfere on the ground it does not possess the requisite expertise to render any final opinion on the rival contention of the experts involving science or engineering[118].

13. Another important limitation on the judiciary, and even the government in preventing the use of hazardous technology, is perception, or lack of it- of the damage that can be caused by various uses of technology. A particular application that Courts disallow for the collateral damage that it causes, does not exclude the application of the same technology in another avenue, in another manner, that might prove to be equally harmful. Like the damage that was caused to the environment and forests in particular, in the wake of the internal combustion engine after was adapted for several uses. Huge forests have been cleared by machineries powered by this engine, hills and mountain sides have been cut down with the aid of this power. And yet still, one cannot say that the production or adaptation of internal combustion engines can or could have been prohibited.

Potential of Science in Predicting Sustainability

14. In the past two centuries or more, we have developed a sound understanding of the nature of chemistry to help us predict the effects and behaviour of chemical compounds and mechanics, in controlled environments without having the need to carry out long term experiments. This has become the basis for predicting effects or impacts of a variety of materials, products, and practices in the scientific community. This study of Life Cycle Impact Assessment (LCA) allows engineers, designer, and scientists today to make professional or policy decisions in their respective occupations or organizations.

118 Tehri Bandh Virodi Sangarsh Samiti v. State of U.P. (1992) Supp. (1) SCC 44

15. The ready reckoner weightages of various compounds that allow for the assessment of their impact on various aspects such as eutrophication, resource depletion, climate change, etc. LCA factors in all phases of a product's lifecycle in an integrated way so as to avoid shifting the environmental impact of one part of the lifecycle to another and mandates action at a stage where it is most effective. Thus, the possible prevention of the introduction and use of harmful technology can be assessed at the very inception rather than in the conclusion after the effects of the environmental degradation are established.

Achieving Sustainable Development

16. It is irrefutable that our environmental nightmares are of our own doing. Bedeviled by greed, our inflictions have become imperishable scars. The necessity to effect a normative change in the fundamentals of our development agendas is not only urgent, but also inescapable. One cannot but aggrandize the need to shift from a parasitic existence to one that fosters synergy between our natural environment, built and social environments, and aspirations for our collective futures.

17. The causal link of disasters like urban fires, building collapses, road accidents etc. to human activity, is a traceable one. However, clarity dims and often absents itself in the case of indirect disasters such as extinction of species that leads to lowering ecosystem and resource productivity, water scarcity, and climate change. About 50% of premature deaths due to pneumonia amongst children under the age of five, are caused by the

particulate matter inhaled from household air pollution[119]. As our impact on the environment and ecosystem rises, the diseases, in humans, livestock, animals, and crops rise. Despite our best efforts, we unknowingly contribute heavily to the depletion of planetary resources and degradation of natural sustainability.[120] Often, the impact of environmental degradation is most severe on the people dependent on the ecology for their sustenance. We must especially be conscious of the power of the collective citizenry in conserving their immediate environment in a sustainable fashion. Involving them in the environment management puts them in charge of their surroundings and brings to fore the indigenous conservatory practices used by them. '*Chipko*'- the famous 'embrace the trees' movement in India was immensely successful and persuaded the Government to cancel all the logging permits and prevented further deforestation with the simple policy of the villagers simply 'sticking to it and hanging onto it with their life'. The movement gave us the slogan - 'Ecology is the permanent economy' in 1970s and the words ring true perpetually.

18. The Kingdom of Bhutan especially stands out for its inclusion of happiness and environmental sustainability in the measure for calculating Gross National Happiness as opposed to merely focusing on economic development at the expense of the environment. Bhutan went a step further and amended their Constitution, a testimony of their pledge to a more sustainable environment; "*Article 5(3) "The Government shall ensure that, in order to conserve the country's natural resources and to prevent degradation of*

119 World Health Organization, Mortality from Household Air Pollution, available at https://afro.who.int/health-topics/air-pollution (Last seen on 5.10.2018)

120 Ibid

the ecosystem, a minimum of sixty percent of Bhutan's total land shall be maintained under forest cover for all time"

19. Needless to say, dialogue without consensus is meaningless. One does not require sophistication to recognize the merits of peaceful and mutually cooperative co-existence, mindfulness in conduct, and the pragmatism that is inherent in benignity. The Industrial Revolution and its collateral in the form 'development', certainly ushered an era of elevated economic growth. But in its corrupted aftermath, hung the stake of many things; a crippled Nature and her abundant facets. Yet, the 'human' element seems to be the only relevant one. This begs a question: are we owners of the natural environment or trustees? As the self-proclaimed custodians of development, the human species possesses an innate ability and power to transform the very nature of a collective lived experience, even if driven by self-interest.

20. It is of cardinal importance to inclusive and just growth, that power is exercised fairly. It is power exercised with fairness that appeals as much to the oppressor as to the oppressed. The obvious difficulty, however, is in the determination of common values. Who is an appropriate authority to decide the parameters of 'fairness' and if one were capable at all to determine them, what are they? Perhaps, the principles propounded by Dias could be of some assistance; power wielders must not employ the use of power to their exclusive advantage or to exclude others, but be susceptible to independent scrutiny and questions, and must comply with their own dictates as well as allow the entry of new members in the power wielding circle.[121]

121 R M W Dias, Jurisprudence, 5th ed. 1985, p. 90

21. Dumping of hazardous wastes and toxic substances such as asbestos, lead paints, pesticides etc. are a few examples of an unfair exercise of power. In the context of sustainable development, an example of the exercise of power with fairness is the principle of common but differentiated responsibility.[122] Every country must have an equal say in shaping the international environmental principles that they would be governed by.

22. It would be interesting if the Governments of the World were to explore the possibility of entertaining a preliminary challenge to every proposal for introducing new technologies or processes in industries and agree on a common standard to be followed for assessing its potential health and environmental risks. Possibly by constituting a representative advisory body comprising of environment experts from each of the members, with the power to set the framework for environmental screening, assessment and continued monitoring of proposed technologies or processes. In any case only provisional permissions may be granted till the same is proven to be environmentally benign. This would be particularly useful in assessing which particular use of technology leads to sustainability and which destroys it.

23. In 2016, the International Criminal Court said that it would assess existing offences such as crimes against humanity, in a broader context[123]. Extensive environmental damage that causes large-scale destruction of habitats and irreversible depletion of the natural resources by human agency, or 'Ecocide,' is a recognized crime in countries like

122 Rio Declaration, Principle 7- "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

123 The ICC Policy Papers on case selection and prioritisation declares: "The office [of the prosecutor] will give particular consideration to prosecuting Rome Statute crimes that are committed by the means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."

Georgia, Armenia and Vietnam. This is a positive step towards the salvaging the environment and will be highly beneficial if it is incorporated in international conventions and municipal laws.

24. Identification and standard-setting for anticipating the potential environmental damage by use of technology at the global level and backed by enactments of laws and regulations by the supreme will of the governments could help us meet the goals we have set for a sustainable tomorrow. The need for law-makers, the environment regulators, the judiciary, and any other institutional players, including business communities and civil societies to come together for effective environment management and preservation, is inescapable. The judicial will and commitment towards the goal of ecologically sustainable development can go far with the political will of the legislature and executive, and the public opinion.

Concluding remarks

25. The trajectory of economic development from the days Adam Smith and John Stuart has led most worlds to a singular point; measurement of development by an acronym. GDP (Gross Domestic Product) is a measure with an inherent problem for it hides more than it reveals[124]. It depreciates all other assets but ignores the environment in the measure[125]. This proposition has frightening implications because when economic values are ascribed to natural capital and ecosystem services, such economic activities prove to

124 Herman Daly, a leading World Bank economist, admits that there is no contact between macro-economics and the environment.

125 Richard Stone, one of the creators the original GDP indicator, suggested that while *"the three pillars on which an analysis of society ought to rest are studies of economic, socio-demographic and environmental phenomenon"*, he had done little work in the area of environmental issues

be loss-ventures after all. The World as we know it is a series of connected, intimate actions; a web that ceaselessly and consequentially ripples. Even trees network and connect through their roots under the ground. They send distress signals and secrete poisons in their leaves to avoid being over eaten. This is the balance that has been created and maintained by Nature. Emerson in his essay on Compensation says that "*every excess causes a defect; and every defect causes an excess. Nature hates monopolies and exceptions. There is always some levelling circumstance that puts down the overbearing, the strong, the rich, the fortunate, substantially on the same ground with all others.*"

26. The very nature of sustainable development is to ensure that there is no excess. Especially by which there can be a shift in the equanimity of the law of nature. Thus, it is imperative that fairness is exercised not only distribution of power and resources, but also by striking a balance between our current economic, social and environmental goals and the need of the future generation.

Mahatma Gandhi said, "*The earth, the air, the land and the water are not an inheritance from our forefathers, but on loan from our children. So we have to handover to them at least as it was handed over to us.*"

SENEGAL

WHICH ARE THE JUDICIARY'S LIMITS TO THE PROTECTION OF THE ENVIRONMENT IN THE FUTURE?

Mamadou Badio Camara, Chief Justice of the Supreme Court of Senegal

In our Opening Ceremony of the Judicial Year in January 2017, we took into consideration the new rights established in the Constitution Amendment Act of April 5, 2016.

Specifically, they are the right to a healthy environment and the right to the exploitation of natural resources, in connection with important oil and gas discoveries in Senegal.

In addressing this issue, it became apparent that the new rights may come into conflict with each other to the extent that the exploitation of the natural resources, e.g. oil, gas, mines, etc., risks giving rise to negative consequences for the right to a healthy environment, even when it is a legal activity, as found by the European Court of Human Rights which deems it "necessary in a democratic society for the economic wellness of the country, as the natural resources are a source of income and employment."

On the other hand, the right to a healthy environment is non-negotiable due to reasons related to humankind's life and survival. Certainly, that is why the Constitution of Senegal has proclaimed that "the environment's protection, preservation and improvement fall within the competence of the public powers".

Nevertheless, it is clear that it is appropriate to provide the citizens and associations who deem their environment at risk with the possibility to intervene before it is too late, to offer information on the projects that may be harmful to them, as well as the possibility of participating in the decisions likely to affect their environment, without excluding their right to compensation for damages to it.

Moreover, that is the purpose of the Río de Janeiro Declaration, according to which “the best way to address environmental issues is to ensure the affected citizens’ involvement, at the most relevant level.”

In Senegal, local communities and those environmental protection associations approved by the Government in the protection of nature and environment may –under section L.107 of the Environment Code– bring proceedings before the competent jurisdictions in accordance with either the administrative or the ordinary law procedure. They may as well exercise the rights recognized to civil parties with regard to acts that constitute an offense.

Section L.4 provides that “any development project created in the country must take into consideration the environment’s protection and enhancement requirements…”

Due to a reform of August 2008, the Supreme Court of Senegal has the particularity of resulting from a merge between the highest administrative jurisdiction, the State Council, and the highest judicial jurisdiction, the Court of Cassation. Its different attributions distribute in chambers according to matters. That is why the Supreme Court has jurisdiction in both judicial and administrative matters.

As regards the task of the judges, I should quickly submit some considerations on the sanctions imposed in case of threat to the environment and to the reparation of ecological damage.

1. The Sanctions

The issue of the sanctions applicable to ecological damage may be examined through the “Almadraba Uno” vessel case. The trawler ran aground on a sandbank, and on August 2, 2013, it spilled almost 310.000 liters of gasoil and toxic substances into the sea off the coast of Dakar, the capital city, into Senegalese territorial waters and the surroundings of the Iles de la Madeleine Natural Park, renowned for its rare and protected animal and vegetal species.

The judicial proceedings against those responsible for the pollution were instituted by the Government of Senegal and the organizations for environmental protection, with the support of NGO Greenpeace-Senegal.

On October 9, 2013, the High Court of Dakar imposed a suspended sentence of three months of imprisonment to the polluters, and ordered them to pay a fine of five million francs, and an allocation of one hundred million francs to the Government of Senegal by way of compensation.

At that time, the national press and the NGOs welcomed the sanctions, which they considered as “severe”. Section L.98 of the Environment Code was applied, which, in similar cases, imposes penalties from six months to one year imprisonment and fines from one million to ten million francs CFA, that is to say, from 1500 to 15.000 euros. The amount allocated to the Government of Senegal by way of compensation for ecological damage was of one hundred million francs CFA, that is to say, around 150.000 euros.

2. Monetary compensation or *in natura* restoration?

The issue arises as to whether monetary compensation, which consists of the allotment of a lump sum, is likely to take into account the total damage, both in its immediate manifestations and its future consequences, based on judicial consideration and in accordance with its relevant criteria.

The question is still open.

Certainly, in a similar case, *in natura* reparation, which, in environmental law is the most adequate one, should be privileged whenever possible, since it allows the restoration of the sites by polluters, as well as the disappearance of the damage or the reduction of its importance.

For this purpose, the judge may fix a short time limit for the reparation, possibly including *astreintes* in order to financially punish any eventual delay.

Polluters may also be entitled to avoid a legal process by accepting to pay an amount fixed by the competent administration for the monetary compensation of the environmental damages. This is an alternative way of resolving environmental cases.

Finally, the international arbitration for the resolution of environmental conflicts would be of great help in case of transnational pollution, or when a project is deemed to have consequences on one or more bordering countries. That is the case, for example, of the

oil discoveries in north Senegal, which extend into the territory of the neighboring Republic of Mauritania.

Environmental cases are sensitive for judges, who are not always properly trained for resolving disputes of this kind, even if, in cases in which technical issues are raised, the law authorizes to resort to an expert. Nevertheless, the training of magistrates is indispensable in order to enable them to understand the problems involved and the experts' reports, and to arrive to the most relevant conclusions.

Thus, the Supreme Court of Senegal has included in its ongoing training program possible judicial and administrative disputes that may arise from the environmental impact and interferences resulting from the exploitation of natural resources. In fact, the emergence of such problems is a sort of foreign element that our judicial systems must integrate with the aim of protecting and preserving the environment.

In this perspective, it is important that judges have the necessary tools to take into consideration the particularities of such environmental cases and to deal with speed and efficiency with interim measures and claims for environmental damage.

For that reason, university professors of the School of Law of Dakar (to whom we asked to analyze the legal and institutional framework for the protection of environment), have suggested, amongst others, the following recommendations, as a result of their research:

* The monitoring of international agreements and treaties;
* The creation of environmental jurisdictions, or, failing that, of environmental chambers within the existing jurisdictions;
* The awareness of the actors and the necessity of training judges for dealing with the environmental problems.

Despite the difficulties, our ambition is to protect the environment against all forms of degradation, to rationally enhance the exploitation of natural resources, to fight against the different kinds of pollution and damages, and to improve the living conditions of the population, respecting the balance of its relationship with the environment.

We may regard ourselves optimistic because environmental issues are the order of the day in Senegal, especially within the framework of the preparation of the 9th World Water Forum, to be held in our country in 2021.

SENEGAL

ROLE OF THE JUDICIARY IN THE UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS

Pape Oumar SAKHO, Chairman of the Constitutional Council of the Republic of Senegal

Summary

At the expiry of the Millennium Development Goals (M.D G.) in 2015, the 193 Member States of the United Nations adopted a new Program called Sustainable Development Goals (S.D.G), supported by three pillars: social, economic and environmental. These seventeen SDGs are inclusive, holistic and multisectorial, integrating therefore the dimension of good governance and impartial, equitable and accessible justice, which challenges, *inter combined*, in all countries, the judicial power. It is especially SDG n°16, entitled “justice and peace” implying, for its realization, the participation of the Judicial Power, guardian of the personal rights and freedoms, which must mobilize the attention of the justice public service actors , in particular of the public prosecutors and the sitting judges of the administrative, civil, criminal, and even constitutional jurisdictions, with the insertion in the Constitutions (preambles or corpus juris), laws or national regulations of references to sustainable development.

Key words: Justice-sustainable development- SDG 16- United Nations Conferences and texts-role of the jurisdictions.

INTRODUCTION

During the Summit on sustainable development held in New York City on September 25th 2015, the 193 UN Member States adopted a new sustainable development program, which included a set of 17 global goals to put an end to poverty, fight against inequalities and injustice, and face climate change by 2030.

The seventeen goals amend and replace the eight Millennium Development Goals (MDGs)[126], which had mobilized all the countries in the world and all the big global development institutions. The Joint MDG Program aimed, as from September 2000 until the expiration year of 2015, to eliminate extreme poverty and hunger, to prevent fatal but curable illnesses and to enlarge the educational prospects for all children. The revaluation of these MDGs will generate a thickening and a reorientation with the adoption of post-2015 goals, called Sustainable Development Goals (SDGs).

Although supported by three pillars social, economic and environmental, these SDGs are inclusive, holistic and multisectorial, therefore integrating the dimension of the respect for human rights, good governance and an impartial, equitable and accessible justice, which challenges, *inter combined*, in all countries, the judicial power.

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126 The Millennium Development Goals (MDGs), are eight goals adopted in 2000 in New York (USA) in the United Nations Organisation Millennium Declaration by 193 UN member states, and at least 23 international organisations, which have to achieve them by 2015. The goals adopted are spread in eight areas:

1. Reduce extreme poverty and hunger.
2. Ensure basic education for all.
3. Promote genderr equality and women empowerment
4. Reduce child mortality.
5. Improve maternal heaalth.
6. Fight against diseases.
7. Ensure environmental sustainability.
8. Develop aglobal partnership for development

I. Development and environment are taken into account: sustainable development.

A. History and significance

The concept of sustainable development or “durable” development was born in the mid Eighties within the international organizations in order to highlight the limits of certain modes of growth and development which degrade the natural heritage of humanity irremediably.

Sustainable development is not recent, because the search for a balance between environmental protection and economic and social development has for a long time been at the heart of the concerns and reflections.

Already in 1951, the International Union for the Conservation of the Nature (IUCN), in its first *report on the Situation of the environment in the World*, recommended the search for conciliation between economy and ecology.

The Club of Rome, will follow in the 60s-70s, by financing Massachusetts Institute of Technology (MIT) researchers for a study which will be published in 1972 and whose main conclusion was therefore to send out alarm signals: “*in a world with limited natural resources, an economic model based on an unlimited growth will lead to a hull slamming of societies as we know them now before 2100*”.

In 1972, more precisely on June 16th, the World Conference on the Environment will be organized in Stockholm which will lead to the eponymous Statement to which the preamble recalls, so that no one is unaware of it, that: “man *has a fundamental right to freedom, equality and satisfactory living conditions, in an environment whose quality will enable him to live in dignity and wellbeing. He has the solemn right to protect and improve the environment for the present and future generations*”. This Summit, called Earth Summit, will give rise to the United Nations Environment Programme, a specialized institution whose head Office is in Nairobi, Kenya. This Summit will also result in the adoption of a Declaration containing 26 Principles.

According to the Stockholm Declaration:*“ Man is both creature and moulder of his environment, which gives him physical sustenance …..The protection and improvement of the human environment is a major issue which affects the well- being of*

peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments".

In 1987, the World Commission on Environment and Development published the report entitled "Our Joint Future". This Commission known as Brundtland, (from the name of Mrs. Gro Harlem Brundtland who chaired it) devotes the term of *"sustainable development",* translated into French by "développement soutenable" then "développement viable" and finally "développement durable". This Commission proposes the definition of sustainable development, which is understood as "*a development which meets the needs of the present generations without compromising the capacity of the future generations to meet theirs".*

Two *consequences results from this:*

"the concept of "needs", and more particularly the essential needs of the most stripped ones, to whom the greatest priority should be given", and

- *"the idea of the limitations that the state of our techniques and our social organization forces on the capacity of the environment to meet the present and future needs".*

In 1989, the Brundtland Report was discussed at United Nations General Assembly, which generated the organisation of a conference on the topics of environment and development, based on the concept of sustainable development.

The Brundtland Report opened up the way for the work of the United Nations Conference on Environment and Development called **Rio Earth Summit** of March 22nd, 1992. This Conference will give rise to the Convention on Biological Diversity, to the Action Plan called **Agenda 21** [127], and to the United Nations Convention on the Fight against desertification, and to the Master Convention on climate change which will be amended in 1997 by the Kyoto Protocol (Japan).

127 Rio Conference was the opportunity to adopt an action programme for the 21st century signed by 173 states. This Agenda 21 or Action 21 is composed of 40 chapters and about 2500 recommendations. Therefore, it states recommendations in the following areas: poverty, health, housing, air pollution, seas, forests and mountains management, desertification, water resources and sanitation, agriculture management and wastemanagment.

Lastly, the principle of sustainable development was reaffirmed at the Johannesburg Conference from August 26th to September 4th, 2002. At the conclusion of that Conference, 190 States signed a Declaration on sustainable development aiming "*at ensuring a collective responsibility in order to boost and foster the interdependent links of sustainable development which strengthen one another (economic development, social development and environmental protection) at the local, national, regional and world levels*"[128].

B. The principle of sustainable development and "Agenda 2030"

It was on September 25th 2015, during a United Nations General Assembly that the 193 UN Member States determined 17 Sustainable Development Goals, stated as follows:

1. *End poverty in all its forms and everywhere in the world*
2. *Fight against the hunger: End hunger, achieve food security and adequate nutrition for all, and promote sustainable agriculture*
3. *Access to health: to give to individuals the means of carrying out a healthy life and promote the wellbeing of all at all the ages*
4. *Access to a quality education:* Make *sure that all have access to quality education and promote possibilities of life-long equitable and quality education*
5. *Gender equality : Attain gender equality by empowering women and girls*

128 That 3rd World Earth summit called Sustainable Development World Summit was held from August 26th to September 4, 2002. It gathered more than 100 states and about 1,500 NGOs. That conference was focused on sustainable development and gave birth an action plan with 153 articles on the following topics

- Access to water and reduction of water-bound stress.
- The energies file.
- La agricultural production.
- Animal species biodiversity.

6. *Access to clean water and sanitation: to guarantee the access of all to services of water provision and sanitation and to ensure a sustainable management of the water resources*
7. *Recourse to renewable energies: guarantee the access of all to reliable, sustainable and renewable energy services at an affordable cost*
8. *Access to decent employment: promote a steady, shared and sustainable economic growth, productive full employment and a decent work for all*
9. *Innovation and infrastructures: set up a resistant infrastructure, promote a sustainable industrialization which benefits all and encourage innovation*
10. *Reduction of inequalities:* Reduce inequalities among and within countries
11. *Sustainable cities and communities: create safe, resistant, sustainable cities and human settlements open to all*
12. *Responsible consumption: to found modes of sustainable consumption and production*
13. *Fight against climate change: to take emergency measures to fight against climate change and its repercussions*
14. *Protection of aquatic fauna and flora: to preserve and exploit in a sustainable way the oceans, seas and marine resources for purposes of sustainable development*
15. *Protection of terrestrial fauna and flora: preserve and restore the terrestrial ecosystems, while ensuring their sustainable exploitation, manage the forests in a sustainable way, fight against desertification, stop and reverse the process of soil degradation and put an end to the impoverishment of the biodiversity*
16. *Justice and peace: promote the advent of a peaceful and open society for purposes of sustainable development, ensure to all access to justice and set up effective, responsible and open institutions at all levels*

17. *Partnerships for the global objectives: revitalize the global partnership at the service of the sustainable development and strengthen the means of this partnership*

Based on the aforementioned, it results that sustainable development takes into account three inseparable dimensions, which are economic, the social and environmental ones. On top of these three dimensions are added the democratic or governance dimension. Therefore the principle of sustainable development, which was already implicit in Principle N° 3 of the Rio 1992 Declaration, tries to reconcile the need for development and the need for protecting the environment. This general objective which imposes an intergenerational responsibility can be divided into six specific targets.

1) To revive the growth without changing quality.
2) To provide for the essential needs in employment, food, energy, water and hygiene.
3) To ensure a viable level for the population.
4) To preserve and strengthen the basis of the resources.
5) To reorient technology and manage the risks.
6) To integrate the environment and the economy in decision-making.

In short, the development policies must aim at fighting against poverty, improving the economic and social conditions and at preserving biological diversity.

Countries also promise to fight against climate change. All the objectives integrate environmental protection. It is not either a question of abstract principles far away from the field realities: for better ensuring their follow-up, 169 precise indicators accompany these objectives. As regards means, the conference of Addis-Ababa held in July 2015 invited a broad coalition of public, local and private sector actors to mobilize themselves to finance the achievement of these goals, on the basis of a renewed commitment of the industrialized countries, in particular of the European Union, to devote 0.7% of their national income to official development assistance by 2030.

But it is especially the goal n°16 (SDG16) which particularly clarifies the connection between justice, peace and sustainable development.

II. Justice and Sustainable Development*:*

SDG 16 entitled “Justice and peace” aims at *“promoting the advent of peaceful and open societies for the purpose of sustainable development, ensuring to all access to justice and setting up, at all the levels, of effective, responsible and open institutions”.*

Accordingly, the judicial power, guardian of individual freedoms, has a very precise role to play for the achievement of SDGs in general, and SDG 16 in particular.

A. Ways and means of intervention of the Judiciary

In this respect, two ways are offered to acclimatize SDGs in States: the channel of the **nationalization** (incorporation of the international rules of law in the internal legal order) and the channel of **socialization** (information of the population and participation to the conservation of the environment).

Nationalization implies the consistency of the public authorities’ inclusive policies as well of the Executive, the Legislature and the Judiciary. At the level of the judicial power, a certain actions will allow the judges and prosecutors to absorb world or local environmental concerns, in correlation with the respect of the basic rights. First of all, because of the complexity and the special character[129] of Environment Law and Human rights matters, it is necessary to put the focus on sustainable development by introducing a training module at the Faculty of Law and the magistrates’ training schools.

In addition there is a requirement to regularly build the capacities of the sitting magistrates or prosecutors, in these fields because of the increasing solicitation of the

129 International Environment Law has many characteristics ; it is a young law as it dates from the end of the 19th century. It is a fragmented law composed of more than 300 international Conventions. But, above all, it is a law of reaction because most of the conventions and declarations have been adopted after accidents, either natural or caused by man. Therefore, after the oil slicks caused by oil spillages, after the nuclear accidents in Tchernobyl in 1986 or in Fukushima, Japon in 2011. It is the same with global warming, with the depletion of the ozone layer and deforestation in the Amazon Forest or the Congo basin in Central Africa.

judges, at the international and national levels, for the protection of the environment and the natural resources and the growing volume of the environmental law business, especially in the French-speaking space where the training of the magistrates stresses more the national private law.

In addition, one could think, with the specialization of the Public Prosecutor's Department and the sitting judges, about the creation of **environmental chambers** in the jurisdictions at the levels of judicial bodies, appeal and cassation to the image just like certain hybrid international courts of Sierra Leone, Kampuchea or the Extraordinary African Chambers of Dakar.

B. fields of intervention of the Judiciary

The concretization of the values of democracy, Rule of law and good administration of justice induce that the Judiciary become aware of its role and its responsibilities in the implementation, execution and the importance of sustainable development and on the obligation for any State, when it implements development projects (infrastructures like dams), to also adhere to the environment.

As the International Court of Justice affirmed it in 1996, "the *environment is not an abstraction but actually the space where the human beings live and on which depend the quality of their lives and health, including for the coming generations*"[130].

In a more explicit way, the environmental concerns are thus stressed in the *Gabčíkovo-Nagymaros case*, "*Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind –for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic*

130 ICJ, Lawfulness of the threat or the use of nuclear arms case Advisory opinion of June 8 996, Rec. 1996, p. 241.

development with protection of the environment is aptly expressed in the concept of sustainable development."

It is from this point of view that SDG16 "*Justice and peace*" comes in a certain number of indicators aiming at building more respect for Human rights and the values of democracy, Rule of law and good governance.

In a practical way, it is advisable to clearly reduce all forms of violence, ill-treatment of the women and the children and other vulnerable people; to promote the rule of law through legal service accessibility and availability, to fight against economic and financial delinquency, in particular corruption; to set up liable and reliable institutions and mechanisms allowing transparency, the accountability, resilience at all levels with both a preventive and a repressive approach; to guarantee public access to environmental information.

To promote and implement the laws and policies favorable to sustainable development, to master the nature and the different types of attacks against the environment as well as to provide for the compensations for **ecological** damage**.**

The judicial Power must use its capacity of interpretation of the national or international relevant texts to make the requirements for sustainable development prevail.

At the level of administrative jurisdictions, environmental protection must be prioritized in order to protect the health of the citizens they are responsible to in the implementation of infrastructure projects and public policies against the requirements of sustainable development. In fact, the administrative judge, in the framework of the appeal relating to the citizens and public service users' rights or in the execution of government contracts, will have to examine the compliance report between the provisions of the acts and public service contracts and the requirements for sustainable development[131], in particular those

131 Now, the principle of sustainable development is used in national laws. It was agreed upon in article L2 paragraph 9 of the Law n° 2001-01 of January 15th 2001 dealing with Environment Code (Legal Part). Similarly, according to Article L4 of the same text, every development project must take into account sustainable development.

related with the principles of the impact assessment on the environment[132], prevention, precaution and the polluter-pay principle[133].

With regard to the penal judge, his/her involvement is all the more necessary as it is also a question of cracking down on the authors of the various infringements to natural or human environment, by enforcing upon them the polluter-pay principle [134], and other aforementioned principles.

The intervention of the civil jurisdictions, pursuant to the relevant legislations in this field, is not negligible since it is necessary to order civil reparations by ruling for damages in favor of the victims of environmental damage.

As for the constitutional jurisdictions, either they intervene in advisory or contentious matters, in basic rights or electoral matters, or within the framework of the control of the constitutionality of the laws by court action or on an exception basis, their role is increasingly prevalent because of progressive constitutionalisation of environment law in general, and sustainable development, in particular.

The majority of the national Constitutions are, from now on, integrating environmental law in the block of constitutionality or in the *corpus juris*, following the example of the Senegalese Constitution of 2001, in its 2016 review.

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132 The Environment Code of Sénégal repeats the principle by defining consequently, in its 1st article § 17, the environmental impact assessment: « Every preliminary study *for projects aiming at setting up works, equipments, implenting industrial plants or farms or others, of programme plans allowing to assess the direct or indirect consequences of the investment on the environment resources* ».

133 In Sénégal, for example, the polluter-pay principle is also incorporated in the ENvironment Code in its article L2 paragraph 24 which specifie the polluter as « *every physical, or moral person emitting a pollutant that brings unbalance to the natural environment* ».

134 The principle was enunciated under number 16 in the Rio 1992 Declaration in these terms : " *national authorities should do their utmost to promote the internationalisation of environment protection costs and the usage of economic instruments based on the principle that it is the polluter who should normally pay the cost of pollution in view of public interest and without violating the rules of international trade and the environment"*.

This constitutionalisation of the environment is expressed in several provisions, in particular article 25-1, according to which *"the natural resources belong to the people. They are used for the improvement of their living conditions.*

The exploitation and management of natural resource must be done in transparency and in order to generate an economic growth, to promote the wellbeing of the population in general and also be ecologically sustainable.
The State and the territorial collectivities have the obligation to ensure the safeguarding of the real estate.".
Article 25-2 provide, in a more explicit way, that:
"*Everyone is entitled to a healthy environment.*
The defense, conservation and improvement of the environment fall on the public authorities. The public authorities have the obligation to conserve, restore the essential ecological processes, to provide for a responsible management of the species and the ecosystems, to conserve the diversity and the integrity of genetic inheritance, to require the environmental assessment of the plans, projects or programs, to promote the environmental education and to ensure the protection of the populations in the development and the implementation of the projects and programs whose social and environmental impacts are significant".

Lastly, article 25-3. states, lengthily, among the rights and duties of the Senegalese citizen, the requirements for respect of the environment and sustainable development, in these terms:
"*Every citizen is required to scrupulously adhere to the Constitution, the laws and regulations, in particular, to achieve his/her civic duties and to respect the rights of others. They must make sure they discharge their tax obligations and take part in the work for the economic and social development of the Nation.*
Every citizen has the duty to defend the motherland against any aggression and to contribute to the fight against corruption and misappropriation.

Every citizen has the duty to respect and to enforce respect for public property, but also to refrain from all acts likely to compromise public order, security, health and peace.
Every citizen has the duty to conserve the natural resources and the environment of the country and to work for sustainable development to the profit of the present and future generations.
Every citizen has the duty to register in the civil registry the acts related to them and those which are relative to their families under the conditions laid down by the law".

Ultimately, at the end of this study, it is advisable to remember the acuity of this reflection of the former UN Secretary-General Boutros-Ghali who was talking about the "square of the indivisible elements": "indivisibility of internal peace and prosperity, the indivisibility of international political security and economic security, the indivisibility of democracy and development as well as the indivisibility of environmental protection and sustainable development"

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UNITED NATIONS

SUSTAINABLE DEVELOPMENT

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I would like to thank the government of Argentina and to this group for their outstanding leadership in steering one of the vital objectives of the sustainable development agenda: that of building peaceful, just and inclusive societies.

Without peace, stability, human rights and governance based on the rule of law, we cannot hope for sustainable development.

We are living in a world that is increasingly divided. Some regions enjoy sustained levels of peace, security and prosperity, while others fall into seemingly endless cycles of conflict and violence. This is not inevitable and must be addressed.

We are living in a multipolar world where traditional dependencies are being realigned.

We are also living in an increasingly globalized and interconnected world: meaning that we are reliant on each other's success. To emerge from these global changes successfully, we need strong collective leadership. We need it now more than ever. And for this, we need to create strong alliances.

Rallying around the 2030 Agenda, and more specifically, Goal 16 and related targets, is a good strategic starting point.

Ten years ago, it was estimated that 4 billion people were excluded from the “rule of law,” meaning exclusion from both the opportunities and the protections that the law can provide.

This is a central problem in rich and poor countries alike, and addressing this exclusion is imperative for sustainable development.

The 2030 Agenda is unique in this respect as it is the first time we have a truly universal agenda. Countries in the global north as well as the global south stand in an equal playing field in so far as their commitments are concerned. The agenda applies to them equally, and there is always room for improvement.

Goal 16 – alongside the gender equality goal - is one of the most transformative goals on the agenda. It guarantees the structures that can ensure the achievement of other goals. For example, gender equality can best be guaranteed through ensuring that all women have access to justice and other government institutions that are inclusive, effective and accountable.

Goal 16 also promotes the reduction of homicides, poverty, unemployment, violence against women and children, and even of corrupt practices.

Corruption, bribery, theft and tax evasion cost some US $1.26 trillion for developing countries per year; this amount of money could be used to lift those who are living on less than $1.25 a day above $1.25 for at least six years.

So what is the “rule of law,” what do we mean when we are asking for this elusive set of rules and organizational principles that will help us unleash sustainable development?

The United Nations Secretary General has said in his report that the rule of law “refers to a principle of governance in which all persons, institutions and entities, public and private,

including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."

It requires, as well, "measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

Where do we start? To tackle these challenges and build more peaceful, inclusive societies, we need more efficient and transparent regulations put in place and more comprehensive and realistic government budgets.

One of the first steps towards this is to ensure universal birth registration. Only 73% of children under 5 years worldwide have been registered at birth, including about 4 million children across Latin America.

The Inter-American Court of Human Rights has, for several times over, provided advisory opinions and adjudicated cases securing the right to nationality and preventing persons from being rendered stateless. The Cartagena Declaration, followed by the Brazil Declaration and Plan of Action were groundbreaking in their attempt to stamp out statelessness in the region. Yet more needs to be done. With the recent migration crisis affecting the region, this number could soon rise significantly.

According to the United Nations Human Rights Council, the groups most vulnerable to non-registration of birth are undocumented migrants, refugees, internally displaced persons, indigenous and minority groups, due to structural discrimination.

According to UNICEF, in Latin America, while 39.2 per cent of children under 5 years old in the poorest quintile are not registered, the rate drops to 6.6 per cent in families with higher resources. So the link between development and birth registration goes both ways.

The role of lawmakers and courts in achieving the goal of legal identity and birth registration for all by 2030, in the region and worldwide, will remain significant for years to come.

Next is to ensure the independence of the judiciary. The Judiciary and the police do not immune to corruption and as those institutions in charge to fight it, sometimes they lack strength, capacities or independence to properly carry on with this task.

Unfortunately, in the last year alone we have seen the serious undermining of the independence of the judiciary, including the politicization of the selection of judges and prosecutors, resulting in serious political crises in several parts of the world. We have also seen limitations placed on the ability of Supreme Courts to review the constitutionality of executive decisions.

In order to support the work of the courts, we need the creation and effective functioning of independent national human rights institutions and the defense of fundamental freedoms around the world.

The UN Special Rapporteur on the rights to peaceful assembly and association, has recently spoken about the role of courts to review legislation and protect constitutional rights, and how this has consequences for real peace and stability.

To prevent violence, we need to ensure the space for difference. The core purpose of the rights to assembly and associate is to preserve the people’s ability to peacefully express

their grievances with political leaders. This may pose a threat to the Government's hold on power, but this should not be confused with a threat to the State itself.

We need to protect this space. According to UNEP, despite the fact that environmental rights are enshrined in over 100 constitutions around the world, in 2017, almost four people a week were killed defending their right to a clean and healthy environment and so far, in 2018, around 50 environmental defenders have lost their lives. We must to do more to protect our constitutional rights, which means also protecting those who defend them.

We must also do more to protect our citizens from violence. Today, and estimated 603 million women live in countries where domestic violence is not considered a crime.

At the global level, nearly 1 person is forcibly displaced every two seconds as a result of conflict or persecution. Today, the total number of forcibly displaced stands at 68.5 million, with 85% being in the developing world.

One key way forward to prevent further displacement and ensure the safe return of those displaced is to pursue accountability and justice for the crimes that led to the displacement in the first place. The role of international courts in this regard is clear, but national courts can also play their part.

In 2016, a court in Guatemala proved just how powerful this approach can be. as it successfully tried and convicted sexual violence as a crime against humanity.

Let's remember that to achieve this, several practical steps were needed. Legal support to ensure the women's participation in the process, psycho-social assistance to empower the women so they could process the facts and be able to testify, physical security to protect them from a backlash, and a communications campaign to raise public awareness about their case.

This had a profound impact on the victims and their community, whose perception of citizenship was transformed: from feeling forgotten and marginalized by state institutions, they felt included and even defended by institutions whose role was to protect their rights.

We need more examples of this. And more of the support that enabled the case to go ahead. In the Central African Republic we may be close to seeing a ground breaking moment for the role of national magistrates in forging peace and stability in the country as the new Special Criminal Court is starting to be operational.

It's clear that from conflict to non-conflict settings, high levels of violence and insecurity have a destructive impact on a country's development. As well as impacting economic growth, this often results in long standing grievances that can result in instability for generations.

The 2030 Agenda, and SDG 16 in particular, aim to significantly reduce all forms of violence, and work with governments and communities to find lasting solutions to conflict and insecurity.

Strengthening the rule of law and promoting human rights at national and international levels is key to this process. And the role for judges and lawmakers in achieving sustainable peace and development has never been greater.

In September 2019, heads of state and government will gather in New York to review the first four years of the 2030 Agenda. They will provide high-level political guidance on the agenda and mobilize further actions to accelerate implementation.

A few months earlier, in July 2019, a ministerial High-level Political Forum will review SDG16. It is imperative that in this moment, we show our leadership and build a momentum around SDG16. We have a limited window to strengthen and empower the

movement for justice, and our time is now. We must seize it for the sake of achieving our common global goals and advancing ourselves and generations in decades to come.

STRENGTHENING THE RULE OF LAW

GERMANY

STRENGTHENING THE RULE OF LAW

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Summary
A key requirement for the "Rule of Law" to be effective is law's acceptance by citizens. This article focuses on the importance of the acceptance of law, its application, as well as its enforcement for the Rule of Law. Further, this contribution explores the conditions for the acceptance of law as well as the risks they face. For this, the distinguishing characteristics of the three branches of government will be considered and examined.

The topic of this forum is manifestly complex. Thus, it can virtually be explored from a kaleidoscopic perspective, adopting a plurality of approaches. Here I want to address the acceptance perspective, as it seems to be one of the crucial factors securing the Rule of Law.

I. On the acceptance of law

The acceptance of law by the people is essential for the existence and the functioning of a State, as well as the way it operates. This is the reason why it is a main important criterion for the action of the three branches of government.

1. A modern legal order cannot generally do without the enforcement of laws through mandates and coercion, in the sense of an understanding of the State as a sovereign authority. This particularly refers to those fields of law the provisions of which must be applied even against the majority and the consensus of the people, or where total submission to law is required.

Of course, respect for law and compliance with the law cannot be only based on mandates and coercion –palpable at first sight– since, in essence, this would neither match the concept of a liberal and democratic State governed by the Rule of Law nor be, in fact, realizable. Hence, a law can normally gain factual legitimacy in a society only when law reaches broad consensus, and the majority, as a rule, willingly comply with it. This basic condition is unavoidable for any state community. Through essentially willing compliance with laws, a legal order is conferred legitimacy within the domain of the modern State.

This picture is also reflected in an allegory by Roman Herzog (1934-2017) –who served as President of Germany and as Chief Justice of the Federal Constitutional Court– which reads as follows: if a State had to post a police officer for every two citizens to compel them to comply with the laws, it would need for every third police officer a fourth one to watch the other three. No State is capable of achieving this[135].

2. Thus, acceptance and understanding among those subject to law are normally needed in order to make law effective in the interest of securing freedom and legal peace, and as a means for coexistence.

The law-making process, which leads to acceptance among the people, on the one hand increases confidence in the legal order, and on the other hand strengthens the law in force. On the contrary, lack of acceptance leads to a decrease in public confidence in the Rule of Law; it also entails a risk of perpetuating inequality before the law, as well as of it

135 HERZOG, "Von der Akzeptanz des Rechts". In: *Freiheit und Verantwortung im Verfassungstaat*, pp. 127-128.

extending to other areas of law, thus leading to a weakening of the Rule of Law at all levels.

In this regard, justice is attached especial importance. However, it is impossible to determine its precise meaning that is valid for all disciplines and for all spheres of life, which is not the object of this presentation. For instance, according to Gustav Radbruch (1878-1949), one of the most influential philosophers of law in the twentieth century, law is the sum of the general arrangements for human coexistence and the reality the meaning of which is to serve justice.

If within this context we have in mind that the central mission of law is achieving an adequate balancing of frequently opposing interests in a pluralist society, then this is the content and measure of –in any case– a legal justice. Acceptance of law is here one of the limits on interpretation –when the action of the legislative, executive and judicial powers goes against the majority opinion in society, thus against its perception of law, public confidence in the legal order is undermined, which leads to a decrease in it. On the contrary, if law is aligned with the general axiological conception of law stemming from the majority public opinion, this would not only be an expression of its proximity to citizens, but also, in any event, a sign of the rightness of the content of law, and thus of equity in the application of law. On the other hand, we should not lose sight of the fact that an extremely strict general law's coupling with the public feeling on law may come into conflict with democratic principles, particularly when, as a result, protection of minorities –one of the pillars of democracy itself– may be put at risk.

3. People's acceptance of law and willingness to accept law are closely related to individuals' own reasons, as well as to their capacity for understanding and for tolerance, which is subject to changing, developing social, environmental and economic frame conditions that lead to a change in society's conception of values, justice and rightness. Not unfrequently does society become more prone to acceptance than before. Nevertheless, the increasing number of individual conceptions in the face of social or

collective axiological ideas, the greater and –to some extent– complex challenges facing individuals due to constantly changing curriculum requirements in a global environment, and digital development will indirectly result in a decrease in the rate of acceptance of law, contributing to a loss of public confidence in legislation, politics and justice. At the same time, this raises the acceptance threshold necessary for any State to be legitimate.

This –extremely worrying– state of development may be reflected by a growing public criticism directed against justice not only from the citizenry but particularly from politicians, criticism that any State governed by the Rule of Law must be prepared to receive and face. However, this phenomenon simultaneously raises important issues concerning separation of powers, mutual respect among the three branches of government and effective protection of the law, with which, in the end, the authority of law and its standing would particularly be affected. In this sense, this is unfortunately a quite widespread phenomenon, as outlined by many headlines in the media, or statements made by national and international politicians.

4. Therefore, the legislative and judicial powers are increasingly imposed –whether consciously or unconsciously– a duty to justify and state the legal grounds for their decisions in terms of their rightness and equity, which is not always achieved in line with the majority opinion. But regretting it is not the object of this presentation. Rather, we will address the shaping factors of acceptance, that is to say, the grounds for social acceptance of the legal order and laws of a State governed by the Rule of Law, and the potential risks that may contribute to a loss of respect for and public confidence in the legal order. These factors depend at first on the enactment and content of legal rules, as well as on the way they are presented, implemented and passed on to citizens. Moreover, they find expression in the way the law is enforced.

II. The Legislative Power

Acceptance of law and realization of justice create an obligation –in the first place– for the legislature.

1. In this respect, an essential shaping factor of acceptance is cognizance of law, and thus the scope of legal rules in force as well. The increasing number of laws, the vast volume of legal rules, the huge amount of case-law developed on a case-by-case basis, and the language used by law may all lead to a certain lack of clarity in the legal system. Nonetheless, when individuals cannot understand law anymore, this situation creates a loss of public confidence in law and a feeling of strangeness about it.

Consequently, the need for a law should be carefully considered in the interest of possible alternative state measures, since a primary aim of modern legislation is –as rightly notes German constitutionalist Paul Kirchhof[136]– to decide which areas should be left to individual freedom or autonomy, and which behaviours should be strictly determined by law for the sake of public confidence. Laws are no panacea for every problem, and this is the reason why they should be considered as an *ultima ratio*. Otherwise, they would tend to achieve an end opposed to the one precisely intended, that is to say, to impart justice.

2. Within the sphere of the legislative activity, not only passed laws but the process of creation of law, in other words, the 'how' of the law-making process, are decisive for acceptance and willing compliance by individuals.

This implies that the legislator should not only explain in advance the reasons behind legislation, as well as the purpose and end of legal rules in order to make citizens aware of the underlying issues involved and of the possibility of their being affected by the regulation intended; particularly, he or she should also welcome and carefully examine possible objections and initiatives. Such transparency of the law-making process is imperative for success, thus for acceptance of law.

136 KIRCHHOF, *Die Bestimmtheit und Offenheit der Rechtssprache*, 1987, p. 25.

However, public participation in the law-making process is often realized not through the action of individual citizens or those affected by regulation, but through the action of groups defending the interests of their members against the legislator. Basically, there is no reason to raise any objections to this, for such concentration of individual interests may not only contribute to their voices being heard within the framework of the law-making process, but to a wider acceptance of a certain law by exerting some influence on the result of the legislative process, though this influence from interests within this context should be transparent to outsiders, so as not to convey an impression of a 'clientelist politics'. The lack of this transparency is sometimes observed.

3. Apart from the materialization of law, its content is especially decisive, since the correspondence between such content and individuals' convictions together with their consent are both essential shaping factors of acceptance. Furthermore, acceptance can be gained by virtue of creating the impression of reaching fair, proportionate –or at least justifiable– solutions to conflicts of interests, since in a pluralist society we cannot always expect consensus about the contents of law.

Hence, the most pressing mission of the legislature is to adopt legal regulations that should be impartial, properly weighing competing interests, in order to achieve acceptance and realize justice. This ideal conception of the contents of law is increasingly at risk.

(a) Frequently, the legislative process is based on political power decisions as a proof of political success, or –in being faced with the need to act with urgency and under temporal pressure, e.g. when there is an election coming up– ends in a result which proves to be poor in terms of legislative technique and the language used, or which requires repeated amendment. This phenomenon, which may be observed, for instance, in German tax law or social legislation, not rarely has a negative impact on the quality of the law's content, circumvents the legal order and leads to a loss of prestige among the people.

(b) Legislation influenced –as often happens– by interest groups regularly runs counter to the ideal described here, too, and it can only achieve consensus or acceptance when any biased content of law or that favouring influential groups is avoided, for such legislation is perceived as neither fair nor defensible nor proportionate from an individual perspective. If the lawmaker only adheres to the opinion of a single group, then this leads to loyalty from and acceptance of law by this group only. Consequently, the legislator will no longer be able to unconditionally rely on the voluntary fidelity to law on the part of third groups. On the other hand, the legislature faces the risk of not being taken seriously if it passes laws for a majority in absence of any recognition factor.

The exercise of influence by interest groups simultaneously raises the issue relating to the (potential) risk of corruption among the organs participating in the legislative process. Any sort of pressure exerted on the legislative process by means of payments of any kind for the benefit of certain (one-sided) interests is clearly in opposition to individuals' trust in legislation and to its prestige among the people. Many times, 'a bad appearance' is already enough to cast doubt on the willing compliance with the law. If, in addition to this, we consider the existing tolerance towards corruption or the non-prosecution by the State of corruption cases, this phenomenon shakes the foundations of the Rule of Law, which may lead to a steady erosion of the people's trust in other spheres of law as well, and promote that the law's inequity should become the rule.

4. In close connection with the acceptance of law, there finally appears the way law presents itself to each individual. As a matter of fact, law standards of clarity and intelligibility are not only a means to account for and promote acceptance, but also, primarily, constitutional mandates.

(a) In this regard, comprehension and understanding of the necessity and the reasonableness of a law are decisive for the individual who should be voluntarily subject to a legal order. Nevertheless, cognoscibility and accessibility of current legal rules are

affected in many cases by deficiencies in legislation, deficiencies which may find expression in the existing extensive catalogue of legal norms, the opacity of the legal system and the legal language used.

(b) This is notably owing to the fact that legal rules are frequently shaped by case-law developed on a case-by-case basis, that is to say, individual norms which have their origin in the search for justice in an individual case, which is certainly in principle understandable in order to find an appropriate legal solution to each problem and to each conflict. However, at this point we often lose sight of the fact that laws must primarily lay down rules for the future which can also be applicable to new cases not envisaged by the law. Individual case rulings will never be a complete regulation, and the greater the difference among them and the more extensive and complex they are, the greater the legal uncertainty they lead to. Thus, the legislator's original intention to create justice normally turns into the opposite to the detriment of justice. The lawmaker then works within the context of a strained relationship between malleability and rigidity of law, whose boundary is difficult to establish, an issue which, according to Paul Kirchhof[137], has today become a dominant topic in juridical science.

c) Another problem connected with this arises when the legislature uses individual cases as a basis for legislation, since this not unfrequently disregards the Anglo-American legal principle that reads: "hard cases make bad law". According to it, extreme individual cases cannot provide a sound basis for general, all-embracing laws, which, through equitable legal provisions, must achieve an adequate balancing of interests. However, on a case-law level, this principle may turn into its opposite: "bad laws make hard cases", as we will see later.

III. The Executive Power

137 *Loc. cit.*

Of no minor importance for the question of the force and effect of law is the Executive Power.

1. This is undoubtedly so as long as the Executive itself has legislative powers in matters concerning State-citizen relations as well as internal regulatory matters of State administration (for example, administrative regulations or rules). In this case, the Executive is subject to the same shaping factors of acceptance as the Legislative as regards the implementation, content and presentation of rules. But we will not focus on this issue here, so this is why I will allow myself to refer at this point to the prior explanation. Rather, I want to address the following aspects which have lately gained importance, not only in Germany.

2. In the first place, the Executive Power must, for its part, abide by the law and rules as long as citizens are expected, as well, to accept and willingly comply with the law. What is more, this commitment to law, which is enshrined, *inter alia*, in German domestic constitutional law (Art. 20.3 of the Basic Law), has also won importance, for if the Executive, for its part, does not obey legal rules, or applies them unequally in the framework of the relationship between State and citizen, this will undoubtedly lead also to a loss of law's prestige among the people. No State can expect voluntary fidelity to law and willing compliance with the law if it does not submit itself to law. The requirement of equal treatment imposed by the people is an essential criterion for a fair political order. If equal protection of the law is guaranteed, then the content of law can be acceptable to the individual in terms of its general validity and lead to a strengthening of the law.

This compels us not only not to do without the law, but to contribute to its enforcement – not only in accordance with its wording, but also with its sense and purpose–, even if it cannot be harmonized with individual conceptions of rightness and values. The State has the right to enforce the law. Even though the individual citizen may remain sceptical about certain legal rules, he or she will willingly comply with them and assimilate them with faithful commitment when third subjects also abide by the duties imposed by law.

Nothing entails the risk of a loss of prestige among the people to a greater extent than does a law which, though written and allegedly valid, is not enforced. This also means not to suspend law enforcement in accordance with the regulations in force in sub-spheres – for instance, for reasons of opportunity or political reasons. The individual subject to the law will no longer accept legal restrictions or obligations imposed upon him or her if law in a particular field is enforced in a consistent manner, while in other spheres it is either applied with laxity or not applied at all for the benefit of third parties. Legal peace and legal certainty, as factors promoting acceptance, can be regularly maintained only if the individual citizen can expect both the State and the others to behave in accordance with law.

3. Nevertheless, inappropriate criticism against the Judiciary by members of the Executive can damage law's validity and prestige, and shake the confidence of the people, as well, although being able to address the issue concerning the Judiciary, its possible mistakes and its decisions in individual cases also from a critical point of view forms part of the foundations of a democratic and liberal State governed by the Rule of Law. However, these foundations are undermined and the boundaries of objective, legitimate and necessary criticism are overstepped when this criticism calls into question the legal regime regulating the institutional powers of the State and the mutual respect among the three branches of government.

4. The loss of law's prestige and of confidence in the Rule of Law created by this behaviour grows greater when there is a lack of (peaceful) enforcement of judicial decisions by the Executive, which puts the boundaries of the Rule of Law to the test, in words of the President of the High Administrative Court of North Rhine-Westphalia. If the legitimacy of judges and their decisions is brought into question –whether for political or other reasons–, e.g. through public statements or even non-compliance, doubts arise over democracy, the Rule of Law and effective legal protection. The individual citizen will neither willingly comply with legal rules nor display loyalty towards the State if he or she cannot effectively assert his or her rights before the court.

IV. The Judicial Power

This brings me to the last point of discussion, which is surely of the greatest interest to local participants –acceptance of judicial law-making, compared with that of the Executive, bears a close relation to the way law is enforced, for men and women judges speak through their judgments. However, when judicial decisions constantly go against the majority opinion (about justice) of the people or are unintelligible, this may lead to a loss of acceptance of the Judiciary and of law.

1. Consistent –and correct– application of laws by independent courts enhances public confidence in law, for legitimacy, longing for justice, and legal certainty are, as Radbruch rightly states, justice requirements[138]. It is also a decisive factor that judicial decisions should be persuasive, legally reasonable and intelligible. If a judicial decision is not grounded on reasons that are intelligible to people, as it is not aimed at the individual citizen seeking justice, who cannot understand it, then acceptance of law and confidence in the judiciary are undermined. Besides, the judicial decision-making process must be devoid of political elements, that is to say, it must neither be an inappropriate vehicle of political discourse nor allow despotism on the part of judges. In other words, judges cannot, for instance, determine which is the general perception of law on the basis of their own, or make any interpretation of legal provisions by putting a gloss on them in such a way that the interpretation result should be in conformity with their own –rather than with the legislator's– convictions.

2. Judiciary's independence is of especial importance, a principle which also applies to judges themselves. If they give up keeping their due distance from the parties and, instead, they further the interest of one of them in the adjudication of a case, no independent decisions are reached any more, which is generally incompatible with the public perception of law. En this sense, institutional protection of judicial independence is

138 RADBRUCH, "Neue Parteien – Neuer Geist". In: *Rechtsphilosophie*, 1973, p. 339 (340).

necessary as well. In particular, courts must be safeguarded against undue influence from the Executive branch both in the content of judicial decisions and in the proceedings.

3. However, such independence implies neither that the letter of the law is subject to the arbitrariness of courts, nor that judges can easily orientate themselves towards the general perception of law. Judges, in order to ensure acceptance, and therefore, in the end, their own independence, will have to apply methodological principles, especially when faced with areas unregulated by law.

In this sense, it is for courts, as the result of a decision-making process, to achieve an adequate balancing of interests if they are allowed an adequate margin of assessment or appreciation. Only in this way will it be possible to prevent unfair results when interpreting laws, and courts will be encouraged to examine the resulting decision taking into consideration an adequate balancing of interests. This idea is already reflected in German law, in the intention of the legislator in drafting the Civil Code, which reads that *"the opinion of all those who think in terms of justice and equity"*[139] may provide an appropriate criterion for interpretation. Likewise, the Federal Supreme and Constitutional Courts' case-law also focuses on *"the community's well-founded general ideas of justice"*[140] or on *"general considerations as regards justice."*[141]

Notwithstanding the above, the room for argumentation oriented towards ideals of justice is still insufficient. Particularly, courts cannot disregard the letter of the law or any considerations on justice introduced by the legislator, and replace them with their own –in this respect, they must operate within the boundaries of law. Hence, the conflict between justice and legal certainty may well be resolved, according to Radbruch, by taking into account that the positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between

139 Preliminary Recitals of the Civil Code, vol. II, p. 727.
140 BverfG, *NJW* 1973, pp. 1221, 1225.
141 BGH, decision of June 19, 1962, I ZB 10/61, *NJW* 1962, pp. 2054, 2057.

statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice.[142]

Consequently, interpretation standards in law serve as argumentative instruments for supporting decisions and beliefs. They provide courts interpreting the law with grounds upon which they might make different interpretations of a legal rule. Therefore they are elements inherent in the judicial decision-making process, the result of which should cause persuasion as well as be rational and reasonably founded in order to encourage acceptance among the parties involved and the people.

142 RADBRUCH, *op. cit.*, pp. 339 (345).

GERMANY

THE ROLE OF CONSTITUTIONAL JURISPRUDENCE IN THE DEMOCRATIC STATE UNDER THE RULE OF LAW

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Key points

1. In a modern and democratic state under the rule of law, all acts of state authority must be *acts governed by law*.
2. The constitutional court serves as an indispensable guardian of the unobstructed and seamless functioning of the democratic state under the rule of law.
3. A robust and efficient constitutional court will fail to deliver on the expectations placed upon it – and fail to effectively strengthen the rule of law – unless the following conditions are met:
   - the court must be on equal footing with the other constitutional organs;
   - it must be vested – unequivocally – with constitutional jurisdiction;
   - there must be a clear understanding of the responsibilities of the constitutional court within the institutional order;
   - it must be ensured that the decisions of the constitutional court are executed.

I would like to begin my remarks by comparing two quotes that may appear contradictory at first.

I. “*Parliament* is the centre of democracy.” This straightforward statement was made by Paul Kirchhof, a German professor of constitutional law and former Justice of the Federal Constitutional Court[143]; he writes:

“Modern constitutions set out institutions, procedures and substantive restrictions to ensure, to the greatest extent possible, that the decision-making of the state draws on all the knowledge available within society and refrains from arbitrary conduct.”

The substantive restrictions mentioned above which bind public authority – that is to say, the state – are primarily enshrined in human rights guarantees, whereas the relevant institutional and procedural safeguards are mostly intended to ensure that all decisions of the state can be traced back to the will of the people; in this regard, Article 20 section 2 of our Basic Law expressly states:

“All state authority is derived from the people.”

The system of government adopted in the Federal Republic of Germany is that of a *representative democracy.* This means that the political will of the people is manifested by way of an elected assembly that represents the people and is vested with autonomous decision-making powers. Thus, what the above quote refers to is that “Parliament is the centre of *decision-making* of in a democracy”.

II. The *Government of Judges*: This is the title of an essay by French law professor Édouard Lambert published in 1921[144]. In it, the author provides a critical analysis of the evolution of the US Supreme Court’s jurisprudence. Lambert discusses the excessive judicial review of statutes on the basis of the Constitution to the effect that the constitutional court usurps the powers of a “substitute legislator”. This ultimately leads to – here I am quoting the German professor of constitutional law, legal philosopher and former Justice of the Federal Constitutional Court Ernst-Wolfgang Böckenförde[145] – “a shift from a parliamentary state ruled by the legislature to a judiciary state ruled by the constitutional court.”

143 *Paul Kirchhof*, Das Parlament als Mitte der Demokratie, in: Der Staat des Grundgesetzes - Kontinuität und Wandel, Festschrift für Peter Badura (2004), pp. 237 et seq.

144 “Le Gouvernement de Juges et la lutte contre la legislation sociale aux États-Unis” (Paris 1921).

145 *E.-W. Böckenförde,* Zur Lage der Grundrechtsdogmatik nach 40 Jahren Grundgesetz, 1989, pp. 61 and 62; id.: Gesetz und gesetzgebende Gewalt, 2nd ed. 1981, p. 402.

III. If, on the one hand, *Parliament* is referred to as the centre of democracy – yet, on the other hand, there is talk of a *Government of Judges* – one may rightly ask: where then is the place of the constitutional court in a democratic state under the rule of law, and what role does it play in detail? Is it true that, indeed,[146] – and I quote – "it is the peculiar nature of the highest courts that they occasionally erect barriers that no political majority decision nor diplomatic skills can overcome"?

This discussion can be traced back to the very origins of constitutional jurisprudence. The President of the Federal Constitutional Court, *Andreas Voßkuhle*, even refers to certain "natural tensions" which arise between the political sphere and constitutional jurisprudence[147].

IV. A robust and efficient constitutional court will fail to deliver on the expectations placed upon it – and fail to effectively strengthen the rule of law – unless the following conditions are met:

1. As an institution, a constitutional court must be truly independent if it is to exercise its assigned functions; otherwise, the court's decisions will fail to secure the necessary level of acceptance. It is an essential, fundamental and indispensable element of the rule of law that state authority be limited by means of an autonomous court, a court that, *by virtue of being a constitutional organ itself*, stands on equal footing with the other constitutional organs.

Thus, the relations between national constitutional organs must be informed by mutual respect. The fact that some of the Federal Constitutional Court's decisions may occasionally face criticism, most notably on the part of politicians, does not merit a different assessment. Such criticism is an inevitable (and, it would seem, an almost necessary) consequence resulting from the oversight function vested in a constitutional court. It also reflects the tensions mentioned above which permeate the relation between politics on the one hand and constitutional jurisprudence on the other. As manifestations of a critical, albeit factual and objective dialogue, this is a reality that an institution such as the Federal Constitutional Court must live with and, when appropriate, confront.

146 So Christian Tomuschat, EuGRZ 2015, 133.
147 For an in-depth analysis of this topic, cf. *Andreas Voßkuhle*, in: vMangoldt/Klein/Starck, Kommentar zum Grundgesetz, Art. 93 paras. 35 et seq.

2. Unequivocal powers of constitutional jurisdiction: The functions of the Federal Constitutional Court are clearly set out (Article 93 of the Basic Law) and can be summarised in one sentence as follows: the Court ensures observance of the Basic Law of the Federal Republic of Germany. As an institution that is explicitly mentioned and emphasised in the Basic Law, it oversees the observance of the formal and substantive constitutional requirements.

First and foremost, it does so in respect of the enforcement of the *fundamental rights* of individual persons. For this, the key mechanism is the individual constitutional complaint – considered by some[148] as the "Queen of all roads leading to the Constitutional Court" –; a constitutional complaint may be lodged by any person who believes that their fundamental rights have been violated by an act of public authority. In addition, the Federal Constitutional Court is tasked with resolving disputes between constitutional organs as regards constitutional rights and duties (in so-called *Organstreit* proceedings) or federalism disputes between the Federation and the *Länder*. Other types of proceedings include the abstract judicial review of statutes[149] as well as the specific review of statutes[150].

b) In this context, the status of law in general and the status of constitutional law in particular merit special emphasis. In a modern and democratic state under the rule of law, the acts of all state authority must always be acts governed by law; this concept of *the rule of law* is pronounced quite distinctively in the Basic Law, and already the philosopher Immanuel Kant famously described the relation between law and politics perfectly aptly[151]:

"The law must never be adapted to politics, but politics to the law."

In other words: society must deal with the existence of diverse – often conflicting – interests and the political influences resulting therefrom. It is the primary function of a constitution, and by extension that of a constitutional court in its capacity as guardian of the constitution, to make sure that no political group has the power to bend the law – and

148 *Peter Häberle*, Jahrbuch des Öffentlichen Rechts, new edition/Volume 45 (1997), 89, 112.
149 *Upon application of the Federal Government, a Land government, or one fourth of the Members of the Bundestag*.
150 *Upon referral by a regular court*.
151[9] Cf. „Immanuel Kant's Sämmtliche Werke", v. G. Hartenstein (ed.), 7th Volume, p. 311.

particularly not constitutional law – at its own discretion and for its benefit. As a consequence, the Basic Law contains *irreversible decisions on constitutional values* that are laid down in Article 79 section 3 of the Basic Law and that subject acts of state authority in any form to absolute limits. Enshrined in the so-called "eternity clause", the foundations of our nation – specifically: the rule of law, democracy, human dignity and the principle of federalism – cannot be abolished, not even by way of constitutional amendment.

c) Last but not least, the effect and influence of constitutional jurisprudence are inextricably linked to the status of the respective constitutional court justices and their understanding of the office they hold. In Germany, Constitutional Court Justices are elected in a democratically legitimated process[152]; re-election is not permissible, ensuring that during their term of office Justices render their decisions in a free and independent manner. The Justices of the Court are even known to invoke a "duty to remain ungrateful" towards the political faction upon whose proposal they were elected into office. In this respect, it is imperative to make a clear distinction: there is no doubt that the jurisprudence of the Federal Constitutional Court has a political dimension, and necessarily so, as it is called upon to decide matters that originate from the political sphere – a prime example are legislative acts of a Parliament which is dominated by the respective political majority – and also because the resulting implications and consequences of the Court's decisions reach well into the political sphere – just consider the nullification of laws, the delineation of competences between the different constitutional organs, the protection of parliamentary minority rights, or the clarification and shaping of constitutional principles such as the social state principle. Constitutional law is by necessity "political law". Yet, by no means do Constitutional Court Justices render their decisions in a "political" manner in the sense that they might favour one political faction over the other.

3. A clear understanding of the responsibilities of the constitutional court within the institutional order: In addition to the review of acts of the executive and the judicial branch, the Federal Constitutional Court is tasked with the oversight of the "centre of

152 *Half of the justices are elected by the Bundestag, half by the Bundesrat; the right to propose eligible candidates rests with the political parties.*

decision-making" as such, most notably with regard to the constitutionality of laws adopted by Parliament.

a) In principle, such review is contingent upon an *application*; the Federal Constitutional Court does not have the power to act on its own initiative for the purpose of volunteering its view on certain constitutional matters. It follows that the Court never renders an opinion "in the abstract", i.e. outside the scope of specific proceedings. Rather, the Court invariably decides only the specific matters brought before it by way of those types of proceedings set out in the applicable constitutional procedures (and subject to compliance with the applicable formal requirements); most notably, this concerns cases submitted by way of constitutional complaint, the specific judicial review of statutes or *Organstreit* proceedings. This mechanism proves to be rather effective in preventing the Constitutional Court from exceeding its mandate. Within the system of the separation of powers, the Constitutional Court may thus assert its role as guardian of the Constitution and ensures observance of constitutional standards; it is, however, barred from exceeding the powers that the Constitution directly confers upon it.

b) As regards the relevant laws and acts of public authority brought before the Court, the applicable standard of review is the Constitution – one almost wishes to add "the Constitution alone". This, too, serves as an important safeguard for ensuring that the Constitutional Court is able to discharge its actual functions, namely to act as the guardian of the Basic Law and to secure its primacy. This means the following: the Federal Constitutional Court will not intervene unless there is a violation of "specific constitutional law"[153]; this is the case when the legislative basis of the challenged act is unconstitutional; the application of ordinary law seems arbitrary; fundamental procedural rights – such as the right to one's lawful judge or the right to be heard – are affected, or courts have crossed the boundaries of judicial law-making.

aa) As far as the judicial review of statutes is concerned, the Constitutional Court has the exclusive power to set aside laws, and thus holds a monopoly in declaring legal provisions unconstitutional. This is due to the deference accorded to the legislature,

153 For instance, cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 53, 30 <53>: the Federal Constitutional Court shall not evolve into a "supreme instance".

which initially gave shape and effect to the relevant legal provision by way of a democratically legitimised process. It is not up to the regular courts, but solely incumbent upon the Constitutional Court (a constitutional organ in its own right), to void such a legal provision – as it were, in the manner of an "act of reversal" (*actus contrarius*).

bb) The Federal Constitutional Court allows the legislature broad latitude and discretion with regard to determining which legal provisions, if any, are necessary, politically sensible as well as reasonable and expedient in society, and furthermore which regulatory approach from among the available options appears to be the most equitable. In principle, it is thus up to the legislature and only the legislature to decide how to best exercise its functions. The significant latitude on the part of the legislature – as the centre of decision-making in a democracy – corresponds to restraint on the part of the Constitutional Court when exercising its judicial review.

4. Finally, in its capacity as national constitutional court, the Federal Constitutional Court cannot remain a "toothless tiger". Its decisions must be fully adhered to and implemented to the extent necessary, given that the judgments and orders rendered by a constitutional court have considerable importance and bearing for the affected areas of the national legal order. This is especially true if the court concludes that the legal provision submitted for review is not compatible with the constitution.

In order for them not be reduced to mere statements of invalidity or incompatibility, it is necessary to ensure that the decisions of the Federal Constitutional Court are duly recognised in legal practice. To this end, any findings on the merits issued by the Federal Constitutional Court, including the operational part of the decision and its key considerations, are binding upon the other constitutional organs of the Federation and the *Länder*, as well as upon all courts and public authorities of the Federal Republic of Germany. This implies that all public authority must not only comply with these decisions when applying and implementing the law, but also create the overall conditions necessary to satisfy the requirements set out by the Federal Constitutional Court.[154]

154 *In decisions on the merits that are rendered in certain types of proceedings (most notably, abstract and specific judicial review proceedings, § 95 section 3 of the Federal Constitutional Court Act), and where*

Moreover, as “the master of executing judgment”, the Federal Constitutional Court asserts the power to make any orders necessary in order to give effect to its decisions rendered on the merits of a case. This must be seen in light of the fact that the function of the Court is not limited to reviewing the constitutionality of laws referred to it and, where appropriate, voiding them. Rather, in the spirit of its status as a constitutional organ, it is the specific responsibility of the Federal Constitutional Court to ensure that the legislature remains bound by the Constitution and that the Court’s decisions are effectively implemented with regard to how the law is applied in practice.

III. These were but a few remarks on the understanding of the role of constitutional jurisprudence and its place within the institutional order as well as on the “Government of Judges” in national and supranational constitutional law. Nevertheless, allow me to draw a brief conclusion: not only does the Federal Constitutional Court expressly recognise Parliament as the “centre of decision-making in a democracy”, it also protects Parliament against shifting competences to the supranational level – beyond what is permissible under our Constitution –, and it further aims to strengthen democratic processes within and outside Parliament. Even though constitutional jurisprudence cannot (nor would it want to!) claim for itself the “centre stage of decision-making”, it nonetheless serves as an indispensable guardian of the unobstructed and seamless functioning of the democratic state under the rule of law. Ultimately, this is in line with the ambition inherent in every modern constitution: to establish a stable legal order, and – by means of constitutional jurisprudence – to preserve it in the long term. Especially in times of crisis, the judicial branch often remains the only state authority in which the people still have confidence, while the other two branches of government possibly lost their trust long ago. This is why constitutional jurisprudence is met with high expectations on the part of the people. Let this be encouragement to all those national constitutional courts – some established only recently – which are still struggling to secure their status and recognition

such proceedings pertain to the validity of a law, the operative part of the decision is even deemed to have the force of law.

within their institutional state order, so that they may ultimately be empowered to assert their proper place.

ITALY

STRENGTHENING THE RULE OF LAW

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Summary

The respect of the *rule of law* is not a mere theoretical concept, but a set of practical principles that all judges are required to enforce, and that supreme Courts are required to ensure. Legality means not merely the respect of fundamental principles, but also that of rules that facilitate the protection of rights, the right to a fair trial, to an efficient organization of justice and reasonable costs of access to justice. At European level, reinforcing the *rule of law* entails the respect of a multilevel legal system through multiple connecting and cooperation instruments. At international level, comparing the diverse legal systems and in particular enhancing the dialogue among the supreme Courts are fundamental for safeguarding individual and collective legality. In order to strengthen the *rule of law* at international level, the judges can contribute mainly engaging in an open dialogue to reach shared solutions to common problems.

Key words: Rule of law – autonomy and independence of the judiciary – constitutional basis –- fair trial – efficiency of justice – cooperation among diverse judicial systems – understanding – comparing – shared solutions.

CONTENTS: 1. The subject matter. 2. The constitutional basis of the protection of the *rule of law* in the Italian and European legal systems. 3. The right to a fair trial in implementation of the *rule of law*. 4. The Italian perspective. 5. The European perspective. 6. The instruments for strengthening the *rule of law* at European level.

7. The international perspective. 8. The method for strengthening the rule *of law* in an international perspective. 9. Concluding remarks.

1. The subject matter.

STRENGHTENING THE RULE OF LAW is the subject matter I shall deal with, examining how the judges can help to make it supreme, since guaranteeing judicial protection is one of the basis of the *Rule of law*.

2. The constitutional basis of the protection of the *rule of law* in the Italian and European legal systems.

The principles at the basis of the *rule of law* are enshrined in the Italian legal system, and the European one, as constitutional principles.

The Italian Constitution outlines the characters and competences of the three branches of power – legislative, executive and judicial – stating that judges are subject only to the law[155] and that the judiciary is an order that is autonomous and independent of all other powers[156].

Such a solemn declaration constitutes the institutional foundation of the impartiality of the judiciary and, at the same time, the recognition that the judiciary is the instrument for ensuring the rights of the citizens. The constitutional principles, in fact, would lack the strength to impose themselves if, in case of violation of those rights there was no jurisdictional protection of them, and if the judges that have to protect them did not have adequate prerogatives of impartiality.

In order to guarantee the autonomy and independence of the judiciary, the Italian Constitution provides[157] that all the decisions concerning the legal status of its members (recruitment, allocation, transfers, promotions, disciplinary actions) must be made by a self-governing body, i.e. the *Consiglio Superiore della Magistratura* – High Council of the Judiciary. This is a collegiate and elective body, two thirds of which are members of the judiciary and one third members of Parliament. It is presided by the President of the

155 Article 101 (2) Constitution.
156 Article 104 (1) Constitution.
157 Articles 104 et seq. Constitution.

Republic in its role of supreme guarantor of the rule of law. Members by right are the First President of the Court of Cassation and the Prosecutor General at the Court of Cassation.

In addition, in Italy ,the recruitment of the members of the judiciary is not made by political appointment, but through a public competitive examination. Moreover, the Constitution grants them the prerogative of *inamovibility*, that is to say that they can only be allocated to another working place, or transferred to a different function, following a decision of the High Council of the Judiciary, that has to be taken with the approval of the relevant member or in compliance with the provisions and guarantees set by the Rules on the administration of the court system [*ordinamento giudiziario*].

The *rule of law* plays a key role also at European level, since both the Preamble to the Treaty on European Union, and more specifically its Article 2, state that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the *rule of law* and respect for human rights. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. .

3. The right to a fair trial in implementation of the *rule of law*.

The Treaty on European Union gives the European Union justice bodies (Court of Justice and Tribunals) the duty to “ensure that in the interpretation and application of the Treaties the law is observed” (Article 19). The Charter of Fundamental Rights of the European Union affirms that everyone has the right to an effective remedy before an independent and impartial tribunal if the rights and freedoms guaranteed by the law of the Union are violated (Article 47).

Article 3 of the European Convention on Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Italian Constitution, at Article 111, proclaims that “Justice shall be administered by a fair trial in compliance with the law. All trials shall ensure that each party be heard, in equal conditions, before and an impartial judge in third party position. The law shall ensure a reasonable duration of trials”.

Therefore, the principle of the jurisdictional protection of rights is the basis and guarantee of the *rule of law*, and it is expressed through the proclamation and protection of the right to a fair trial.

This framework of European and national legislation and values requires the EU Member States to respect the principles of the *rule of law*, and the EU judicial organs to sanction any conduct contrary to or in violation of them[158].

4. The Italian perspective.

All Italian citizens, as a whole, are the custodians of the *rule of law*, and all the country's private and public institutions' actions have to pursue to protect it.

Judges, as well as public prosecutors, have a special task: they have to safeguard the *rule of law* not only formally, through their judicial activity, but also in practice, administering justice in a professional and correct way, enhancing the efficiency of their offices, and responding to the expectations of the public through their role and activity.

The Italian Court of Cassation pursues these aims, as well as its typical one of establishing principles of law for a correct interpretation of the laws by all the citizen in their relationship with the courts.

158 The Grand Chamber of Court of Justice of the European Union, in its judgment of 5 April 2016 , in Joined Cases C-404/15 and C-659/15, Aranyosi and Căldăraru, ruled for the first time that before surrendering an individual in execution of a European arrest warrant, the executing Member State must assess whether the detention conditions in the issuing Member State comply with **Article 4 of the** Charter of Fundamental Rights of the European Union, which prohibits inhuman or degrading treatment or detention, and the corresponding Article 3 of the ECHR, as interpreted by the Strasbourg Court.
Recently, in its judgement C-216/18, on the reference for a preliminary ruling from the High Court of Ireland that asked whether the surrender (based on a European arrest warrant) of a European citizen to his country of origin (namely Poland) where he ran the risk of being prosecuted in denial of adequate guarantees as to a fair trial, the Court of Justice ruled that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalized deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

The Court of Cassation every year shares the results of its activity with the citizens, at the opening of the judicial year. On that occasion, the First President of the Court informs the President of the Republic, the highest officials of the State, the judiciary and the representatives of the civil society, on the achievements as well as the shortcomings that remain, and the methods and instruments adopted for overcoming them. It also analyzes its own functioning and that of the whole Italian court system, given its position at the apex of it.

5. The European perspective.

The Italian Court of Cassation's activity is not only performed within its limited national boundaries, but also within a multi-level legal system, since it is a court of a European Union Member State.

Italian national law has long being taking into consideration also the general principles of European law (i.e. the founding treaties of the European Union, the European Convention of Human Rights, the European Social Charter and the Nice Charter of Fundamental Rights) and the secondary EU legislation (based in Article 288 TFEU).

In this context of multiple and diverse legal sources, the law established by the Court of Cassation becomes even more important, since it puts together and coordinates the various levels of sources of law as a "living" law, through its actual enforcement [*diritto vivente*].

The principle governing the relationship between domestic and European law is that, when a national law is in contrast with a legal provision of the European Union, the judge - and hence also the supreme national courts - has to enforce the EU legal provision, which has direct effect. This complies with the principles of the primacy of European Union law and that the judge is subject solely to the law.

Moreover, the national legislation must conform to the principles of the European Convention of Human Rights. Therefore, the Italian judge, as well as the European judge, must enforce the domestic legislation complying not only with the national Constitution, but also with the European Union provisions and the principles set by the Convention itself.

6**. The instruments for strengthening the *rule of law* at European level.**

At European level, the strengthening of the *rule of law*, as described very succinctly above, is enforced integrating together the many features of a multi-level legal structure. However, it is also strengthened through many forms of cooperation among the various European legal systems, in a constant and productive dialogue.

A structured system of Networks among the Member States of the European Union and their judicial institutions has been set up, offering instruments for communication and information.

Among the main ones, we must mention the Network of the Presidents of the Supreme Judicial Courts of the European Union, i.e. the association of the Presidents and Chief Justices of the Supreme Courts of the Member States of the European Union[159]. As a matter of fact, the President of the Court of Justice of the European Union and that of the European Court of Human Rights participate in the general assemblies and colloquiums of the Network. The Network aims at providing a forum for discussion and the exchange of ideas on issues of common interest, in a European perspective[160]. The Network also organizes internships at the Supreme Courts in the frame of an exchange programme between judicial authorities, which also offers an opportunity for asking the Member States involved information on their domestic procedures.[161]

We must also mention the European Union Judicial Network – EUJN, which was set up very recently on the initiative of the Court of Justice of the European Union. This is a multilingual website, in operation since January 2018, for the exchange of information and dialogue between the Supreme Courts of the 28 Member States of the European Union and the Court of Justice. It aims at collecting the judicial decisions of the Court of

159 In parallel to it there is the Network of the Prosecutors-General in the European Union, i.e. the Eurojustice network, which is formed by the heads of prosecution services in order to foster the co-operation between law enforcement authorities across Europe and to encourage mutual understanding of the different prosecution offices through stimulating discussions on commonly shared topics.

160 The last meeting of the Network of the Prosecutors-General in the European Union, that has just taken place in Karlsruhe from 27 to 29 September 2018, discussed the relationship between the Constitutional Courts and the Supreme courts.

161 Mention should also be made of the European Judicial Network (EJN) in criminal matters, the European Judicial Network (EJN) in civil and commercial matters , the European Judicial Training Network (EJTN), the European Network of the Councils for the Judiciary (ENCJ).

Justice, as well as all the documents relevant to the whole procedure of the references to the Court of Justice for its preliminary ruling on the interpretation of a provision of European Union law relevant to the case before the referring court. There are also confidential studies and judicial decisions that the national courts wish to bring to the attention of the other courts, due to their importance and consequences, also at international level. Thanks to a multilingual website, these judicial decisions will become easily known outside their national borders.

The use of the Network is a tool for reaching the target of an increased integration of European and national jurisdictions, through a comparative method. The Court of Justice will be able to group together the references for a preliminary ruling from different national courts, according to the same issues raised. In addition, the various national courts will be able to obtain comprehensive information on the outcome of the references for a preliminary ruling, as well as study material also on the legislation of the other Member States, that would otherwise be difficult to find.

Over the last 2 years, the Italian Supreme Court, as other European courts, has signed protocols both with the European Court of Human Rights and the Court of Justice of the European Union aimed simplifying the contacts with them. For each protocol, it appointed a judge with specific competence at international level to act as a point of contact.

Two protocols have been put into practice setting up a permanent working group, composed by a justice from each division - civil and criminal - of the Court of Cassation. This working group selects the judgements of the Court that apply important European legislation, and selects the judgements of the European Court of Human Rights and of the Court of Justice of the European Union that have a more direct effect on Italy, making them known to their colleagues at the Court through very concise, but specific, abstracts.

Recently, it was decided to promote the activities of the working group for the enforcement of the protocols, collecting its works in a biannual bulletin published - since September 2018 - on the Court's website. The aim is to reach not only the justices of the Court of Cassation, but also all the members of the judiciary, jurists, as well as the public.

This type of instruments, overcoming the huge language barriers, make it possible to disseminate a common European culture and contribute to its evolution, as well as to assist the national legal systems in order to solve their domestic problems.

7. The international perspective.

Today, however, I am here to speak to the representatives of courts from all over the world. I therefore need to depart from my usual national and European perspective to consider, first of all, whether, in the broader perspective of a dialogue with other Supreme Courts, the notion itself of the *rule of law* has a different meaning and whether the instruments used, together or along a common approach, are useful for strengthening it.

The perspective changes: from national to international, and therefore also the methods of analysis and the measures of intervention need to change.

8. The method for strengthening the *rule of law* in an international perspective.

In a truly international perspective, not limited within its own boundaries, the strengthening of the principle of the *rule of law* necessarily calls for an effort to increase the knowledge and understanding of the various and different legal systems involved. Therefore, the circulation of information - also thanks to opportunities such as this extremely useful one here - offers us the occasion to exchange views, overcoming our national and regional perspectives.

The knowledge, even minimal, of the main aspects of diverse legal systems enables us to understand them and respect their miscellany. It also enables us to understand that from an international perspective the most effective way of solving common problems is that of exchanging different points of view.

The diversity of the legal systems is indeed our starting point, and also our testing ground.

Diverse systems will never be able to be alike, and neither perfectly coherent with one another. Too many historical, cultural, political and religious components have lead them to shape into their present form.

Consequently, at international level, the diversity of the legal traditions - once its existence is acknowledged, understood and known, even if only very little - shall not and must not be an obstacle to a common dialogue and action.

It is therefore necessary to examine which is the most appropriate model – outside the European framework - for making the *rule of law* more efficient. Is it an international convention or an international treaty?

The reality of international relations and movements, though, is much too rapid to rely exclusively on these instruments, however fundamental they may be.

Moreover, we – in our role of judicial authorities – can and must play a more active part in developing the *rule of law,* and therefore not limit ourselves to enforcing or giving the best interpretation of treaties.

I have already mentioned the importance of knowing and understanding the diverse legal systems and the need to increase the instruments for the dissemination of information.

These instruments are given, in the first place, by the multiplication of the opportunities to meet and work together.

In this context the Italian Supreme Court , lately, has engaged in intensively multiplying the opportunities to meet at international level and widening as much as possible the number of Justices directly involved in international experiences. The aim is to ensure that such useful international contacts be not limited to very few and solitary experts.

We have increased the number of delegations visiting the Court and that of Italian delegations going abroad, as well as the number of international exchanges of individual justices; we have signed Protocols and Memoranda of Understanding with the supreme Courts of other countries, and given constant importance to the Court's international activity setting up a dedicated office.

This has enabled us to sign cooperation agreements with the courts of countries with very different legal traditions from ours, such as Russia or China, with which we have started a very fruitful dialogue and practical cooperation on well-defined objectives.

China, for example is at present drafting its civil code, drawing also on the Roman cultural legal tradition and adapting those principles to its own different context. On the basis of the Memorandum of Understanding we signed, and of the existing cooperation

between Italian and Chinese universities, the Italian Court of Cassation will give its contribution through a reasoned and commented selection of the most important Italian judicial decisions, chosen by our Research and Study Office, in order to contribute to the understanding of the fundamental principles of our law and also of the legal techniques we use for drafting legal decisions.

In a wider perspective of dialogue with the courts of the whole world, the best method seems to be that of identifying common objectives, in order to deal with them together, through a *problem solving* approach.

Indeed, all the systems, or at least a wide group of systems, can share some problems, or areas of interest. These will be identified according to the legal system of reference or geographic location or even simply to the need to deal adequately together with a common problem. Therefore, eliminating or curbing that common problem can only have a positive effect on the *rule of law.*

It is also essential, at international level, to set up - and contribute continuously - to Networks connecting the various legal systems, improving their mutual knowledge and increasing judicial cooperation so as to solve together common problems and promoting the respect of the principles that we consider as basic.

In this connection, I found the speech of the President of the Supreme Court of Singapore, whom I heard at the Meeting of ELI (European Law Institute) - organized in Italy last May[162] with the support of the Italian Supreme Court of Cassation and the Italian High Council of the Judiciary - particularly enlightening. He explained how Singapore has different legal systems for different legal subject matters, and that the various systems involved are profoundly different from one another. Such a difference has led to reach uniform and coordinated interpretations of the law in fields such as family and commercial law, or international trade. He also reported the existence of a network of the Presidents of the Supreme Courts of Asia, Australia and Canada that periodically holds meetings focused on specific cases and issues.

9. Concluding remarks.

162 The Meeting on the *Judicial Dialogue and Networks for Cost Awareness in Court Actions,* was held in Rome on 24 and 25 May 2018.'

The respect of the *rule of law* is not a mere theoretical concept, but the assertion of a set of practical legal principles that all judges are required to enforce, and that supreme Courts are required to ensure at a general level, each one within its own legal system. Legality means not only the respect of fundamental principles, but also the respect of all the rules that favour the protection of those rights. That is not only the abolition of the death penalty, the prohibition of torture and of inhuman or degrading treatment, but also the right to a fair trial (by an impartial judge and with the guarantee of the right to a defence), to an efficient organization of justice and reasonable costs of access to justice.

Moreover, our daily life requires us to look also at the fields of the economy and of social relations, since - in these areas - the rights of the persons are becoming more and more endangered and thus call for a stronger legal protection of interpersonal relations. This is true, for instance, in the trafficking of human beings, organized crime, environmental crimes, and in the misuse of sensitive computer data.

The comparison of national legal systems, and in particular the dialogue among supreme Courts are of the utmost importance, since the legal opinions of the supreme Courts can offer strong references to the individual States. Dialogue and mutual knowledge of the respective domestic legal case law are a valuable opportunity for enhancing further the protection of individual and collective legality.

Therefore, in order to strengthen the *rule of law* at international level, the most valuable contribution that the judges can give is that of engaging in an open dialogue in order to reach shared solutions to common problems. Indeed, this approach does not mean abdicating the principles of the *rule of law*, but strengthening the ability of the States to deal with the real problems of the people and of the economy, without losing their identity and at the same time without letting that identity be a barrier leading to isolation.

SOUTH AFRICA

REFLECTIONS ON ACCESS TO JUSTICE IN POST-1994 SOUTH AFRICA

Justice Mandisa Maya, President, Supreme Court of Appeal of South Africa

Introduction

My paper covers, in broad strokes, one of the serious challenges that my country, South Africa, faces – making justice accessible to all her citizens, especially the poor, illiterate and indigent.

South Africa, previously an apartheid authoritarian state, attained constitutional democracy in 1994. Young as it is, her Constitution[163] is often singled out, continentally and on the international stage, as an exemplary founding document in the creation of any society based on human rights, communal-ethics and human dignity. It is frequently impressed upon nations undergoing political and legal transitions from their own histories of injustice and oppression to take their cue from the South African Constitution. It has, in a sense, become the global threshold when it comes to constitutionalism. And while it may be revered on its own terms alone, the South African Courts have interpreted it in a manner that consistently affirms and develop the values it enshrines. The judgments that have come from the South African Courts, the Constitutional Court, in particular, have been nothing short of pioneering in their findings and the implications thereof on the rule of law in democratic South Africa.

The revolutionary constitutional jurisprudence has contributed significantly to the creation of a new order; one that is founded on the principles of democracy and the sovereignty of the Constitution - with its generous and inviolable provisions for the rights, freedoms and

163 The Constitution of the Republic of South Africa, 1996.

liberties of all people in the nation.[164] The new constitutional dispensation has radically transformed almost every area of South African law and the most visible impact has been in the tetchy area of socio-economic rights such as the right to access to housing, education and health care, water.

In all the cases, the Courts emphasized the principles of human dignity, Ubuntu (humaneness), equality and the advancement of human rights and freedoms. For example, in ***S v Makwanyane***[165] in which the Constitutional Court abolished the death penalty, the court reasoned thus:

'The carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account … in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.'

In ***Shilubana and Others v Nwamitwa***,[166] the Constitutional Court enforced the right to gender equality by finding that a custom that prevented a woman from becoming a chief and a leader of her community because of her gender, was contrary to the constitution and amounted to gender discrimination.[167]

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164 And customary international law has been incorporated into the domestic legal order in the monist tradition through an incorporation clause found in section 232 of the Constitution in terms of which 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' In the event of conflict, the courts have opted for a harmonizing interpretation of the conflicting instruments.

165 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (CC); [1996] 2 CHRLD 164; 1995 (2) SACR 1 (CC).

166 *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

167 It is however worth noting the court's affirmation of the place and integrity of customary law as a system of law in the constitutional dispensation by its acknowledgement that '[c]ustomary law is an independent and original source of law. Like the common law it is adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law.'

In another groundbreaking case, ***Government of the Republic of South Africa and Others v Grootboom and Others***,[168] a community was rendered homeless as a result of their eviction from their informal homes situated on private land that was earmarked for formal low-cost housing. In its judgment, the Constitutional Court effectively suspended the evictions and avoided rendering the community homeless by holding that to do so would violate the community members' rights to dignity. The Court lamented the appalling living conditions from whence the community had fled from before settling on the private land from which they were now being evicted and remarked that:

'[t]o transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as [poverty and suffering] continue to exist that aspiration will have a hollow ring.'

The development of a society based on democratic values, social justice and fundamental human rights that is envisioned by the South African Constitution, requires its citizens to have, at the very least, a threshold comprehension of the law in order to comply with it and claim its protection so that the justice gap is reduced. A lack of that comprehension, ignorance of the law, and the effect thereof is aptly and very simply described by Dunlap who says that it 'robs [the law] of its deterrent effect, deprives those whose rights have been violated of recourse and undermines democracy'.[169]

Political settlements and constitutional reforms in post-conflict democracies such as South Africa, have radically altered the relationship between citizens and the state, creating a new order of citizen entitlement and state responsibilities. Traditional 'rule of law' reforms failed to bring about the transformation required for the sustained development of vulnerable communities across the world and legal empowerment as an alternative to these traditional reforms, is therefore described as a 'demand-side

168 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (4 October 2000).

169 B Dunlap '*Anyone can ''Think like a lawyer'': How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States'* 2014 82(6) Fordham Law Review at 2817 – 2842.

response to addressing the deficits in the rule of law'.[170] Legal empowerment of the poor, is not foreign to the South African development paradigm as it manifests everywhere, in practice through initiatives such as legal services for the poor, public interest litigation, social justice litigation, social accountability, women's empowerment and land tenure security.

1. Strides Made to Ensure Access to Justice in Post-1994 South Africa

In addition to pertinent provisions contained in the Constitution itself, a vast array of statutory provisions have been enacted and many statutory public institutions established to enhance and facilitate access to justice in post-1994 South Africa.

The language of the Constitution – the values it espouses and its vision of a free, transformed and equal society – and this broad framework of legal entitlements created for the benefit all those who live in South Africa, have fundamentally shifted the public imagination in respect of law. Thus, for the most part, the South African citizenry has a healthy relationship with the law and State institutions since 1994.

Many South Africans know that they enjoy powerful constitutional rights and protections and they are keenly aware of treatment, policies and rules that infringe on such rights. In many scenarios where members of the public are being treated unfairly and subjected to some or other indignity - they will readily make it known that they will go to court to get their justice. The idea of law as a force of good and the judiciary as a functioning and independent mechanism for achieving justice is firmly entrenched in the public consciousness. When one reflects on our recent inhumane past and the relationship between the people and the laws and the courts of that era, this belief and trust that the courts and the law are mechanism through which citizens can access justice is enormously significant. The South African Constitution has definitely ushered a

170 S Bakrania '*Safety, Security and Justice: Topic Guide*' 2014 Birmingham, UK GSRDC, University of Birmingham at 14.

transformative dispensation which has empowered and inspired people to seek justice, to struggle to end unjust treatment and to insist on constitutional conditions for their lives.

The key constitutional provisions

The South African Constitution entrenches access to courts and justice in three key provisions.

Section 34 provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

In terms of section 35(2)(c) '[e]veryone who is detained, including every sentenced prisoner, has the right …to have a legal practitioner assigned to [him or her] by the state, and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'.

Section 28 deals with children and provides, inter alia, that '[e]very child has the right … to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'.[171]

State Funded Legal Aid

171 In s 28(1)(*h*) of the Constitution.

State funded legal representation is provided to indigent persons by the Legal Aid South Africa (LASA), which is an independent statutory body established in terms of the Legal Aid Act 22 of 1969, as amended by the Legal Aid Amendment Act 20 of 1996 and the Legal Aid Act 39 of 2014. According to the empowering guidelines set out in the Legal Aid Guide of 2014, the criteria to allocate legal aid are the following:

(a) the seriousness of the issue for the applicant;

(b) the complexity of the relevant law and procedure;

(c) the ability of the person to represent himself or herself effectively without a lawyer;

(d) the financial situation of the person;

(e) the person's chances of success in the case; and

(f) whether the applicant has a substantial disadvantage compared with the other party in the case.

The Guide is reviewed from time to time and any amendments to it are approved by the Board through a circular.

A critical piece of legislation, the **Legal Practice Act 28 of 2014**, has recently been promulgated through the collaborative efforts of the three branches of government to enhance access to justice. Litigating is extremely expensive in South Africa and this has seriously impeded access to legal representation for the vast majority of South Africans. This statute aims, among other objectives, to provide (a) a legislative framework for the transformation and restructuring of the legal profession into one which is broadly representative of the country's demographics, in terms of race and gender, under a single regulatory body which unifies the dual system of attorneys (who deal directly with and take instructions from the litigants, and advocates (who represent the litigants only upon referral from the attorneys), eliminates the double billing and resultant financial burden for the litigants and ensures that fees charged by legal practitioners are reasonable and promote access to legal services thereby enhancing access to justice; (b) ensure that the principles underpinning the Constitution are embraced and that the rule of law is upheld; (c) ensure that legal services are accessible; (d) ensure the independence of the legal profession and (e) ensure the accountability of the legal profession to the public.

Non-Governmental Organizations and University Law Clinics, which are generally open to the public, have also become an integral fixture of South African institutional bodies that assist in the upholding of the rule of law and advancing access to justice although most of their efforts however come from the extensive research they conduct regarding the impact of the law (or lack thereof) on people's lives, particularly as it relates to government fulfilling its constitutional obligations in terms of the Bill of Rights. These organizations also participate in the processes of legislation and policy promulgation. They participate in parliamentary and governmental functions as advisers, experts and on behalf of the public. Most notably, they are often part of and fund class actions or matters which they find of interest as *amicus curiae* so as to assist the court in the administration of justice.

Small Claims Courts[172] provide for a quicker and easier resolution of disputes that involve minimal amounts (up to R15 000, about US $1 000) and allow natural persons to institute simple claims (eg the enforcement of repayment of loans, delivery of property, payment of rent, acknowledgements of debt, promissory note, cheque debts, credit agreement debts and provable damages) without legal representation and at no expense to them.

Specialist Courts such as the Land Claims Courts, the Equality Courts, the Tax Courts, the Maintenance Courts, the Sexual Offences Courts etc have also been established to provide expertise on the bench and ensure that certain areas of law are afforded special attention for the speedy and inexpensive administration of justice.

Specialist tribunals have also been established by means of statutes. These include the Competition Tribunal of South Africa, the Rental Housing Tribunal, the National Consumer Tribunal, the Companies Tribunal, the Water Tribunal and the Commission for Conciliation, Mediation and Arbitration (CCMA), and more recently, the Companies

172 Established in terms of the Small Claims Court Act 61 of 1984.

Tribunal. These bodies provide quick and inexpensive cheaper avenues for dispute resolution and assist immensely by ensuring compliance with important legislation.

Alternative Dispute Resolution (ADR) mechanisms are also now also an important cog in the administration of justice and have made substantial, positive particular inroads in three key areas of the law; namely, family law, labour law and commercial law.[173]

The community-based paralegal system has rendered a vital service to vulnerable South African communities for decades. However, the sustainability of this service is threatened by its exclusive dependence on external donor- funding, volunteerism and the lack of its recognition and regulation within the formal legal system. Encouragingly, the importance of the paralegal practitioners in South Africa has recently been evidenced by their inclusion of this class of practitioners in the Legal Practice Act which mandates the Legal Practice Council to investigate their status and make recommendations to the Minister on their statutory recognition.[174]

Legal Education campaigns have elevated legal literacy among the general public. These include (a) free distribution of copies of the Constitution in all eleven official languages to the general public, which are also readily available in most public institutions; (b) formal incorporation into the official school curriculum by the Department of Education; and (c) the introduction by the national broadcaster of a myriad of

173 Significantly, the Constitution itself provides expressly for mediation in the event of an impasse between the National Assembly and the National Council of Provinces when legislation is to be passed. A number of statutes make provision for compulsory ADR. The Commission on Gender Equality is by law obliged to resolve gender-related issues or complaints through the process of mediation (section 11(1)(*e*) of the *Commission on Gender Equality Act*, 39 of 1996). Professional boards in the health sector, likewise, are tasked with mediating minor transgressions by health professionals (section 42 of the *Health Professions Act*, 56 of 1974). In addition, a Community Forestry Agreement is by law required to provide for dispute resolution through informal mediation or arbitration (t*he National Forests Act*, 84 of 1998). Furthermore, parties to existing government transport contracts that cannot reach consensus on amendments or inclusions to the contract, are obliged to refer the matter for mediation (section 46(2) of the *National Land Transport Act*, 5 of 2009). The pro forma founding agreements for transport authorities are also by law required to refer related disputes to mediation (sections 6 and 7 of the National Land Transport Regulations on Contracting for Public Transport Services, 2009 (Republic of South Africa, '*GNR 877 (GG 32535)*' of August 31, 2009, *Government Gazette*) and mediation is specifically provided for in respect of the pension-related disputes of postal employees (in the *Post Office Act*, 44 of 1958).
174 In section 34(9)(*b*).

educational programs aimed at bringing awareness to the public about their legal rights and the protocols for accessing justice if such rights are being violated.

The private legal representatives, enjoined by their professional bodies, the Law Societies which monitor attorneys and the Bar Associations which are responsible for advocates, have also played their part by providing **Pro Bono Services** ie free legal services to the poor.

There are various other legal instruments which are intended to assist vulnerable communities as intervention measures before the relevant disputes require adjudication in a court of law. For example, the **National Consumer Protection Act**[175] was enacted to 'promote fairness, openness and good business practices between suppliers of goods and services and Consumers of these goods and services' and introduces three important provisions to this end – (a) the '**Cooling-off**' right– which allows ordinary consumers to return any goods or rescind any contractual agreement within five working days if the purchase of such goods or the conclusion of the contract arose from direct marketing (eg advertisements, telemarketing, messages, solicitations); (b) the '**20 Days business days for rental agreements cancellation'** provision which was enacted to curb the exploitative practices by lessors eg charging lessees exorbitant sums as penalties for cancelling lease agreements that they could no longer afford – in terms of these provisions any lessee with a fixed term lease agreement can cancel it without penalty by providing their lessor with a 20 business days' notice; (c) the Consumer Protection Act also enjoins suppliers and commercial enterprises to draw **adverse clauses in agreements to the attention of consumers** when they are negotiating the terms thereof failing which those clauses may be rendered unenforceable; (d) the **National Credit Act**[176] is also a consumer-orientated legislation that has introduced strict protections for vulnerable consumers as they participate in credit markets and use purchase credit facilities eg, the requirement for a credit provider to obtain a **court order before enforcing a garnishee order**, the introduction of **Debt Counsellors**, a legal

175 National Consumer Protection Act 68 of 2009.
176 The National Credit Act 35 of 2005.

process which provides for a consumer to be declared over-indebted and for the debt counsellor to negotiate restructured payments on his or her behalf and protect them from the enforcement of their debt except in terms of payment plans which the debt counsellors deem reasonable and are supported by court orders.

Lingering challenges and new possibilities in enhancing Access to Justice

Despite these admirable gains, South Africa has not entirely transcended transitional justice, which aims at addressing the challenges that confront societies as they emerge from serious conflict and transition from an authoritarian state to a form of democracy. The residues of her past of oppression and divisions continue to haunt her contemporary society through the inequalities that were deeply ingrained by apartheid laws and policies implemented by the State and by private citizens, natural and juristic, who were not even required by the law to do so.[177]

Thus, a whole range of measures are still needed to ensure access to justice. These include the abolition and amendment of some of the old order laws so as to conform to the constitutional imperatives (still an ongoing and massive undertaking for the South African Law Reform Commission), proper training of the police, court interpreters, prosecutors and even judicial officials, transforming the legal professions (which the Legal Practice Act seeks to do) so that legal representation is affordable to all, improving court case management processes, and making state subsidised legal representation available to the indigent in all cases where the interests of justice so require.

As may be discerned from a reading of section 34 of the South African Constitution above, it does not expressly confer the right to legal representation. The Constitution

177 T F Hodgson 2015 at 194 *'Bridging the gap between people and the law: transformative constitutionalism and the right to constitutional literacy: part II: reflections on Justice Langa's court and philosophy'*, (2015), 2015(1), *Acta Juridica*, pp. 189–212.

provides expressly for the right to legal representation at the expense of the State only in sections 28 and 35, namely in civil matters which involve persons younger than 18 and in criminal matters in respect of persons of all ages.

The Courts have been slow to interpret section 34 as extending legal assistance to indigent litigants in civil matters just as LASA has been reluctant to grant it, based mainly on its heavy financial burdens and constraints which compel it to prioritize criminal proceedings in light of the threat to an accused's liberty. It is only in a few circumscribed instances that they have done so. *Nkuzi Development Association v Government of the Republic of South Africa*,[178] involved the security of tenure of labour tenants (poor farm dwellers). There, the Land Claims Court held that labour tenants whose tenure was unlawfully threatened or infringed have a right to legal representation at the state's expense in the context of security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997, the Land Reform (Labour Tenants) Act 66 of 1995 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; pieces of legislation which seek to protect vulnerable communities from eviction from their homes.

The matter of *Legal Aid South Africa v Magidiwana & others*[179] presented an important milestone in democratic times[180] and currently stands as authority for the right to legal representation at the expense of the State in fora other than courts of law. The Constitutional Court held that legal assistance could be provided to participants in a

178 2002 (2) SA 733 (LCC).

179 *Legal Aid South Africa v Magidiwana & others* (CCT188/14) [2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC) (22 September 2015).

180 It should be noted however that the right to legal representation in fora other than courts of law, was available in South Africa even under the common law position on the right remained consistent (see, for example, *CCMA v Law Society, Northern Provinces* 2013 para 19, in which the court highlighted this position and the recognition by the common law of the 'right to a procedurally fair hearing in civil and administrative matters').

Commission of Inquiry on the grounds of fairness and interest of justice[181] although there was no regulation compelling LASA to fund poor individuals participating in a Commission of Inquiry.[182] But the Court cautioned that the factors that were taken into consideration were context-specific and that 'it [was] therefore not feasible, nor desirable to lay down an inflexible list of such considerations'.

Thus it has been pointed out that the decision may have limited impact because of the finding that it 'is no authority for the proposition that in all commissions of inquiry, there is a right for State-funded legal representation [as], it depends on the context' and that 'this cautious approach is likely to turn this important decision into a mere flash in the pan as it does not provide the necessary pressure needed to compel LASA to always provide legal aid in Commissions of Inquiry. It has been contended that the Courts should interpret section 34 in a manner which gives it more meaning so as to ensure that it protects the dignity, equality and achieve social justice for those in abject poverty.

The argument continues that, bearing in mind that the principle of equality is at the centre of the Constitution[183] as it aims to establish an egalitarian society, failure to give the provisions this construction deprives the ordinary South Africans, who are most affected by the historic inequalities, of access to the rights, protections and justice guaranteed by the Constitution and the law. This is so, it is argued, because they have no legal assistance and therefore no access to the courts in civil matters through which their socio-economic rights can be vindicated. Therefore, whilst the provision of legal aid is only one of the measures needed to ensure access to justice, the lack thereof is a critical impediment for to the full realisation of the constitutional promise. And there is no legal or

181 These participants were survivors of a national tragedy in which several mineworkers were killed by mine security officers and police officers arising from an unprotected strike for wage increases and all the other parties (the state, families of the victims, the South African Police Services, the mining companies and the injured and arrested persons) could afford legal representation and were actually legally represented at the Commission of Inquiry mandated by the State President to investigate 'matters of public, national and international concerns arising out of the tragic incidents'.

182 Provided by the empowering 2012 *Legal Aid Guide*, Legal Aid South Africa *The Legal Aid Guide* 13 ed (2014) 36.

183 Guaranteed in section 9(1) of the South African Constitution in terms of which 'everyone is equal before the law and has the right to equal protection and benefit of the law'.

logical basis for distinguishing between criminal and civil matters in light of section 34 and the fact that the issues in both categories may be equally complex and the laws and procedures difficult to understand.

The judiciary has been criticized as failing in its duty to 'uphold and protect the Constitution and the human rights entrenched in it, [and to] administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law' because the Courts (a) have not unequivocally interpreted section 34 as providing the right to legal representation at the state's expense for criminal and civil proceedings alike as they should have done, and (b) have been unduly reluctant to use the *informa pauperis* procedure provided by the Rules of Court which enables the Courts to provide legal assistance to impecunious litigants in civil matters through the Registrar of the Court who refers the applicants to private legal practitioners after assessing whether they qualify for assistance. It has been suggested that instead of avoiding the procedure because of its undue length and complexity, the Courts should have it reformed and its procedures simplified into a user-friendly process that can meaningfully enhance the right to legal assistance for the vulnerable in civil matters.

There may very well be merit in these views and they do provide the judiciary with useful inputs in conducting self-introspection into whether it is carrying out its constitutional mandate fully as we all continue to build a new order in which everyone’s potential is realized.

TURKEY

CONSTITUTIONAL PROTECTION OF THE RULE OF LAW IN TURKEY: A CURSORY VIEW OF THE ROLE OF THE CONSTITUTIONAL COURT

Prof. Dr. Zühtü Arslan, The President of the Constitutional Court of Turkey

It is a great pleasure for me to be here and talk to you on the role of constitutional/supreme courts in strengthening the rule of law.

I would like to thank the Chief Justice of Argentina, Mr Carlos Rosenkrantz for his kind and warm hospitality.

As we all know, the rule of law, along with human rights, is among the most fundamental characteristics of constitutional democracy. Therefore it wouldn't be wrong to say that *"[i]n the absence of the rule of law, contemporary constitutional democracy would be impossible."*[184] Unless the will of majority is restricted by the rule of law, democracy may easily turn out to be an autocratic form of government. In this sense Alija Izetbegovic, the founding President of Bosnia-Herzegovina, stated that *"majority rule without mediation of the law inevitably transforms itself into the tyranny of the majority, and the tyranny of the majority is as much a tyranny as any other".*[185]

The Rule of Law in Turkish Constitution

Due to its significance for constitutional democracy, almost all constitutions enshrine the rule of law. In the Turkish Constitution, this principle is articulated as *"legal state"* or *"state of law"*. Article 2 of the Constitution, which is unamendable, stipulates that the Republic of Turkey is a democratic state of law that respects human rights.

It is often emphasized in the judgments of the Turkish Constitutional Court (TCC) that the rule of law requires, among others, (a) the restriction of political power in favor of

184 M. Rosenfeld, *The Rule of Law and Legitimacy of Constitutional Democracy*, Southern California Law Review, (Vol. 74, 2001), p. 1307.

185 A. Izetbegović, *Inescapable Questions: Autobiographical Notes*, (Leicester: Islamic Foundation, 2003), p.68.

fundamental rights and freedoms, (b) judicial review of the acts and activities of the state, and (c) execution of judicial decisions which is deeply embedded in the access to justice.

The TCC has two main tools to uphold the principle of rule of law. First, the Court has been reviewing constitutionality of laws ever since its establishment in 1961. Through abstract and concrete norm review, the Constitutional Court has annulled the laws which contravened the rule of law.

Second, the constitutional amendment of 2010 introduced the individual/constitutional complaint into the Turkish law. Through individual applications, the Court has assumed a direct and active role in protecting and strengthening democratic rule of law and human rights. The Constitutional Court found violations on the basic rights ranging from right to life to freedom of expression. Indeed, some of them are of particular concern regarding the principle of rule of law.

Today I want to speak briefly about two main elements of the rule of law, namely the principle of legal certainty and the access to justice by referring to two prominent cases. Both cases have played a critical role in advancing the rule of law in Turkey.

Legal certainty

The legal certainty is central to the rule of law. As defined in the case-law of TCC and other constitutional jurisdictions, it requires laws to be sufficiently explicit and precise, foreseeable and free from ambiguity not to allow arbitrary actions. The Court applied these criteria in its much-highlighted YouTube judgment.[186] The Court received an individual complaint after the administrative authorities had blocked access to YouTube. The Court examined the legal provision that the administrative authorities acted upon. The provision prescribed a general measure to block access to internet web sites due to criminal content, without specifying whether it was a gradual measure. In other words, the provision did not specify whether the whole website or only the criminal part would be blocked. Relying on this provision, the administration blocked access to Youtube as a whole rather than blocking only specific videos with criminal content.

186 *Youtube LLC Corporation Service Company and others [Plenary]*, App. No: 2014/4705, 29/5/2014.

The Court based its analysis on the premise of rule of law and found that relevant law failed to meet the certainty and foreseeability criteria required for restriction for human rights. The Court also emphasized the crucial role of social media in democratic societies as a form of exercise of freedom of expression. The Court found a violation, and the block was lifted following the Court's decision.

More recently, the same legal provision was brought before the Court through concrete norm review, and the Court annulled the law on the same ground by citing the YouTube application.[187] I just want to note that, if the relevant law had explicitly authorized the administration to block the whole website, then it would have been scrutinized under the principle of proportionality, also a cardinal element of the rule of law.

Access to Justice

I would like to devote the rest of my time to a recent individual application concerning the execution of court judgments, which relates to the right of access to a court.

On January 11th 2018, the Constitutional Court found violations of the right to personal liberty and the freedom of expression and media regarding the pre-trial detention of two journalists.[188] The applicants had been arrested and detained following the coup attempt of 15 July 2016 for alleged terror offences. The Court found that the available evidence was insufficient to reach the conclusion of a strong indication of guilt, which is a constitutional precondition for pre-trial detentions.

The Constitutional Court sent the judgments to the first instance court and ordered necessary action for redress of violations, without specifying the release of the applicants. Upon the violation judgments, the applicants requested their release before the competent courts.

The first instance courts, however, adopted a different legal stance and refused the request. They argued that the Constitutional Court had assessed the evidence in the case file by exceeding its mandate and that therefore the violation judgment did not comply with the law.

187 E. 2015/76, K. 2017/153, 15.11.2017.

188 *Şahin Alpay [Plenary],* App. No: 2016/16092, 11/1/2014; *Mehmet Hasan Altan [Plenary],* App. No: 2016/23672, 11/1/2014.

One of the applicants had filed a new complaint alleging a violation due to non-execution of the previous judgment.

The Constitutional Court urgently took up the issue in this new application.[189] The Court started its analysis by stating that the existence of strong indication of guilt is a constitutional prerequisite for pre-trial detentions. It followed that, it is a constitutional requirement for the Constitutional Court to examine this prerequisite in individual complaints on the account of allegedly unlawful detentions.

The Court continued to state that Article 153 of the Constitution explicitly provides that the decisions of the Constitutional Court are final and binding upon natural and legal persons, as well as upon the state authorities, including courts. Further, execution of court decisions is an indispensable part of the right to fair trial (access to a court) in a state of law. The Court declared that the rule of law requires trial courts to implement the decisions of the Constitutional Court rather than questioning its constitutional powers.

The Court then assessed the specific circumstances of the present case and concluded that the applicant must have been released upon the violation judgment. Following the final and binding interpretation of the Constitutional Court on the matter, the competent court ordered release of the applicant immediately.

The legal issue arising from the failure to adequately execute the violation judgment thereby was resolved within the principle of rule of law.

The European Court of Human Rights

Finally I want to say a few words about the involvement of the European Court of Human Rights in this interesting issue.

Meanwhile, the applicants lodged an application before the Strasbourg Court on the ground that their certain rights and freedoms were violated by the Turkish government. The European Court mostly agreed with the findings of the Constitutional Court concerning the lawfulness of the complained pre-trial detention and found violations of the right to liberty and the freedom of expression.[190]

189 *Şahin Alpay (2) [Plenary],* App. No: 2018/3007, 15/3/2018.

190 *Şahin Alpay v. Turkey*, App. No: 16538/17, 20.03.2018; *Mehmet Hasan Altan v. Turkey,* App. No: 13237/17, 20.03.2018.

In these judgments the European Court stated that since the decisions of the Constitutional Court of Turkey were *"final"* and *"binding"*, they provide effective remedy for violations of Article 5 of the Convention which guarantees the right to personal liberty. The Court also pointed out that the failure of the Assize Courts to release the applicant following the binding judgment of the TCC *"runs counter to the fundamental principles of the rule of law and legal certainty."* For the Strasbourg Court, these principles, which are inherent not only in Article 5 but all Articles of the Convention, *"are the cornerstones of the guarantees against arbitrariness."*[191]

In conclusion, I believe that this recent example provides a valuable experience in terms of practice of rule of law. It posed a formidable challenge for the Turkish legal and constitutional system. However, the Constitutional Court has not resorted to any means other than its constitutional prerogatives. Such controversies, although undesired, serve to strengthening the practice of rule of law when adequately resolved within the law.

191 *Şahin Alpay v. Turkey*, §§ 116, 118.

UNITED KINGDOM

HOW CAN JUDGES STRENGTHEN THE RULE OF LAW?

Lord Justice Gross, Court of Appeal of England & Wales[192]

Introduction

1. It is an honour to have been asked to take part in this J20 conference. The opportunity to exchange ideas and best practice between judicial colleagues from this group of nations is immediately apparent. The larger challenge is to put these exchanges to good practical use and the question which I am privileged to address could not be more important. That question is 'how can judges strengthen the rule of law?'

2. The question is asked against the background of the high aspirations of the United Nations Sustainable Development Goal Indicators[193], including (amongst many others) ending poverty and hunger, promoting gender equality, inclusive and sustainable economic growth and combating climate change. The practical inquiry is how the Rule of Law can advance these goals and how Judges can strengthen the Rule of Law so that it can do so.

3. My theme, in a nutshell, is this: assuming the political will to accomplish the goals of sustainable development, the Rule of Law is essential to their accomplishment. The Judiciary, as the independent third branch of the State, can do much to strengthen the Rule of Law but neither the Judiciary nor the Rule of Law can do it alone. All three branches of the State must respect each other's preserves for the Rule of Law to be sustainable, to flourish and to provide the foundation for the achievement of social goals. That is the theme I shall develop today.

The views expressed are my own.

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192 I am most grateful to Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and the Master of the Rolls, for his assistance with the preparation of this lecture

193 Contained in the Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators (2017)

4. The two primary functions of the State can be expressed as follows: the Defence of the Realm and the provision of a justice system. If a State succumbs to its external enemies, all is lost. If a State does not uphold law and justice, no other rights can be enforced or entitlements enjoyed. The Rule of Law is crucial to that second function and therefore indispensable to achieving the social goals underlying sustainable development.

5. The Rule of Law is needed in all major spheres of activity[194]:

(i) Individual human rights – guarding against the midnight knock on the door and the show trial.

(ii) Investment – who would invest in a country where assets are subject to capricious and arbitrary officialdom?

(iii) Fighting corruption; no special treatment; no lost files; no convenient delays.

(iv) Fighting terrorism – the Rule of Law alone will not defeat terrorism but successful counter-terrorism is hugely assisted by the value system inherent in the Rule of Law.

6. Indeed it is difficult to see how progress can be made with the sustainable development agenda, absent the Rule of Law. But law, lawyers and Judges cannot do it all[195]. The law and the Judiciary do not exist in a vacuum. The Rule of Law requires a political acceptance – indeed a political insistence – that it will and should shape the society in question. That calls for mutual respect and understanding between the three branches of the State – Legislature, Executive and Judiciary – notwithstanding inevitable institutional tensions between them from time to time. Moreover, expectations must be managed; though Legislatures not infrequently "out-source" political questions that are too hot to handle to the Judiciary,[196] there are issues that are sometimes best left to the development of a political consensus and are unsuitable for Judicial decision.[197] Judicial development of the law is one thing; judicial legislation may be quite another.

Meaning

194 On a perhaps lighter note, the absence of the Rule of Law and the insecurity which flows from such absence form the backdrop to two well-known operas – Wagner's Lohengrin and Donizetti's Lucia Di Lammermoor.

195 passim, Lord Sumption and the Limits of the Law (2016)

196 See, e.g., abortion in the US, Roe v Wade 410 US 113 (19973); see too, And Brett makes five, The Economist, September 15th – 21st 2018, at pp. 22 and following.

197 See, e.g., assisted suicide: Nicklinson v Ministry of Justice [2014] UKSC 38; [2015] AC 657

7. The most compelling working definition of the Rule of Law was that given by the late Lord Bingham, Senior Law Lord, in his short and incisive book entitled The Rule of Law[198]. As he put it, the core of the principle is

'. . . that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'[199]

Lord Bingham went on to identify eight features inherent in this definition. Those were that

- the law must be accessible, intelligible, clear and predictable;
- questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion;
- laws should apply equally to all, save to the extent that objective differences justify differentiation;
- ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – not unreasonably and without exceeding the limits of such powers;
- the law must afford adequate protection of fundamental Human Rights;
- the state must provide a way of resolving disputes which the parties cannot themselves resolve; and that
- the adjudicative procedures provided by the state should be fair – one of the most important rights is the right to a fair trial;
- compliance by the State with its obligations in international law

8. I have focused on a working definition of the Rule of Law. As is plain, the Rule of Law must embrace procedural justice. Warning lights should flash when a law is purportedly retrospective, when an argument is advanced for a court sitting otherwise than in

198 (2010)
199 Lord Bingham, The Rule of Law, at 8.

public[200]– and plainly it would be unacceptable if in practice there is one procedure for the powerful or wealthy and a different procedure for others[201]. Substantive justice is more complex. The Rule of Law without any substantive content could be used to embrace mass murder, in strict compliance with the law of the land - and would be an empty concept. Conversely, and certainly in the international sphere, there will not be unanimity as to the requirements of substantive justice – in particular around the edges. The Rule of Law ought not to be the preserve of any one political philosophy or judicial system. Hence, to my mind, the wisdom of Lord Bingham's formulation; whatever disputes there may well be over interpretation and, importantly, who should interpret what[202], I cannot see why the Rule of Law should not embrace fundamental Human Rights, such as those contained in the European Convention on Human Rights and protected by the common law for a very long time before.

9. The meaning of the Rule of Law is also well articulated in the Benchmarks set out by the Venice Commission[203], in its Rule of Law Checklist. These capture the essence of the concept and are, in summary:

35/17 Legality;

35/17 Legal certainty;

35/17 Prevention of abuse of powers;

35/17 Equality before the law and non-discrimination;

35/17 Access to justice.

10. In some fortunate countries, we tend to take the Rule of Law for granted, which we should not. Even the most fleeting visit to a State which has lost the Rule of Law and a

200 Though sometimes it is necessary for a court to sit in private, e.g., when dealing with trade secrets, or, on occasions, national security.

201 The Judicial Oath in England and Wales is as striking as it is simple: after swearing allegiance to the Sovereign, the Judge swears to "do right to all manner of people after the laws and usages of this realm, without fear or favour,
affection or ill will".

202 The concept of subsidiarity and questions of margin of appreciation; see too, Lord Hoffmann, Judges, Interpretation and Self-Government, in Lord Sumption and the Limits of the Law (op cit), at pp. 67 and following.

203 European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Study No. 711/2013, adopted by the Venice Commission 2016, Endorsed by Ministers' Deputies 2016, Endorsed by the Congress of Local and Regional Authorities of the Council of Europe 2016.

functioning justice system serves as a humbling and moving reminder of its fundamental importance.

Hallmarks

11. I turn to a selection[204] of the principal hallmarks of a functioning justice system, sustaining and giving effect to the Rule of Law.

12. I start with the Judiciary. While an independent Judiciary does not, of itself, guarantee the Rule of Law, absent an independent Judiciary there can be no Rule of Law. In that regard, I cannot avoid, in a Conference of this nature, expressing concern at the all too many States in all parts of the world, where there is real concern that the independence of the Judiciary is under threat – and that threat comes in different forms, ranging from dismissals, the undermining of security of tenure, to the very modern variant of abuse (as distinct from criticism) on social media.

13. Open justice is a key principle. Justice must not only be done; it must be seen to be done. Effective public and media access to proceedings is essential. It helps promote fair process. It inoculates the justice system against arbitrary conduct – the rule of individuals rather than law – which could grow if the courts were shielded from scrutiny. It equally helps demonstrate to the public that the law is applied and how it is applied. It promotes public knowledge of what is being done in the courts. It is a necessity for the exercise of free speech and debate concerning laws, their interpretation and application. It is not just therefore a necessary feature of the proper administration of justice, but equally of the Rule of Law in society as a whole.

14. A facet of open justice is the ready availability and accessibility (very much including on the internet)[205] of judgments. Judgments must be properly accessible both to the parties and to the public. The parties need to know their rights, and, importantly, to understand why the court has arrived at the particular judgment in their case. The public, so that society can understand the law and the decisions of the Courts. Moreover, certainty as to the law is of the first importance (in particular for commercial law), so that individuals and businesses can order their affairs, in reliance on a framework of law. In

204 There are of course others; time and space preclude any effort to be exhaustive.
205 For instance, via court websites or websites such as BAILLI.

passing, it is pertinent to ask: are we doing enough to ensure that judgments are intelligible? Can they be understood by the wider public?

15. Furthermore, a functioning justice system must provide effective access to the Courts[206]. While there is room for argument as to detail[207], the principle cannot be in doubt. It is hollow to provide rights without the means of accessing Courts to give effect to them; our concern is with practical not theoretical justice. Effective, readily available, legal advice and representation. Ease and effectiveness of enforcement. Costs that are not to be prohibitive; the Judiciary can properly take steps to ensure that court rules, practices and procedures do not increase the cost of litigation unnecessarily. And within the rules, judges should manage cases[208] so that they are conducted at proportionate cost. Without access, property rights will not be secure, contractual rights will not be capable of ready enforcement: businesses will be neither able nor willing to invest and society will, as a consequence be impoverished. Equally, human and other civil rights and obligations will be incapable of effective implementation. Both the socio and economic demand of law will go unmet. The goals of sustainable development could not be achieved.

16. Let me linger on civil justice, as it is all too easily neglected. Civil justice is a public good.[209] Its provision is an integral part of the State's duty; as with the rest of the justice system it is not just another public service. As Lord Diplock expressed it:[210] "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access."

A shared endeavour

17. As already emphasised, all three branches of the State, Legislature, Executive and Judiciary[211] have an integral part in securing the Rule of Law. This is a shared endeavour.

206 See, Lord Reed in R(UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409, at [68]
207 The types of legal representation available, the resources committed to Legal Aid and so on.
208 More on case management below.
209 See, the 2008 Hamlyn Lectures by Prof. Dame Hazel Genn DBE, Judging Civil Justice (CUP 2009).
210 In Bremer Vulkan v South India Shipping Corp [1981] AC 909, at p.976
211 See, Alexander Bickel, The Least Dangerous Branch (1962), passim.

There needs to be a genuine commitment from the other branches of the State to judicial independence. It also requires such a commitment across society more broadly. The Judiciary's independence must be respected, and its decisions implemented. This does not mean that the Judiciary should be immune from criticism or that judicial decisions should be shielded from public debate. We can all think of judicial decisions with which we do not agree. It would be a strange state of affairs were it otherwise. Such decisions ought properly to be subject to reasoned debate and discussion, characteristic of a democratic society and serving to strengthen the Rule of Law. Such healthy challenge or disagreement is to be contrasted with abuse, from whatever quarter[212], intended to undermine Judicial independence, to which I have already referred. For the judiciary to properly carry out its role, it is necessary for it – as an institution– to be afforded a proper degree of respect and confidence by the other branches of the State and civic society generally[213]. On the part of the Legislature and Executive, this calls for a constitutional understanding of the role of an independent Judiciary, even, perhaps especially, in response to adverse decisions. Lord Bingham again[214]:

"There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live."

Respect for the Judiciary as an institution is respect for our shared endeavour in the Rule of Law.

18. Let me, however, be clear. The demands of respect cut both ways[215]. The quality of reserve or restraint is one of the Judiciary's great strengths and keeps judicial decision-making within its proper ambit.[216] Judges do not court public controversy; they are also not and should not aspire to be "celebrities". For the Judiciary to properly carry out its role, it must equally respect the roles of the other branches of the State. Institutional over-reach by the Judiciary is as much to be deprecated, as it is in any of the other branches of the State. Certainly, in a common law system, judicial development of the

212 Whether government inspired, mainstream media or social media driven.
213 The Rt Hon The Lord Burnett of Maldon, Becoming Stronger Together, Opening Speech at the CMJA Annual Conference, in Brisbane, 10 September 2018, at [27] and following.
214 The Rule of Law, at p.65.
215 Lord Burnett, ibid, esp. at [37]
216 Lord Justice Gross, The Judicial Role Today, Queen Mary University, Law and Society Lecture (London 23 November 2016).

law is inevitable – but there are limits to proper judicial law-making. There must be respect for "comparative institutional competence"[217]. Over-reach by the Judiciary through, for instance, judges entering into the political arena – the proper province of Executive and Legislature – cannot but draw the judiciary into disrepute. A politicised, political judiciary is one that would not be seen as capable of providing unbiased decisions based on the application of right law to right fact. Public confidence in the judicial function would be undermined, which in turn would undermine confidence in the rule of law.

19. Pulling these threads together: for judges to strengthen the Rule of Law, there needs to be a proper recognition and respect for their institutional and individual independence, while recognising the interdependence of the three branches of the State. Judges and Judiciaries should therefore ensure that they carry out their functions in ways which properly maintain, as Lord Hope put it 'the mutual respect which each institution has for the other'.[218] Equally, they must ensure that they do not act in ways that compromise their independence whether directly or indirectly, so that they are able to maintain public confidence in them and the role they play in securing the Rule of Law.

Judicial Leadership[219]

20. The most important task of a Judge is trying cases or hearing appeals. However, looking beyond that primary and essential task, a critical contribution to the strengthening of the Rule of Law and a functioning justice system is provided by judicial leadership. The range and extent of judicial leadership is striking; some aspects are traditional, of very long standing and taken effectively for granted. Others involve little short of a sea change.

21. Let me highlight four aspects of judicial leadership, at least as they apply in England and Wales. First, developing the substantive law. Secondly, developing procedural law – focusing here on "case management". Thirdly, leading reform of the justice system. Fourthly, promoting the Rule of Law internationally. Overall, judicial leadership calls for

217 Alan Paterson, Final Judgment (2013), at p.276.
218 R (Jackson & Ors) v Her Majesty's Attorney General [2005] UKHL 56; [2006] 1 AC 262, at [125].
219 Sir Peter Gross, Judicial Leadership, Gresham College Lecture, Barnard's Inn (23 June 2016)

fearless independence, while concurrently recognising that the Judiciary does not exist in splendid isolation, coupled with a readiness to cooperate with other Branches of the State when to do so will secure the administration of justice. In this way, judicial leadership contributes to setting the tone for the relationship between the Judiciary and the other branches of the State.

22. Substantive law: In our common law system, the Judiciary has as central a role in developing the law as does Parliament – subject of course to Parliament's constitutional right to amend, revise or correct the common law system through statute. This is the traditional role of the Judiciary, developing the common law by way of a "fourfold method"[220]: evolution, experiment, history and distillation. Here lies the genius of the common law; its ability to adapt to changed circumstances, so maintaining its relevance. It is not static; the product of a moment in time. This development of the law is plainly Judiciary led and calls for a careful balance between creativity, judgment and reserve or restraint.

23. Procedural law – case management: The Judiciary's role in procedural reform can be traced back at least to the 1820s[221] but I confine my focus here to active judicial case management, a feature now embedded in all our jurisdictions (crime, civil and family). It is difficult to overemphasise the cultural sea-change; the Judiciary has moved from a passive umpire (in the cricketing sense[222]) to taking a "grip" on the case, both pre-trial and at trial. To continue the cricketing analogy, Judges are still umpires but they now take a keen interest in the over rate and in the preparation of the pitch[223]. We have become "allergic to adjournments". Case management reforms have been Judiciary led; they would not have happened without determined and sustained judicial leadership; they would not, however, have succeeded without the active support of the legal professions and other agencies involved[224]. The philosophy requires Appellate Courts to support robust case decisions of lower court Judges, save where something has gone seriously

220 2013 Hamlyn Lectures, Sir John Laws, The Common Law Constitution, preface, p. xiii.
221 At an even earlier stage, Lord Mansfield CJ was anxious to speed up the Court's procedures: see, Poser, Lord Mansfield: Justice in the Age of Reason (2013), at pp. 202 and following.
222 Calling "balls and strikes" in baseball terms, an observation attributed to Chief Justice Roberts, in The Economist 8th-14th September, 2018, at p.35
223 Consider too the pro-active role of rugby referees in today's game.
224 For instance, the police and the Crown Prosecution Service in the criminal jurisdiction.

wrong. Though sounding unglamorous, case management is itself of considerable significance for strengthening the Rule of Law. By requiring the parties to identify the real issues in dispute at the earliest possible stage, it reduces the time and cost of litigation. Likewise, it reduces delays in the system as a whole – and justice delayed runs counter to the Rule of Law, even in legal systems where delays do not facilitate or encourage corruption[225].

24. Reform of the justice system: In England and Wales we are currently embarked upon a radical and ambitious court reform programme. It is one which (together with others) I was instrumental in shaping when I had the privilege of serving as Senior Presiding Judge for England and Wales[226]. The Reform programme is not an IT programme but it is IT enabled. It seeks to harness technology to improve the delivery of justice in a manner appropriate to the 21st century. It has as its aim a justice system that is digital by default – rather than paperbased. It includes the development of online, or digital forms of justice, including the incorporation of ADR to a greater extent than previously within our small claims process; online filing of claims and evidence; online case management; video hearings. But, recognizing that we are dealing with the delivery of justice, we are taking the necessary steps to ensure that it remains open justice, publicly accessible. It is also necessary to build in safeguards and support for those without internet access or capability. If we succeed – and we must succeed (there is no Plan B) – we will develop a more accessible justice system, so strengthening the Rule of Law and, in doing so, reduce the cost both to the State and, crucially, to litigants. Judicial leadership is crucial to the success of the Reform Programme, a view supported by both the previous and present Lord Chief Justices and the Senior President of Tribunals[227]. Judges and only Judges – working properly within proper constitutional bounds – have the experience to do so. They have a detailed understanding of what works. And crucially, they are able to provide their expertise on such matters as the necessity and nature of procedural justice

225 A real danger in some systems.

226 2013-2015

227 See, for example, Lord Thomas CJ, The judiciary within the state – the relationship between the branches of the state (Ryle Lecture, 15 June 2017) https://www.judiciary.uk/wp-content/uploads/2017/06/lcj-michael-rylememorial-lecture-20170616.pdf; Sir Ernest Ryder SPT, Securing Open Justice (Max Planck Institute Luxembourg for Procedural Law & Saarland University, 1 February 2018) https://www.judiciary.uk/wpcontent/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf

and the role it plays in securing fair and just decisions. The Judiciary, however, could not do it alone; the Reform programme is an outstanding example of the closest cooperation between the Judiciary and Executive to strengthen the justice system and, thus, the RulE of Law.

25. Promoting the Rule of Law internationally: Promoting the Rule of Law internationally is the unifying principle underlying our Judiciary's involvement in international work. We seek to work both bilaterally and multilaterally – this Conference and our work in the Standing International Forum of Commercial Courts ("SIFoCC") exemplify the latter. Such engagement means we learn from one another and can share our experiences and best practice. It is an exercise to which we can all commit ourselves; the Rule of Law at home is strengthened by its promotion internationally. The task of judicial leadership in this area is to set the goals and prioritise accordingly.

Education

26. By definition, we believe in the Rule of Law and a functioning justice system. But what do we do to explain all this to others? We should not assume support without working to achieve it. Here, therefore, I want to highlight the importance of judges playing a role in civic education, as a means of encouraging an understanding of the Judiciary, their role and relationship with the Executive and Legislature. It is an essential means of explaining the importance and function of judicial independence, of judicial accountability through appellate review and security of tenure. Explaining such matters, as well as the extent and the limits of judicial power, cannot but invigorate our shared enterprise and the Rule of Law.

27. In England the Lord Chief Justice has recently established a schools engagement programme. Its aim is to enable individual judges across the country to visit schools. There they will be able to explain what the justice system does, what they do, why and how they do it. Such schemes, and similar engagement through press conferences, such as the Lord Chief Justice's annual press conference, and through attending Parliamentary committees, such as the Justice Committee and Constitution Committee, to explain matters of relevance to the Judiciary and the operation of the justice system,

are all ways in which judges can engage and educate. They are all ways in which, as judges, we can help foster a Rule of Law culture.

Conclusion

28. I conclude by way of a recap of my theme, formulated in brief propositions:

(1) The Rule of Law is essential to the implementation of the social goals of sustainable development.

(2) The Rule of Law cannot be sustained by the Judiciary alone; it requires constitutional understanding from and the support and commitment of the other branches of the State, together with civic society as a whole.

(3) The Judiciary must fearlessly defend its independence as the third branch of the State but independence does not equate to splendid isolation.

(4) What is required is mutual respect between the three branches of the State, respect strengthened on our part by judicial reserve and avoidance of over-reach.

(5) The Judiciary can and should strengthen the Rule of Law by insisting on and defending its independence, open justice and accessible justice. Judicial leadership makes a crucial contribution to strengthening the Rule of Law, extending to substantive law, case management, reform of the justice system to meet contemporary needs and a commitment to international relations – evidenced by our work together here.

(6) The Judiciary should not assume that the truths of which we are persuaded are selfevident to all; effort put into public education will not be wasted.

EUROPEAN UNION

THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE RULE OF LAW: PROTECTING JUDICIAL INDEPENDENCE

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Abstract

The purpose of the present contribution is to show that EU law protects the independence of Member State courts. That independence is essential for the effective judicial protection of the rights that EU law confers on individuals. It also operates as a pre-condition in order for those courts to engage in a dialogue with the Court of Justice of the European Union (the 'CJEU') by means of the preliminary reference mechanism. From a transnational perspective, judicial cooperation between the Member States can only take place where courts exercise their functions wholly autonomously and impartially, since only those courts may be trusted with protecting EU rights effectively, and in particular EU fundamental rights. Most importantly, by protecting the judicial independence of Member State courts, EU law strengthens the rule of law not only within the EU but also within the legal orders of the Member States.

Keywords: Rule of Law – Member State Courts – Judicial Independence – Effective Judicial Protection of EU Rights – Preliminary Reference Mechanism – Mutual Trust – The Essence of the Right to a Fair Trial.

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228 All opinions expressed herein are personal to the author.

From a European Union ('EU') perspective, I believe that the timing could not be better for discussing this topic. That is because recent developments in the case law of the Court of Justice of the European Union (the 'CJEU') show that European Union law ('EU law') protects the independence of Member State courts, which is part and parcel of the rule of law within the EU.[229]

This means, in essence, that from the Gulf of Finland to the Strait of Gibraltar and from the Atlantic to the Aegean, any Member State court may, in the fields covered by EU law, rely on that law in order to set aside a Member State measure that threatens its independence.[230]

An external observer, who is not very much acquainted with the way in which the EU and its law operate, may wonder why a supranational organisation, such as the EU, protects the independence of Member State courts. What is the reason behind it?

That reason lies in the fact that the EU is more than its internal market and free trade. It is, first and foremost, a 'Union of values',[231] where respect for the rule of law is to be protected at both EU and Member State levels.

Accordingly, 'the European Union is a union based on the rule of law'[232] in which 'individual parties have the right to challenge before the courts the legality of any decision

229 See CJEU, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

230 CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C 64/16, EU:C:2018:117.

231 See Article 2 of the Treaty on the European Union ('TEU') that states 'The [EU] is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

232 See, e.g., CJEU, judgments of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C−50/00 P, EU:C:2002:462, paras 38 and 40; of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, para. 44; of 3 September 2008, Kadi and *Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, para. 281; of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para. 31, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 49.

or other Member State measure relating to the application to them of an EU act'.[233] Stated differently, in the EU legal order, the respect for the rule of law, effective judicial protection of EU rights and judicial independence go hand in hand. One cannot exist without the others.

The purpose of my contribution is thus to explain why maintaining the independence of Member State courts and tribunals is of paramount importance for the rule of law within the EU. I propose to address this topic as follows. First, I shall explain the role that Member State courts are called upon to play in the EU legal order. On the one hand, those courts are entrusted with securing the right to effective judicial protection, a fundamental right enshrined in Article 47 of the Charter of Fundamental Rights of the EU (the 'EU Charter'). On the other hand, they play an essential role in the preliminary reference mechanism, the keystone of the EU judicial system that ensures the uniform application of EU law.[234] Second, I shall point out that a Member State court or tribunal, within the meaning of EU law, refers to a body that exercises its functions wholly autonomously and impartially. Once it is found that such a body is to be considered a 'court or tribunal', within the meaning of EU law, that body may rely on that law in order to set aside a Member State measure that calls into question its independence. Third, I shall look at judicial independence from a transnational perspective. I shall present the view that judicial cooperation between the Member States can only take place where courts are independent. Finally, I shall explain how, by protecting the judicial independence of Member State courts, EU law strengthens the rule of law not only within the EU but also within the legal orders of the Member States.

I. The role of Member State courts in the EU legal order

233 CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para. 31

234 CJEU, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 176, where it was held that 'the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law').

Unlike systems with different levels of governance where there are both ‘federal’ and ‘state’ judges, such as the US or Argentina, there are no ‘EU District Courts’ or ‘EU Circuit Courts’ scattered across the European continent that are entrusted with protecting the rights that EU law confers on individuals.

On the contrary, the EU judicial power is shared between the CJEU and all Member State courts. The EU Treaties indeed entrust the responsibility for ensuring judicial review in the EU legal order not only to the CJEU but also to Member State courts and tribunals.[235] That sharing of responsibility does not take place in accordance with hierarchical principles, but in accordance with a division of jurisdiction: whilst it is for the CJEU to provide the definitive interpretation of the law of the EU, it is for the Member State court to apply that law to the case before it.[236]

It follows that, since Member State courts are the ‘common law’ courts of the EU, ‘Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law’.[237] Those remedies may include providing interim relief, setting aside conflicting Member State measures and awarding damages for breach of EU law.

That division of jurisdiction calls upon the CJEU and Member State courts to cooperate and to engage in a constructive dialogue, notably by means of the preliminary ruling mechanism.[238] The preliminary reference procedure is the mechanism by which Member State courts may or, as the case may be, must address questions to the CJEU on points of EU law. Any Member State court – be it a court of first instance, a court of appeal, a

235 See the second subparagraph of Article 19(1) TEU which states that: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by [EU] law.’
236 See, e.g., CJEU, judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, point 11.
237 CJEU, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paras 100 and 101.
238 See Article 267 Treaty on the Functioning of the European Union (‘TFEU`).

supreme or a constitutional court – enjoys full discretion to stay the proceedings before it and refer a preliminary question to the CJEU.

The answer given by the CJEU to those questions does not constitute an advisory opinion,[239] but a binding ruling.[240] That is why hypothetical questions will be dismissed as inadmissible by the CJEU, since the *raison d'être* of the preliminary reference mechanism is to answer questions that contribute to solving the dispute pending before the Member State court.[241] Moreover, judgments of the CJEU delivered in the context of that mechanism enjoy, as is said in French, '*la force de la chose interprétée*', an expression that conveys the following idea: since the CJEU determines how a given provision of EU law is to be interpreted, those judgments are binding not only upon the court that made the reference but also upon any court that applies that same provision.[242]

Coupled with the fact that EU law enjoys primacy and direct effect,[243] and that Member State courts are empowered to set aside conflicting Member State laws,[244] the preliminary reference mechanism ensures the uniform application of EU law and thereby, equality before the law for all EU citizens.

In summary, Member State courts are entrusted with ensuring effective judicial protection of the rights that EU law confers on individuals. By referring questions to the CJEU, those courts also contribute to ensuring the uniform interpretation and application of EU law.

II. Member State courts and judicial independence

239 See, e.g., CJEU, judgments of 24 October 2013, *Stoilov i Ko*, C-180/12, EU:C:2013:693, para. 47 and the case-law cited, and, to that effect, of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paras 39 and 40. See also CJEU, judgment of of 20 December 2017, *Erzeugerorganisation Tiefkühlgemüse*, C−516/16, EU:C:2017:1011, para. 82.
240 See, e.g., CJEU, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, point 16.
241 See, e.g., CJEU, judgment of 10 November 2016, *Private Equity Insurance Group*, C−156/15, EU:C:2016:851, para. 56 and the case-law cited.
242 See, e.g., CJEU, judgment of 24 June 1969, *Milch-, Fett- und Eierkontor*, 29/68, EU:C:1969:27, point 3.
243 CJEU, judgments of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1, and of 15 July 1964, *Costa*, 6/64, EU:C:1964:66.
244 CJEU, judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49.

Logically, the question that arises is what is to be understood by a Member State ‘court or tribunal’ within the meaning of EU law. That is an important question, since the notion of ‘court or tribunal’ determines the body that may provide effective remedies against violations of EU law and that may engage in a dialogue with the CJEU.

In that regard, the CJEU has ruled that the notion of ‘court or tribunal’ is to be defined autonomously. This means, in essence, that it is for EU law, as interpreted by the CJEU, to determine the factors that must be taken into account in order for a Member State body to be considered ‘a court or tribunal’ within the meaning of that law.

In that regard, the CJEU has held, and I quote, that ‘the factors to be taken into account in assessing whether a body is a ‘court or tribunal’ include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent’.[245]

That last factor has been defined by the CJEU as including both an internal and an external dimension.[246] Internally, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. In other words, independence requires courts to be impartial.

Externally, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them.[247] That protection must apply to the members of the judiciary, by, for example, laying down guarantees against removal from office.[248]

245 CJEU, judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, para. 27 and the case-law cited.

246 CJEU, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paras. 50 to 52, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraphs 37 and 38.

247 CJEU, judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, para. 51.

248 See, e.g., CJEU, judgments of 22 October 1998, *Jokela and Pitkäranta*, C-9/97 and C-118/97, EU:C:1998:497, para. 20, and of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52,

Thus, the notion of ‘court or tribunal’, as defined by EU law, must be interpreted as *always* meaning an independent court.

But what happens where a court (or tribunal), within the meaning of EU law, sees its independence put in jeopardy by the other branches of government. That court would no longer be able to provide effective judicial protection of EU rights, nor avail of the preliminary reference mechanism. This shows that, where a Member State court loses its independence, the entire EU system of judicial protection is called into question.

In *Associação Sindical dos Juízes Portugueses*, decided last February, the CJEU held, and I quote, that ‘[in] order for [the] protection [of EU rights] to be ensured, maintaining [a] court or tribunal’s independence is essential’.[249]

It follows that, once it is found that a body is to be considered a ‘court or tribunal’, within the meaning of EU law, that court may rely on that law in order to set aside a Member State measure that hinders its independence.

For example, in *Associação Sindical dos Juízes Portugueses*, the Member State measure in question was a Portuguese law, adopted in 2014, that sought to cut public spending by reducing the salaries of various public office holders and employees, including members of the legislature, the executive and the judiciary. That law was passed in response to the EU programme of financial assistance and with a view to curtailing its excessive budget deficit.

Such salary-reduction measures also applied to the members of the Portuguese Court of Auditors (‘Tribunal de Contas’). The Union of Portuguese Judges, acting on behalf of those members, brought legal proceedings against the administrative acts implementing

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para. 21.

249 CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para. 41.

that law, arguing that those salary-reduction measures threatened the judicial independence of the said members, as guaranteed by EU law.

At the outset, the CJEU found, subject to final verification by the referring court, that the Tribunal de Contas could fall within the notion of 'court or tribunal' as defined by EU law.[250] Accordingly, in respect of fields covered by EU law, Portugal had the obligation to maintain the independence of that court. In particular, the CJEU noted that 'the receipt by [persons who have the task of adjudicating in a dispute] of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence'.[251]

Next, the CJEU went on to examine whether the salary-reduction measures at issue called into question the independence of the members of the Tribunal de Contas. The CJEU replied in the negative. First, those measures were adopted as a response to mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.[252] Second, the reduction of the amount of remuneration was limited to a percentage varying in accordance with the level of salary.[253] Third, they were temporary in nature since by 2016, the full reinstatement of the rights to remuneration at issue in the main proceedings had already taken place.[254] Most importantly, the salary-reduction measures did not target the members of the Tribunal de Contas specifically, but applied to various public office holders as part of a comprehensive effort to cut down spending in the public sector at a time of economic crisis.[255]

III. Judicial independence and mutual trust

250 *Ibid*., para. 40.
251 *Ibid*., para. 45.
252 *Ibid*., para. 46.
253 *Ibid*., para. 47.
254 *Ibid*., para. 50.
255 *Ibid*., para. 49.

The EU has evolved beyond the internal market paradigm. Currently, it seeks to offer its citizens an Area of Freedom, Security and Justice ('AFSJ') without internal frontiers, where citizens may move freely and securely.

In an area without internal borders, the exercise of free movement should not undermine the powers of the competent Member State court and the effectiveness of the applicable Member State laws, which operate on a territorial basis. As internal borders disappear in Europe, the arm of the law should acquire a transnational dimension, so that, for example, criminals are prevented from relying on free movement as a means of pursuing their activities with impunity.

Accordingly, the authors of the EU Treaties reasoned that the free movement of persons should be accompanied by the free movement of judicial decisions. By virtue of the principle of mutual recognition, judicial decisions adopted in the Member State of origin are to be recognised and enforced in the Member State of enforcement as if they were its own.

The European Arrest Warrant mechanism (the 'EAW mechanism') illustrates this point. That mechanism aims to replace the multilateral system of extradition between Member States with a simplified and more effective system of surrender between judicial authorities which facilitates and accelerates judicial cooperation.[256] In that regard, the CJEU has held that 'while execution of the [EAW] constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly'.[257]

It follows that, in order to establish an AFSJ, judicial cooperation in civil and criminal matters must be facilitated. That cooperation is based on the fundamental premise that Member State courts trust each other and see each other as equals. Thus, in the light of

256 See., e.g., CJEU, judgments of 30 May 2013, *F.*, C−168/13 PPU, EU:C:2013:358, para. 57; of 16 July 2015, *Lanigan*, C−237/15 PPU, EU:C:2015:474, para. 27; of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, para. 76; of 10 November 2016, Poltorak, C−452/16 PPU, EU:C:2016:858, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C 216/18 PPU, EU:C:2018:586, para. 25.
257 See, e.g., judgment of 10 August 2017, *Tupikas,* C-270/17 PPU, EU:C:2017:628, paras 49 and 50.

the principle of mutual trust, 'each of [the Member] States, save in exceptional circumstances, [is] to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[258]

This shows that, whilst the principle of mutual trust is of paramount importance for the creation and maintenance of the AFSJ, 'mutual trust is not to be confused with blind trust'.[259] This means that, in exceptional circumstances, that fundamental premise may be set aside. For example, in the seminal *Aranyosi and Căldăraru*, decided in April 2016, the CJEU held that a Member State may not execute an EAW where such execution entails a violation of the prohibition of torture and inhuman or degrading treatment or punishment, enshrined in Article 4 of the EU Charter, brought about by the conditions of detention in the prison system of the Member State that issued the EAW.[260] In so doing, the CJEU stressed the fact that Article 4 of the EU Charter provides an absolute right.

At this stage, the question that arises is whether judicial cooperation may take place despite the fact that the independence of the court that adopted the decision to be recognised and enforced is called into question. In *Minister for Justice and Equality (Deficiencies in the system of justice)*, decided last July, the CJEU was confronted with that very question.

The facts may be summarised as follows. Polish courts issued three EAWs against a Polish national for the purpose of conducting criminal prosecutions for drug trafficking. The person concerned was detained in Ireland and put in custody. He opposed the execution of the EAWs, submitting that 'his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of [Polish courts]

258 CJEU, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 192.
259 See K. Lenaerts, '*La vie après l'avis*: Exploring the principle of mutual (yet not blind) trust' (2017) 54 *Common Market Law Review*, pp. 805–840.
260 CJEU, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198.

resulting from implementation of the recent legislative reforms of the system of justice in that Member State'.[261]

The High Court of Ireland, which was in charge of executing the EAWs, also had some doubts as to the independence of Polish courts. Notably, it based those doubts on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland,[262] and on the two opinions of the Venice Commission.[263] Thus, the High Court of Ireland asked the CJEU whether, in the light of those circumstances,[264] it was still bound by the principle of mutual trust to execute those EAWs.

At the outset, the CJEU examined whether a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the EU Charter was capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to an EAW.[265]

261 CJEU, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 46.
262 COM(2017) 835 final.
263 Opinion of the Venice Commission No 904/2017 of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of Ordinary Courts; and Opinion of the Venice Commission No 892/2017 of 11 December 2017 on the Act on the Public Prosecutor's office, as amended ('the opinions of the Venice Commission'). These documents are available on the Venice Commission's website at the following address: http://www.venice.coe.int/webforms/events/
264 The High Court of Ireland found the following reforms to be problematic: '– the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Trybunał Konstytucyjny (Constitutional Tribunal) and its refusal to publish certain judgments; – the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice; – the fact that the Sąd Najwyższy (Supreme Court) is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and – the fact that the integrity and effectiveness of the Trybunał Konstytucyjny (Constitutional Court) have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system'.
265 *Ibid*., para. 47. CJEU, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C 216/18 PPU, EU:C:2018:586, para. 21.

The CJEU replied in the affirmative. In what is in my view the most important passage of that judgment, the CJEU ruled, and I quote, that 'the requirement of judicial independence forms part of the *essence* of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[266]

[As the two German judges sitting in this panel may confirm], the essence of a fundamental right operates as a 'limit on limitations' that may be imposed on the exercise of that right. It is a core nucleus that must remain free from public interferences. Since judicial independence forms part of that core nucleus, the CJEU reasoned that such independence may not be limited in light of the principle of mutual trust.

Next, the CJEU went on to provide the High Court of Ireland with a framework of analysis that would enable it to determine whether such a real risk existed in the case at hand. In recalling its previous ruling in *Aranyosi and Căldăraru*, the CJEU held that the executing judicial authority must follow a two-step assessment. The first step focuses on the situation of the system of justice of the Member State concerned as a whole, whilst the second step looks at the circumstances of the case at hand.

As a first step, the executing judicial authority must examine, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk of the essence of the right to a fair trial being breached. In so doing, the executing judicial authority must look at both the internal and external aspects of independence.[267]

In particular, the CJEU pointed out that judicial independence requires the adoption of rules that govern the composition, appointment and length of services of the body that

266 CJEU, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 48.
267 *Ibid*., para. 61.

has the task of adjudicating in a dispute. Those rules should also lay down the grounds for abstention, rejection and dismissal of its members. Moreover, when it comes to dismissals, those grounds should be determined by express legislative provisions. The purpose of those rules is to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[268]

The CJEU also provided useful guidance regarding the conditions under which a disciplinary regime may operate without calling into question judicial independence. Notably, the CJEU stressed the fact that such a regime must not be 'used as a system of political control of the content of judicial decisions'. Again, the adoption of rules is essential for safeguarding the independence of the judiciary. Those rules must, first, define both the conduct amounting to disciplinary offences and the penalties actually applicable. Second, they must also provide for the involvement of an independent body in accordance with a procedure which fully safeguards the basic procedural rights guaranteed by the EU Charter, in particular the rights of the defence. Last but not least, those rules must offer the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions.[269]

As to the second step, the executing judicial authority must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk. In other words, having regard to the personal situation of the person concerned, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the EAW, the executing judicial authority must determine whether the systemic or generalised deficiencies in the system of justice of the issuing Member State are liable to call into question the independence of the court that issued the EAW in question.

268 *Ibid*., para. 66.
269 *Ibid*., para. 67.

IV. Concluding remarks

The purpose of this panel is to look at the different ways in which the rule of law may be strengthened. From a European perspective, I would like to point out that EU law contributes to strengthening the rule of law not only within the EU but also within the legal orders of the Member States.

Vertically, the protection of judicial independence guarantees that Member State courts provide effective judicial protection of the rights that EU law confers on individuals. That protection also guarantees the proper functioning of the preliminary reference mechanism, which is essential for the uniform application of EU law. Horizontally, judicial cooperation may only take place among Member State courts that are independent. Where that independence is lacking, mutual trust ceases to exist. Therefore, if a Member State wishes that its own courts gain the trust of courts from other Member States, it must earn that trust by guaranteeing judicial independence.

Most importantly, in the fields covered by EU law, the Member States are under the obligation to maintain the independence of bodies that are to be considered 'courts or tribunals' within the meaning of that law. Any measure that constitutes a threat to that independence is repugnant to the values on which the EU is founded and must be set aside.

CHILE

STRENGTHENING THE RULE OF LAW "FUNDAMENTAL LAW AND CONSTITUTIONAL COURT"

Iván Aróstica Maldonado, President of the Constitutional Court of Chile

Summary

The subject of this presentation is about the connection between the Rule of Law and Democracy; this is done by reviewing the character of constitutions as substantive norms or fundamental laws.

The presentation illustrates how constitutions can be changed by democratic but totalitarian governments. This connection is exemplified by the case of the Enabling Act of 1933, which *de facto* derogated the Weimar Constitution.

I am very pleased to attend, on behalf of the Constitutional Court of Chile, to this Judicial Conference of the Supreme Courts of the G20, here, in the beloved city of Buenos Aires.

Law professionals in general –and we, constitutional justices in particular– learn in many different ways. We learn during the long hours of seclusion and intimacy of study. We learn by unravelling the meaning of the rules. We learn by interpreting them. We learn by comparing them. We learn by discussing them among colleagues, with the Judiciary, and the Academy. And, we also learn –last but not least– by our contacts with the local and global community, of those who cultivate these same disciplines and share experiences that may seem interesting and valuable to us.

In a globalized world, very few countries can sustain today what Pericles said with good reasons in his Funeral Oration on the year 431 B.C.: "Our constitution does not copy the laws of neighbouring states; we are rather a pattern to others than imitators ourselves."[270]

Today, getting-together occasions are not only a blessing or a privilege; they are also an imperative. Certainly, through unique and unrepeatable processes, countries have engendered certainties and created institutions to promote social harmony and develop political systems congruent with the principles of freedom, the respect for fundamental

270 Thucydides. *History of the Peloponnesian War*.

rights, the autonomy of the people, and of the political, social and cultural dynamics. But, it is our common responsibility, Magistrates and/or Justices of Supreme or Constitutional Courts, to contribute to the preservation of the Rule of Law and of Democracy.

I emphasize this last point, because from an historical perspective, many societies teach us that, between the dynamics of the law of the majorities and the respect for fundamental rights, usually conflicts arise that the constitutional and legal order calls us to face. Especially, regarding a phenomenon that in Latin America tends to rise, in contexts of political messianism, where democratic mechanisms end up being co-opted by authoritarian or moreover totalitarian regimes.

At our doorsteps, we are being threatened by new forms, no longer of dictatorships or tyrannies, but, of rejuvenated totalitarianisms, now in pursuit of cultural hegemony, thanks to an unforeseen legal revolution. They misuse Democracy to reach power and perpetuate in it by the intricacies of the Rule of Law. Never before, has the dignity of the human being been so attacked, preventing its understanding as a simple instrument or object in the hands of new social or constructivist engineers. Never as today, has so much deference from this ideological legislator been demanded, allowing for fundamental rights invasions just because these invasions are soft and the damages relatively light.

It is the eloquent warning of Justice Joseph P. Bradley, in the Boyd v. United States (1886)[271] case: "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

271 Boyd v. United States, 116 U.S. 616, 635 (1886)

In Germany, the catastrophe occurred with the Enabling Act of 1933, a modification which *de facto* derogated the Weimar Constitution. It proved that the most extreme totalitarianism could reach power through balloting and hence rule under the protection of perfectly majority laws. This enabling law solely needed to prevent rules that the chancellor might dictate "not to contradict" the institutionalism, although they could "differ" from it; thus, the "legal revolution" that Nazism carried out through an alternate legality apart from the constitutional order.

Indeed, "No doubt, the fact that totalitarian government, its open criminality notwithstanding, rests on mass support is very disquieting."[272] Hannah Arendt wrote, shortly after the end of World War II, in her contemporary political essay called *The Origins of Totalitarianism.* "It is therefore hardly surprising"[273] the outstanding author added, "that scholars as well as statesmen often refuse to recognize it, the former by believing in the magic of propaganda and brainwashing, the latter by simply denying it,"[274] and for a repugnant opportunism, we would add**.** For Hannah Arendt, the case couldn't be clearer: "It is quite obvious," she asserted, "that mass support for totalitarianism comes neither from ignorance nor from brainwashing."[275] Certainly, it derives from the twisted and fraudulent management of Democracy.

Yet, thus far, we could assert that, present-day totalitarianisms still pose the problem of their excessive concentration of power, but also the fact that they can be very popular, somehow, making them all the more terrifying.

For that reason, the Germans call their current Constitution the "Basic Law" of Bonn; since it "…is committed to democratic, social and federal principles, to the rule of law…"

272 Arendt, H. (1973). *The Origins of Totalitarianism*, 3rd Ed., with new prefaces, San Diego/ New York/ London: Harcourt, Brace & World, p. xxiii
273 Idem
274 Idem
275 Idem

(Article 28.1).[276] Primarily, the Rule of Law, with legal principles, the intangible dignity of the human being and rights whose essential content cannot be derogated by majorities. A Rule of Law that –therefore– is republican, not monarchical, and also democratic, it is based on the government of the majorities; and, ultimately, it is also social; it aims at levels of cohesion, well-being and peaceful coexistence without which democracies surely can be an unsatisfying experience.

A mature institutional system, where at the top there is a Basic or Fundamental Law, where below are coherently articulated different general and particular laws, then interpretive laws and procedural laws, not only have to answer without hesitation to the questions of who make the laws and how. A Fundamental Law must go even further, and ask why and for what reason the laws are enacted: to proscribe all those who tend to distort or destroy the fundamental regime of the Rule of Law and consequently Democracy, as well as to invalidate any law that is not in accordance with the Fundamental Law, especially when they do not acknowledge human being's dignity or the essential content of the fundamental rights.

The legislator requires all necessary discretion; "freedom of configuration" understood as a legal power granted by the Constitution and only to produce legal effects within the Constitution, in other words, as a power to choose between several alternatives to a decision, if all of them are equally in agreement with the Constitution.

Besides, to prevent that all of this derives in a complete inanity, the Fundamental Law requires the existence of a jurisdictional body to enforce its pre-eminence over laws. It needs the existence of a Constitutional Court or an autonomous Supreme Court, –institutionally guaranteed–, that it will be able to adopt the decisions that the legal conscience dictates to its members, even when some judgments may displease some political or social sector.

276 Basic Law for the Federal Republic of Germany. (23 May 1949), Deutscher Bundestag. (Last amended on 13 July 2017)

Perhaps, in no other institutional instance, the ropes of politics and the ropes of law and justice manifestly cross as in the constitutional courts. It is everyone's task not to politicize the law, and our responsibility not to judicialize politics. Our task is not easy, and, it is delicate. There are no exact rules – nor there does a system do offer answers for everything – for the achievement of this difficult balance between the realities of politics and the imperatives of justice. Constitutional justice presupposes rigorous and constant study. It also requires being loyal to both the wording and the spirit of the Constitution. As it presupposes, of course, a no less amount of prudence, that old and often underestimated virtue that for Aristotle[277] meant right justice not only in reasoning but also in human action.

I would like to finish these words by thanking our illustrious hosts and wishing them all the best wishes of success in this, our noble task, to continuously preserving constitutional supremacy.

277 Aristotle, Ross, W. D., & Brown, L. (2009). *The Nicomachean ethics*. Oxford: Oxford University Press.

JUDICIAL REFORM

CHINA

PEOPLE-CENTERED JUDICIAL SYSTEM REFORM IN CHINA

Senior Judge Liu Hehua, Supreme People's Court of the People's Republic of China

Abstract

Chinese courts always adhere to the people-centered approach in the judicial system reform. We have launched a series of major initiatives to realize handy justice for the public, fairness and justice, scientific and efficient justice and the construction of smart courts, and have made unremitting efforts in safeguarding judicial justice and justice for the people so as to improve judicial credibility and to make the people more satisfied with the administration of justice in China.

Keywords: people-centered, justice for the people, judicial openness, judicial justice, smart courts

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Entrusted by Mr. Zhou Qiang, President of the Supreme People's Court of the People's Republic of China, I'd like to share my views with you on the judicial system reform. The judicial system reform is an important part in China's endeavor to comprehensively deepen reforms and promote the rule of law. It is of great importance in building a socialist country ruled by law and promoting the modernization of the state's governance system and governance capacity. Since the 18th National Congress of the Communist Party of China in 2012, Chinese courts have launched a number of major reform initiatives and made initial achievements. Judicial quality, efficiency and credibility have been largely improved; the socialist judicial system with Chinese characteristics has been

perfected, and people's sense of gain, happiness and security has been constantly enhanced. We can put it in this way: Chinese courts have succeeded in “reforms that have been pondered and discussed for many years”. The judicial reform of Chinese courts has always been based on the people-centered approach in meeting people’s growing and diversified judicial needs in democracy, rule of law, fairness, justice, security and environment, and in solving the major problems encountered by the people in disputes litigation, so as to enhance judicial credibility and make people more satisfied with the administration of justice.

——Reform provides more guarantee to people’s right of appeal. Chinese courts have made continuous efforts in strengthening the protection of people’s right of appeal and innovating litigation service mechanisms to promote fair, efficient and diversified settlement of cases. First, comprehensive reform of case-filing register system. Since May 1, 2015, Chinese courts have fully implemented the register system for filing cases, which has thoroughly addressed "difficulty in filing lawsuits", an issue much complained by the people. After the reform, the on-the-spot case registration rate exceeded 95%. Second, enrichment of online and offline litigation service forms to provide more convenience to the people. We have built modern litigation service halls, and litigation service centers have almost covered courts at all levels nationwide. More than 2,700 courts have opened litigation service websites and 12368 litigation service hotline; 1,137 courts have launched litigation service APP; more than 2,600 courts have established platforms for online case filing or online appointments for case filing; more than 1,200 courts have implemented cross-jurisdiction case filing services; and 1,958 courts have set up lawyers service platforms to provide more convenient and efficient litigation access to litigants. Third, diversified solutions to disputes to alleviate litigation exhaustion. Chinese courts have been working on the reform of diversified disputes resolution mechanism. We work to connect litigation and mediation even closer by making full use of various disputes settlement approaches such as people’s mediation, business conciliation, lawyer mediation, industrial mediation, arbitration and notarization to lead litigates to settle disputes through non-litigation approaches. Last year, cases diverted before litigation in courts at all levels in China claimed more than 1.863million.

——Reform has made trial and enforcement more transparent. Chinese courts have made full use of the information technology to improve and reform the open, dynamic, transparent and convenient sunshine justice mechanism for openness-driven justice and justice-driven credibility. At present, Chinese courts have set up four open platforms: trial process, trial activities, issuance of judgments and enforcement information. The parties concerned can inquire the information related to the trial and enforcement of cases and effective judgments, as well as watch the live broadcast or recordings of the trial at any time on the Internet. In this way, people can see and feel fairness and justice. Up to now, the China Judgment Online has published nearly 50 million judgments. It has users from more than 210 countries and regions, and is the world's largest database of judgments. Chinese courts have also taken the initiative to meet the emerging needs of the society by providing detailed and authoritative judicial information to the community through various channels, such as white papers, official websites, Weibo, Wechat, APPs and news clients, so as to ensure people's right to know, to participate in and to monitor the administration of justice on the premise of the information security of the parties concerned.

——Reform has standardized the exercise of judicial power. Chinese courts have reformed the mechanism of law enforcement, the organizational structure of court institutions, and the litigation system to ensure that the people's courts exercise their judicial power independently and impartially according to law and to promote a more just, efficient and authoritative judicial environment. First, reform of the organizational structure of courts. The Supreme People's Court has set up six circuit courts and two international commercial courts. We have also set up intellectual property courts in Beijing, Shanghai and Guangzhou and carried out pilot reform of cross-administrative division courts in No. 4 Intermediate People’s Court of Beijing Municipality and No. 3 Intermediate People’s Court of Shanghai Municipality. Financial courts have also been set up in Shanghai. We streamlined the internal bodies of local courts, so as to lay a solid organizational foundation for judicial justice and professional trials. Second, reforms with judicial accountability at its core. We have improved the accountability system for case-handling by judges. Presidents and tribunal directors will no longer issue judgments for

trails they have not participated in. In this way, the judges will be responsible for their own judgments. We have also provided assistants to judges and adopted intensive management and social services procurement for ancillary office work such as delivery and information recording to improve trial efficiency. Third, reform of the trial-centered criminal procedures. We carry out trials in the principles of law-based penalty, evidentiary adjudication, exclusion of unlawful evidence and presumption of innocence to increase the attendance rate of witnesses, ensure that lawyers defend parties concerned in accordance with law, improve the mechanism for the prevention of miscarriages of justice in criminal cases, give full play to the decisive role of court trials in ascertaining facts and evidence, protecting the right to appeal and exercising impartial adjudication, and ensure that innocent people are spared from criminal investigation, and that guilty people are punished impartially. We have carried out the pilot program of fast-track sentencing procedure. For minor crime cases, on the premise of protecting the rights of the defendant, it is necessary to simplify the litigation procedure to prevent prolonged detention. Fourth, we have promoted diversion of complex and simple cases and application of speedy trial to simple cases and deliberate trial to complex cases. Fifth, reform of the enforcement mechanism. The Supreme People's Court has set up an enforcement command center for a more coordinated management system of enforcement of courts at four levels. The network enforcement inquiry and control system has been set up and the credit supervision, warning and punishment system of dishonest persons subject to enforcement has been improved to address "difficulty in enforcement".

——Reform brings intelligence to dispute settlements. Nowadays, the new round of scientific and technological revolution with information technology at its core is booming, profoundly changing the human society and the world. Facing the profound changes brought about by the development of science and technology, Chinese courts actively embrace modern science and technologies by promoting the deep integration of modern technologies with the work of courts, speeding up the construction of smart courts to gradually realize the online, transparent trial and enforcement and provide all-round smart services to litigates and parties from all walks of life. At present, all courts in China have had access to the court's special network. Judges and other judicial assistants are

able to handle cases and office works all in “one network”. We promoted the R&A and application of justice big data and artificial intelligence to realize such functions as retrieval of similar cases, automatic inspection of defects in judgments, full-process recognition and recording of speeches in court trials, synchronous generation of electronic files with cases, intelligent trial assistance, self-service in litigation, and supervision and management of online cases. Last year on August 18, China set up the world's first Internet court, the Hangzhou Internet Court. This year, more Internet courts will be set up in Beijing and Guangzhou to explore the construction of a new trial mode and litigation rules for online cases, and to contribute to the judicial governance in cyberspace.

Reform is not a mission accomplished. Rather, it is an endeavor always in progress. The 19th Congress of the Communist Party of China has put forward new requirements and arrangements for deepening of the judicial system reform. We will continue to adhere to the people-centered approach, take reform and innovation as the driving force and keep improving the socialist judicial system with Chinese characteristics, so as to provide the public with fairness and justice in every case.

At present, Chinese people are making unremitting efforts to realize the Chinese dream of the great rejuvenation of the nation. The judicial practice and exploration of Chinese courts are not only committed to promoting justice for the people and impartial justice, but also to contributing Chinese wisdom and providing China’s plans to the development of the rule of law in the world. We sincerely hope to draw from each other's experience and strengthen practical cooperation with other countries, so as to make new and greater contributions to the development of judicial undertakings and the rule of law.

KOREA

JUDICIAL REFORM IN KOREA: ACHIEVEMENTS AND CHALLENGES

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Summary

Judicial reform has always been a recurring theme in the Republic of Korea's national agenda. Over the many years, our judiciary was able to secure the political support necessary for achieving its policy goals during the legislative process, leading to successive waves of reforms. Up until now, the underlying features of Korea's judicial reform have been primarily as follows: (i) improving litigation procedures, (ii) increasing citizens' participation in the judicial process, and (iii) promoting judicial expertise. The Korean judiciary, however, has been faced with totally different sorts of challenges in recent years. I will review the progress made during the decades that preceded the current situation and briefly discuss the prospects for future judicial reform.

While the current features of Korea's judicial reform were made possible because of the efforts on the part of the judiciary and other branches of the government, they evolved neither quickly nor effortlessly. It should be noted that the Korean Judiciary itself initiated the first comprehensive judicial reform when it created the Committee on Judicial System Development in 1993. The former Chief Justice Yun Kwan proposed that the whole judicial system should be revamped to keep abreast of the fast-changing Korean society. He emphasized that it was time to streamline the judicial procedures upon the occasion of the centennial anniversary of the modern Korean judicial system, which fell on March 25, 1995.

The Roh Moo-hyun administration, which took power in 2002, vowed to launch judicial reforms as an important part of its agenda. President Roh and then Chief Justice Choi Jong-young agreed to cooperate in pushing judicial reform forward. As a result of this

collaboration between the executive and the judicial branches of the government, trial-by-jury processes were introduced in criminal proceedings. It also put into place the graduate Law School system in Korea, replacing the previous legal education system.

In 2010, the National Assembly established its Special Committee on Judicial Reform. There were people who suspected it was a politically motivated attempt to vent out the frustrations of politicians who disliked the so-called “liberal tendency” of the Lee Yong-hoon Court. The judiciary succeeded in preventing hastily-designed reform measures from being implemented, but agreed with the legislature to revamp the personnel system so that judges were thereafter recruited from legal practitioners of minimum ten years of working experience.

In Korea, the Chief Justice has the authority over and responsibility for all judicial administrative matters. The National Court Administration (NCA) established under the Supreme Court is responsible for implementing administrative matters. The NCA provides comprehensive administrative support to the courts nationwide. It includes, among others, examining various issues that may affect the judiciary as a whole, assigning personnel throughout the court system, and managing judicial budgets and external affairs.

With the growth of the size and duties of the judiciary as an institution, the NCA has exercised its authority extensively, which has prompted some reasonable concerns. There has been criticism that judges functioning as full-time administrators might cause at least an appearance of impropriety. Recently, voices have even charged that it might compromise the judicial independence of individual judges by meddling with the completion of judicial duties.

The incumbent Chief Justice Kim Myeongsu took office in 2017. He promised an overhaul of the administrative structure of the judiciary, which was well-received among most judges as well as much of the public. The Committee on Judicial Development was launched this April to present its recommendations for judicial reform. In September, Chief Justice Kim announced that he will push forward with a reform of judicial administration in accordance with the Committee’s recent proposals.

As part of the judicial reform initiative, Chief Justice Kim plans to abolish the NCA, and instead establish two new entities: (i) the Judicial Administration Conference, mandated to make decisions on judicial administrative matters, and (ii) the Secretariat, mandated to implement and execute policies set by the Conference. The Judicial Administration Conference will be composed of both members of the judiciary and outside experts. Unlike the NCA, the Secretariat will operate its functions without participation of any judges.

Chief Justice Kim also vowed to overhaul the personnel system in the courts. He empathized with reform-minded judges that the current judicial hierarchy is too rigid, and that judges should be free from pressure of any kind, for example, transfer and promotion within judicial hierarchy, and etc.

Against this backdrop, Chief Justice Kim has asked the Committee on Judicial Development to produce its reform proposal along with a concrete legislative roadmap by the end of this year. He intends to persuade the National Assembly to make revisions to the Court Organization Act and related statutes in the near future.

It is quite unique that the '2018 Judicial Reform' was initiated from within the judiciary itself, and that it targets the steeply hierarchical structure of our traditional judicial administration. But there has been criticism that this reform process neglects how it is viewed from the perspective of the general public. It seems that citizens want to have more of a voice in judicial administrative matters, as well as in the judicial process. And there are worries about whether or not these reforms can progress well in our highly divided partisan legislature. In conclusion, however, I am quite optimistic that our nation's judges' aspirations for judicial reform and their passion for a more democratic and accountable court system will lead to positive outcomes in the foreseeable future.

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1) Introduction

It should be noted that judicial reform has always been a recurring theme in the Republic of Korea's national agenda, drawing keen interest from the general public. Over the many

years, our judiciary was able to secure the political support necessary for achieving its policy goals during the legislative process, leading to successive waves of reforms.

Up until now, the underlying features of Korea's judicial reform have been primarily as follows:

(i) *Improving litigation procedures*. The judiciary has tried to address administrative problems so that courts could improve efficiency in case management and e-litigation nationwide by harnessing modern technology. As for judicial proceedings, the judiciary has made significant changes particularly in criminal procedures including mandatory hearings for issuance of arrest and detention warrants, the establishment of a Sentencing Commission and the adoption of sentencing guidelines. The Civil Procedure Act was also amended so that the traditional "piecemeal" method could be replaced with "continuous and intensive" hearings in civil proceedings.

(ii) *Increasing citizens' participation in the judicial process.* The "trial by jury" system was introduced in criminal proceedings. This has produced a heightened sense of fairness in the administration of justice.

(iii) *Promoting judicial expertise*. The judiciary established a separate Patent Court and also an Administrative Court, thereby enabling judges to obtain and then utilize legal expertise in specialized disciplines.

The Korean judiciary, however, has been faced with totally different sorts of challenges in recent years. I will review the progress made during the decades that preceded the current situation and briefly discuss the prospects for future judicial reform.

2) Three Decades of Judicial Reforms: 1990s, 2000s, and 2010s

A. Political and Social Background

While the current features of Korea's judicial reform were made possible because of the efforts on the part of the judiciary and other branches of the government, they evolved neither quickly nor effortlessly. In 1987, Constitutional Amendments were ratified in a national referendum as a result of the successful democratization movements of the 1980s. Judicial reform began to be discussed earnestly under the new full-blown democratic governments. Moreover, voices for judicial reform intensified when President

Kim Young-sam took office in 1993 with the agenda of instituting what was referred to as a “civilian government.” At that time, there was strong public demand for “judicial democratization,” which called for the elimination of non-democratic and authoritarian elements within the judiciary and stronger guarantees of civil rights.

B. Judicial Reform Efforts

(1) It should be noted that the Korean Judiciary itself initiated the first comprehensive judicial reform when it created the Committee on Judicial System Development in 1993. The former Chief Justice Yun Kwan proposed that the whole judicial system should be revamped to keep abreast of the fast-changing Korean society. He emphasized that it was time to streamline the judicial procedures upon the occasion of the centennial anniversary of the modern Korean judicial system, which fell on March 25, 1995.

(2) The Roh Moo-hyun administration, which took power in the 2002 Presidential Election and dubbed itself as the “Participatory Government”, vowed to launch judicial reforms as an important part of its agenda. It promised increased participation in government activities on the part of citizens and civic groups. President Roh and then Chief Justice Choi Jong-young agreed to cooperate in pushing judicial reform forward. This collaboration between the executive and the judicial branches of the government is significant. As a result, trial-by-jury processes were introduced in criminal proceedings. It also put into place the graduate Law School system in Korea, replacing the previous legal education system.

(3) In 2010, the National Assembly established its Special Committee on Judicial Reform. There were people who suspected it was a politically motivated attempt to vent out the frustrations of politicians who disliked the so-called “liberal tendency” of the Lee Yong-hoon Court, since it was announced in a way that led observers to consider it as a “court-packing” maneuver to correct that supposed bias. The judiciary succeeded in preventing hastily-designed reform measures from being implemented, but agreed with the legislature to revamp the personnel system so that judges were thereafter recruited from legal practitioners of minimum ten years of working experience, instead of fresh passers of the national judicial exams.

3) New Challenges

A. In Korea, the Chief Justice has the authority over and responsibility for all judicial administrative matters. The Chief Justice relegates his or her authorities to Chief Judges of lower and local courts around the country. The Council of the Supreme Court Justices decides on important administrative matters, including judicial appointments, enactments and revisions of Supreme Court rules and regulations, and so on. The National Court Administration (NCA) established under the Supreme Court is responsible for implementing administrative matters. The NCA provides comprehensive administrative support to the courts nationwide. It includes, among others, examining various issues that may affect the judiciary as a whole, assigning personnel throughout the court system, and managing judicial budgets and external affairs. The NCA also covers matters related to inter-branch relations if and when the need arises. The Minister of the NCA is appointed from among the Supreme Court Justices. In addition, there are judges who work full-time upon the request of the Chief Justice.

B. With the growth of the size and duties of the judiciary as an institution, the NCA has exercised its authority extensively, which has prompted some reasonable concerns within as well as outside the courts. There has been criticism that judges functioning as full-time administrators might cause at least an appearance of impropriety. Recently, voices have even charged that it might compromise the judicial independence of individual judges by meddling with the completion of judicial duties. There are also reform-minded judges who are skeptical of placing judges in the NCA on a full-time basis, since judicial officials including the Minister are prohibited from adjudicative functions while on administrative duty.

C. The incumbent Chief Justice Kim Myeongsu took office in September of 2017. He promised an overhaul of the administrative structure of the judiciary, which was well-received among most judges as well as much of the public. The Committee on Judicial Development was launched this April to present its recommendations for judicial reform.

In September, Chief Justice Kim officially announced that he will push forward with a reform of judicial administration in accordance with the Committee's recent proposals.

As part of the judicial reform initiative, Chief Justice Kim plans to abolish the NCA, and instead establish two new entities: (i) the Judicial Administration Conference, mandated to make decisions on judicial administrative matters, and (ii) the Secretariat, mandated to implement and execute policies set by the Conference. The Judicial Administration Conference will be composed of both members of the judiciary and outside experts. Unlike the NCA, the Secretariat will operate its functions without participation of any judges.

Chief Justice Kim also vowed to overhaul the personnel system in the courts. He empathized with reform-minded judges that the current judicial hierarchy is too rigid, and that judges should be free from pressure of any kind, for example, transfer and promotion within judicial hierarchy, and etc. The judiciary should be a community of judges relating on a more equal basis.

Against this backdrop, Chief Justice Kim has asked the Committee on Judicial Development to produce its reform proposal along with a concrete legislative roadmap by the end of this year. He intends to persuade the National Assembly to make revisions to the Court Organization Act and related statutes in the near future.

4) Conclusion

It is quite unique that the '2018 Judicial Reform' was initiated from within the judiciary itself, and that it targets the steeply hierarchical structure of our traditional judicial administration. But there has been criticism that this reform process neglects how it is viewed from the perspective of the general public. It seems that citizens want to have more of a voice in judicial administrative matters, as well as in the judicial process. And there are worries about whether or not these reforms can progress well in our highly divided partisan legislature.

In conclusion, however, I am quite optimistic that our nation's judges' aspirations for judicial reform and their passion for a more democratic and a more accountable court

system will lead to positive outcomes in the foreseeable future, and that this will greatly benefit our country.

RUSSIA

JUDICIAL REFORM

Mr. Pyotr Serkov, First Deputy Chief Justice of the Supreme Court of the Russian Federation

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First of all, allow me to express my gratitude for inviting me to participate in the discussion of today's important topic.

The effective and successful work of the judiciary as a vital social and legal mechanism is of course a significant issue for any state. The effectiveness and success depend on many factors, and when these indicators go downward, it is a signal that reforms should be conducted.

Given the limited amount of time, I would like to briefly inform you of the following.

Judicial reform in the Russian Federation began after the dissolution of the Soviet Union. The creation of a state that is based on and driven by law requires the existence of a judiciary that is capable to resolve ***any*** emerging conflicts in a timely and fair manner. Therefore the actual functioning of the system of checks and balances helps the judicial power gain respect of the legislative and executive powers.

The response to the strategic needs of the society and state has by itself radically changed the Russian judicial system, making it ever more independent and self-reliant.

Reforms in the judicial system are taking place in three dimensions: one is strictly organisational, the other pertains to corrections into the structure of courts, and the third one is implementation of novelties in the judicial procedure.

Speaking about the organisational level, I would like to refer to the following legislative solutions.

First of all, it has been stipulated in law, that the decrease of financing of the court system may only take place with consent of the judiciary itself.[278]
In order to realize the constitutional principle of separation of powers, the Ministry of Justice – a body of the executive – has been stripped of its functions of managing the courts' human resources, financial and other practical matters. By virtue of law, these tasks were given directly to the judicial branch.[279] The Judicial Department at the Supreme Court was created for the aforementioned purposes, to act as an executive body of the judiciary, engaged in a specific type of state administration. Three federal target programs have been adopted for the comprehensive development of the judicial system.[280] In particular, their realization has allowed to construct 1287 modern court buildings. Also, new buildings for the Supreme Court and the Judicial Department are currently under construction in Saint-Petersburg.

The Supreme Court is the founder of the Russian State University of Justice, an institution tasked with training the judges and court staff members. The university has 11 branches across Russia.

278 Art. 2 of Federal Law No. 30 of 10 February 1999 "On the Financing of Courts in the Russian Federation".
279 Federal Law No. 7 of 8 January 1998 "On the Judicial Department at the Supreme Court of the Russian Federation".
280 Federal Target Program "Development of Russia's Judicial System" for 2002-2006, adopted by Decree of the Russian Government No. 805 of 20 November 2001; Federal Target Program "Development of Russia's Judicial System" for 2007-2012, adopted by Decree of the Russian Government No. 583 of 21 September 2006; Federal Target Program "Development of Russia's Judicial System" for 2013-2020, adopted by Decree of the Russian Government No. 1406 of 27 December 2012.

The most important changes regarding the structure of the court system were aimed at strengthening the principles of irremovability and immunity of judges[281]. For example, judges of all courts on the federal level are appointed by the President of the Russian Federation[282], while ***only*** a qualification board of judges may terminate judicial powers[283].

The Supreme Court of the Russian Federation has the right of legal initiative.[284] The activities of the Court in this sphere help correct legal deficiencies and in some cases make legislative norms clearer and less ambiguous.

In order to sustain a single economic space in the Russian Federation, a specialized system of commercial courts has been created along with the courts of general jurisdiction[285]. In pursuit of this task and following the suggestion of the Russian President Vladimir Putin, the Supreme Court was merged with the Supreme Commercial Court in 2014.[286] This decision helped root out the contradictions existing in the practice of the two systems of courts regarding the vital aspects of civil legislation.

Appellate proceedings have been introduced in civil and criminal cases.[287] Jury trials have recently been introduced in criminal cases in district courts.[288]

281 Articles 121, 122 of the Russian Constitution.
282 Part 2 of Art. 128 of the Russian Constitution.
283 Federal Constitutional Law No. 1 of 31 December 1996 "On the Judicial System of the Russian Federation".
284 Part 1 of Art. 104 of the Russian Constitution, Part 6 of Art. 2 of Federal Constitutional Law No. 3 of 5 February 2014 "On the Supreme Court of the Russian Federation".
285 Item 2 of the Ruling of the Supreme Court of the RSFSR No. 1544-1 of 04 July 1991 "On Enactment of the Law of the RSFSR "On Commercial Courts".
286 Federal Constitutional Law on Amendment of the Russian Constitution No. 2 of 5 February 2014 "On the Supreme Court of the Russian Federation and the Prosecution Office of the Russian Federation".
287 Federal Law No. 353 of 9 December 2010 "On Amendments to the Civil Procedure Code of the Russian Federation"; Federal Law No. 433 of 29 December 2010 "On Amendments to the Criminal Procedure Code of the Russian Federation and Abrogation of Certain Legislative Acts (Their Provisions)".
288 Federal Law No. 467 "On Amendments to Articles 30 and 31 of the Criminal Procedure Code of the Russian Federation and to Article 1 of Federal Law "On Amendments to the CrPC RF due to Broader Use of the Institute of Jury"; Item 2.1 of Part 2 of Art. 30 of the CrPC RF.

Work is currently under way to create five independent appellate courts and nine courts of cassation within the system of courts of general jurisdiction.[289] The territorial jurisdiction of these courts will not depend on the administrative borders of constituent entities of the Russian Federation, which will improve the hierarchical structure of the court system and help optimize court workload. Moreover, the territorial jurisdiction of these new courts will differ from the jurisdiction of appellate and cassational commercial courts.

Novelties of the judicial procedure are aimed at strengthening such basic principles as access to justice, public and adversarial nature of the proceedings.

In pursuit of legal certainty during court application of legislation, the Supreme Court has used its constitutional right of legislative initiative more than 30 times. Only during the last three years the Court has initiated amendments into the Codes of Civil Procedure, Commercial Procedure and Administrative Judicial Procedure of the Russian Federation. These amendments stipulated similar procedures of consideration of various categories of cases for the courts of general jurisdiction and commercial courts, introduced simplified proceedings and allowed for broader use of court order proceedings in civil litigation. Conciliatory procedures are now applied on a broader basis in civil, commercial and administrative judicial proceedings.

As for criminal procedure, the Supreme Court has proposed an initiative to decriminalize certain actions and use the institute of issue preclusion more broadly in cases regarding non-grave crimes. The Court has also suggested new grounds for relief from criminal liability.[290]

One of the principal development directions is to secure maximum transparency of proceedings and ensure access to information about the work of courts, with regard to

289 Federal Constitutional Law No. 1 of 29 July 2018 “On Amendments to Federal Constitutional Law “On the Judicial System” and to Certain Federal Constitutional Laws due to Creation of Cassational and Appellate Courts of General Jurisdiction”.
290 Federal Law No. 323 of 3 July 2016 “On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation with regard to Improvement of Grounds and Manner of Relief from Criminal Liability”.

existing constitutional provisions and international standards.[291] Modern information and communication technologies are being actively introduced and put to work for this purpose. The commercial courts and federal courts of general jurisdiction are forming a single information space, which will help create a joint databank of judicial acts and further improve the judicial practice. The software used by the courts is being constantly updated – in particular, as regards the search algorithms.

The public has constant free access to the official websites of the Supreme Court and of all the other courts. Users can find information about the judicial system, the working hours and rules of courts, about the progress of individual cases, the date and time of consideration of every case and about the adopted judicial acts. Procedural documents may be filed in electronic form on a 24/7 basis. SMS messaging is actively used as means of informing the participants of proceedings about the upcoming court sessions and other procedural issues.

An automated information system is used to form the court composition for each case, taking into account the workload and specialization of judges and excluding any external influence. All court sessions are now audio recorded on an obligatory basis.[292]

All courtrooms at the Supreme Court have been equipped with videoconferencing system terminals. This system covers the whole territory of the country: over 10 000 kilometres and 11 time zones between the easternmost and westernmost Russian cities (Petropavlovsk-Kamchatskiy and Kaliningrad).

291 In Russia, the activities of federal courts of general jurisdiction are supported by the State Automated System "Justice". Commercial courts use a set of integrated software and hardware means, which include information systems "My Arbiter", "Databank of Commercial Cases", "Databank of Commercial Court Decisions".

292 Art. 155 of the Commercial Procedure Code, Art. 206 of the Code of Administrative Judicial Procedure, Art. 228 of the Civil Procedure Code (starting 1 September 2019), Art. 259 of the Criminal Procedure Code (starting 1 September 2019).

Overall in the Russian Federation, trials with the use of videoconferencing are conducted in more than 2 500 courts. Moreover, 900 institutions of the Federal Penitentiary Service are connected to this system.

Work is currently under way to connect over 2 000 pre-trial detention centres of the Ministry of Internal Affairs to the videoconferencing system of courts of general jurisdiction. This will greatly simplify the consideration of pre-trial detention issues.

Information about the income of judges, their expenses and property is also made public through the courts' websites.

In the past years, the Plenary Session of the Supreme Court has adopted over 200 rulings with clarifications on more than 2 000 legal issues which caused complications in the application of law for lower courts.[293]

The effect of the work carried out by the Supreme Court can be traced through the improving court statistics, including shorter case consideration time. As a consequence, the level of court protection of individual rights and obligations is rising.

In conclusion, I would like to thank our Argentinean hosts for perfectly organising this meeting. I hope it will contribute significantly to the more profound international cooperation among judicial bodies across the globe.

293 http://vsrf.ru/en/rulings_plenum/2017/

UNITED STATES

JUDICIAL REFORM

MANAGING INCREASING COURT CASELOADS

Jeffrey P. Minear, Counselor to the Chief Justice of the United States

Summary

Established and developing nations face a common problem of increasing court caseloads that invariably delay the prompt resolution of legal disputes. Over the past 150 years, the United States has addressed this problem through mechanisms that can be understood through the economic concepts of supply, demand, and efficiency gains. The United States has sought to reduce the demand for federal court adjudications by imposing jurisdictional restrictions that promote state court adjudication of local disputes and by facilitating alternative dispute mechanisms such as mediation and arbitration. It has sought to make federal courts more efficient through the streamlining of discovery processes and employing new technologies, such as electronic filing. It has also increased the supply of judges. During periods of budgetary austerity, requests for new judgeships have often met resistance based on cost. That resistance overlooks the measurable economic benefits that additional judges produce through facilitating the resolution of disputes. Expenditures to increase the supply of judges should be viewed as investments in social infrastructure that produce real benefits in the form of fairness, stability, and economic growth.

I commend the Supreme Court of Argentina for convening this J20 Conference in conjunction with the Argentine Republic's hosting of the G20 Economic Conference. The confluence of these two conferences recognizes the vital contribution of sound judicial

administration to economic growth and prosperity. A well-functioning judicial system is part of a nation's social infrastructure, and it is just as important as physical infrastructure — such as transportation systems, telecommunications, and power generation — in promoting economic growth. Both established and developing economies rely on courts to provide predictable and efficient dispute resolution to support commerce and promote fairness, stability, and prosperity.

Established and developing nations face a common problem — increasing court caseloads that can clog dockets and thwart the prompt resolution of disputes. The effect of docket congestion on an economy is similar to the effect of traffic congestion on a public highway. It produces delays that are felt far beyond the immediate bottleneck, producing frustrations and declines in productivity throughout the system. The United States began experiencing this problem during the nineteenth century, with the growth of the nation and the advent of the industrial revolution. The focus of this paper is the United States' experience in managing the federal courts' civil caseloads over the past 150 years.

First, some background. Article III of the United States Constitution establishes a federal court system with limited jurisdiction, which stands alongside separate judicial systems exercising general jurisdiction in each of the 50 separate states. The federal courts primarily hear two kinds of civil cases: (1) cases involving a question of federal law, arising from the federal Constitution or federal statutes; or (2) cases arising from disputes between citizens of states. Those cases are currently heard through a three-tiered federal court system consisting of: (1) ninety-four federal district courts, which serve as the courts of first instance; (2) thirteen courts of appeals, which provide an appeal of right from the ninety-four district courts; and (3) one Supreme Court, which exercises discretionary review of cases from the thirteen courts of appeals and of cases involving federal questions from the fifty state supreme courts.

During the early history of the United States, the federal courts had relatively small and manageable dockets, because most legal cases were local disputes governed by state law. But by the mid-nineteenth century, at the time of the United States' Civil War, circumstances were changing. Through the latter half of the nineteenth century, three

factors contributed to a dramatic increase in federal cases: (1) new states were added to the Union; (2) industrialization led to increases in interstate commerce and related disputes; and (3) Congress enacted new legislation addressing both civil rights and regulatory issues. Numbers tell the story. The Supreme Court's docket increased from 310 cases in 1860, to 1,816 cases in 1890. In the federal district courts, the number of cases increased from 29,000 in 1873 to 54,000 in 1890. The current number of cases in the federal district courts exceeds 250,000.

Over the past 150 years, the United States has responded to increasing case dockets through actions that are best understood through the economic concepts of supply, demand, and efficiency gains. Let's turn to the demand side of the equation first. The United States has attempted to reduce the demands on federal courts through two primary mechanisms: (1) imposing restrictions on the jurisdiction of the federal courts; and (2) providing alternative means of dispute resolution. Each of those mechanisms functions much like the solutions that highway engineers employ in dealing with traffic congestion.

As an example of a restriction on demand, the United States has placed jurisdictional requirements based on the amount in controversy. Currently, a federal court will hear a case between citizens of different states only if the amount in controversy is at least $75,000. That jurisdictional requirement on access to the federal courts functions much like a highway engineer's restrictions on the type of vehicles that can utilize certain roads or high speed lanes. The litigant remains free to pursue smaller claims, but must instead utilize the state courts, which are less expensive and better suited to handle those disputes. As a practical matter, the amount-in-controversy restriction implements the European Union's principle of subsidiarity, which calls for adjudication of a claim at the most local level that is consistent with effective resolution.

The Supreme Court of the United States has adopted an innovation, not available to the federal district courts or the federal courts of appeals, that has been crucial to its management of its docket. Since 1925, the Supreme Court has exercised discretionary review in most instances through the so-called *certiorari* process. A litigant must file a petition requesting review (the so-called petition for a writ of *certiorari*), and the Court

exercises its discretion in deciding whether to grant the petition and allow the appeal to go forward, reviewing only those cases that present issues of extraordinary importance. This individualized case selection mechanism allows the Court to determine how many cases it will hear each year. It rests on the rationale that the Supreme Court's function is to decide questions of national significance, and not simply to correct errors in the proceedings below. It reflects the United States' view that a litigant is entitled to one fair trial, and one appeal of right to correct any trial errors, but that any review beyond the court of appeals must raise matters of special importance, such as a disagreement among two or more courts of appeals on a point of law. Again, numbers tell the story. The Supreme Court typically receives more than 7,000 petitions for review each year, and it elects to hear about 70 of those cases, enabling it to devote significant attention to each of those selected cases.

To curtail demands on the federal courts, the United States has also encouraged litigants, in appropriate cases, to use mechanisms other than a judicial action, to resolve their disputes. These alternative dispute resolution (ADR) mechanisms, such as mediation or arbitration, function much like tram or light rail lines, which supplement highways systems, providing more limited service, ideally at greater speed and lower cost. But these ADR mechanisms are not the right forum for every case. Litigants who elect ADR must often forgo procedures that have become staples of the American judicial process, such as discovery, the right to a jury trial, and oversight of the process by federal judge who enjoys the independence provided by life tenure. ADR mechanisms cannot completely displace traditional courts, but they can alleviate the docket congestion caused by routine cases that do not require the more demanding procedures of a federal court. And they can often be used in conjunction with federal court procedures; for example, mediation in advance of a court trial can narrow issues and provide consensus, expediting the journey to a final resolution.

Although there is some value in addressing increasing caseloads by curtailing demand, whether by directing cases to state courts or ADR mechanisms, that is only a partial answer. Courts can also increase their capacity through procedural innovations that

make the courts more productive. In recent years, the federal courts have taken significant steps to improve efficiency by modernizing court procedures.

As one example, the federal courts have adopted procedural rules to streamline United States discovery practices, which enable a litigant to compel the production of factual information from an adversary for use at trial. Properly managed, discovery facilitates resolution of a case by clarifying the issues in dispute and avoiding surprise or suppression of relevant information. But excessive discovery requests can cause extensive delay and expense with no countervailing benefits. The federal courts have also incorporated technology to make the judicial process more efficient. Virtually every federal court, including the Supreme Court of the United States, now utilizes electronic filing to reduce costs and provide greater transparency. These changes, like a highway engineer's use of technology to manage and direct traffic, are essential to increase the capacity of the courts to handle additional cases.

The third approach to addressing increasing court dockets — increasing the number of judges — is the most obvious solution. And indeed, the United States has increased the number of federal judges, by a greater percentage than its population increase, over the past 150 years. For example, in 1893, the United States had 64 federal judges to support a population of 65 million people. In 2004, the United had 680 federal district judges to support a population of nearly 300 million people. In other words, the number of judges increased nearly twice as fast as the population. But in recent years, Congress has become reluctant to create new judgeships because of the vexing problem of cost. The Congressional Budget Office, a legislative branch agency charged with estimating the fiscal impact of new legislation, estimated in 2011 that the each new federal judgeship would cost approximately $1 million in startup costs and $770,000 in annual support expenses — not including the salary of the judge. Congress has cited those costs as a key reason for withholding the creation of new judgeships. The legislative bodies of other countries, which typically control fiscal expenditures, seem to engage in the same calculus when concluding that their budgets simply cannot absorb the cost of additional judgeships.

The focus on costs, however, overlooks the economic benefits that judges generate. When Congress considers building a new highway, it does not look simply at the cost of the road; it considers the prospective economic benefits of providing additional transportation resources. Legislatures should consider their expenditure on court systems in the same light. The value of a judgeship can be assessed in concrete quantitative terms by the public benefit of the judiciary's end product: case resolution. Legislatures should determine their investments in new judgeships with an eye to obtaining a desired output: termination of legal disputes. Rather than focusing strictly on the cost of creating judgeships, legislatures should strive to allocate sufficient fiscal resources to match the public demand for timely case resolution, aiming for economically efficient levels of case dispositions. The number of judges should reflect the most efficient and cost effective use of taxpayer funds, which in turn should reflect the least-cost combination of inputs — fixed and variable costs of judges — necessary to produce the desired number of case resolutions each year.

This perspective on the economic value of judges should in no way devalue their immeasurable contributions. Society rightly values judges as voices for the rule of law, expositors of moral and legal principles, and exemplars of public service and civic virtue. But society should not lose sight of the fact that court systems are valuable public infrastructure, and judges produce tangible economic benefits. Courts, like highways, are worthy investments. Investments in our court systems promote fairness and stability, as well as economic growth.

CHILE

JUDICIAL REFORM

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Today we are gathered to face the challenge posed by the Argentine State towards the future.

We have been invited to meditate about 3 essential questions, which, by the way, also set courses.

- What is dialogue without consensus?
- What is power without equity?
- What is development without sustainability?

On this presentation I will try to show how judicial systems can contribute to such discussion. To this effect I will review the advances and challenges of the judicial reforms in Chile, which place us before a more friendly and more sensitive future to the citizens' expectations and needs.

1. Judicial reforms

As many of you know, since early 2000 the State of Chile embraced a modernizing process, as a result of the interaction between public powers and citizenship, which aimed to give a democratic end to the transitional period that the country had started in the 90s.

This institutional closure allowed the government to "*respond in substantive way to the majority message that citizens had given in the last presidential election, which is the*

demand to reestablish social peace in the country and provide a real solution to the problems and conflicts of the past, regaining the indispensable mutual trust" [294].

Chile –while taking care of them- left aside the franked vicissitudes and prepared to adequate its institutionalism to the requirements of the present times[295], with a prospective project aiming to develop and consolidate a constitutional and democratic system[296].

For the justice sector this process meant a modernization prone to "*adequate the hole group of institutions that participate of the justice administration*" [297], because while the Chilean system had been designed and constituted by mid XIX century, remaining unaltered since then, Chilean society had transformed in an economic and political sense [298].

In relation to this, the reforms introduced to the criminal, family, constitutional and labor justice, structured around two main components:

- The adaptation of the courts to a "*growing number and variety of disputes which demanded agility and efficiency on its solution*" [299]; and
- The construction of an "*accessible, impartial and equal justice that maximized the guarantees"*[300] of independence and efficiency as means of ensuring "*citizen participation in public power control"*[301] and "*the necessity to prevent corruption*" [302].

The motivation then was "*not only increase the capacity of the system to resolve conflicts, but to focus on the way they are decided, in order to obtain decisions that are socially adequate and perceived as legitimate*" [303].

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294 National Congress Library. "Historia de la Ley N° 19.696", 12 october 2000, p. 4. [Online] https://www.leychile.cl/navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/643/1/hl19696.pdf, p. 29.
295 *Ibíd*., p.4.
296 *Ibíd*., p. 4.
297 *Ibíd*., p. 5.
298 *Ibíd*., p. 5.
299 *Ibíd*., p. 5.
300 *Ibíd*., p. 6.
301 *Ibíd*., p. 6.
302 *Ibíd*., p. 6.
303 National Congress Library. "Historia de la Ley N° 19.968", 30 august 2004, p. 5. [Online] https://www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/537/1/HL19968.pdf.

2. Specialized training

The first action undertaken was the choice for the specialization of the courts, hence judicial training was the first reform to be promoted, which resulted in the establishment of the Judicial Academy in 1994, whose mission was the general training of judge candidates and the professional advancement of all the members[304] of the judiciary.

The same specializing path followed the criminal procedure reform on 2000 by separating persecutorial and resolutorial functions, enshrining the Prosecutor Office as a state authority specialized on criminal prosecution, victim protection and the impartial and swift crime repression[305]. This reform also differentiated the jurisdictional roles between the Guarantees Court and the Oral Criminal Court.

Likewise, the family justice reform in 2004 aimed to create a "*family conflict specialized jurisdiction*"[306], so people "*did not have to engage in several different processes to resolve the affairs they were involved in*"[307], and that would also count with the Technical Council figure which constitutes a "*specialized advice body composed by social workers and psychologists that assist the judge on the understanding of facts and situations in discussion, enabling him with an interdisciplinary vision*"[308].

Lastly, the labour and welfare justice reform of 2005 also sought to "*count with a specialized, agile and efficient justice system that enforced the rights assured by the labour and welfare legislation to the workers*"[309].

Specialization hence was the technical option adopted for the system, a result of the consensus to which the country arrived in order to develop a judiciary that would deliver profound and sustainable solutions over time.

3. Orality and immediacy

The same reforming momentum led Chile to install a judicial system based on orality, as this "*simple and direct communication method was the only one that could assure that*

304 Law N° 19.346, Creates the Judicial Academy, article 1-1.
305 *Op. Cit.*, National Congress Library. "Historia de la Ley N° 19.696", p. 10.
306 *Op. Cit.*, National Congress Library. "Historia de la Ley N° 19.968", pp. 10 y 11.
307 *Ibíd*., pp. 10 y 11.
308 *Ibíd*., pp. 10 y 11.
309 National Congress Library. "Historia de la Ley N° 20.022", 30 may 2005, p. 5. [Online] http://www.bcn.cl/obtienearchivo?id=recursoslegales/10221.3/3811/1/HL20022.pdf.

the set of acts that constitute the trial would carry out in a public and concentrated way, with permanent presence of all the parts involved and with no admission of mediations or delegations"[310]. The will was to make the process subject to public scrutiny, auditable by people in all of its stages.

In other words, for the first time judiciary opened from a structural point of view to people's direct participation, their perceptions, needs and expectatives.

Today, among us is quite uncontroversial that the public and oral trial constitutes "*an essential mechanism for justice administrations to accomplish with all the duties society mandates*"[311]:

- "*Settling conflicts in a way that is perceived as legitimate by the community, with the aim of reinforcing citizen trust on the legal system*";
- "*Allowing an adequate judicial system work socialization and improving its perception by the common of people*"[312]; and
- "*Highlighting the judge figure as an institutional system actor*"[313].

Thus, there are multiple positive consequences derived from this openness that demonstrate, for example, in the general preventive effect that criminal prosecution produces[314] or the legitimacy on the publicity and impartiality that the jurisdictional trial acquires[315].

This is why justice modernization processes ought to be able to remove "*any distance between the judge, the process and the parts. Litigants must perceive directly that the judge is listening and deciding over the base of the proof and allegations produced in one single act, and not by arguments foreign to the process*"[316].

310 *Op. Cit.*, National Congress Library. "Historia de la Ley N° 19.696", pp. 15 y 16.
311 *Ibíd*., p. 16.
312 *Ibíd*., p. 16.
313 *Ibíd*., p. 16.
314 *Ibíd*., p. 16.
315 *Op. Cit.*, National Congress Library. "Historia de la Ley N° 19.968", p. 7.
316 *Op. Cit.*, National Congress Library. "Historia de la Ley N° 20.022", pp. 6 y 7.

After all, the ultimate goal of this is to "*achieve a justice system which is accessible for all the population and that will work with celerity to resolve jurisdictionally relevant conflicts in a timely, fair and impartial manner*"[317].

Nowadays, at all levels -including the cassation before the Supreme Court- every affair takes place at an open court, and is also publicized by the judges called upon to hear.

4. Access to justice challenges

However and despite the uncountable reforming improvements we have referred, the actual stage confronts us with a different perspective of access to justice, in the context of the social and democratic state governed by the rule of law: the conceptualization of the access not as management but as a true human right.

Although the right of access to justice is recognized and consecrated in different international treaties, the social, political and economic development defies us to re-think the formal justice system from a perspective of the 'access to the law' (in a formal, institutional sense) towards the construction of the notion of access to justice as "*an axis that grants operational guarantees to the human rights in general*"[318].

Thereof the relevance of the practical enhancement of this concept through the permeability of the ancient judicial structures, with opinions, perceptions and expectations of today's citizens.

The preceding aim is not easy, as openness place a challenge to judiciary operators, its old practices and dynamics[319], our culture. Judicial reforms represent the field where today the validity of fundamental rights is tested, that is, where the application of international law instruments gets tested both in domestic and foreign spheres of protection[320]; role that naturally concerns to the Judicial Power under its functions of hearing, settling and executing decisions.

317 *Op. Cit.*, National Congress Library. "Historia de la Ley N° 20.022", pp. 6 y 7.

318 Interamerican Human Rights Institute et al. "Manual autoformativo sobre acceso a la justicia y derechos humanos en Chile". San José de Costa Rica, 2011, p. 11. [Online] https://www.iidh.ed.cr/IIDH/media/1450/manual-autofor-chile-2010.pdf.

319 Ventura, Manuel. "La jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de acceso a la justicia e impunidad". [In] Ventura, Manuel. "Estudios sobre el sistema interamericano de protección de los Derechos Humanos". San José de Costa Rica, 2007, p. 348. [Online] http://www.corteidh.or.cr/tablas/r31036.pdf.

320 *Ibíd.*, p. 348.

The unavoidable responsibility of settling this complex kind of issues, adds up to the non-less relevant of urge for new reforms.

Again, the vision that I propose is one in which the incorporation of a single concept to the reform processes discussion takes place: citizen participation.

When it comes to justice, citizen participation can be analyzed from a double perspective: an intra-procedural and an extra-procedural one.

The **intra-procedural** perspective, more typical to the anglosaxon tradition countries, confronts us to the discussion about the citizens' role on conflict resolution. Although this debate has usually derived in the establishment of juries[321], today it defies us to take into account the incorporation of alternative dispute resolution (ADR) mechanisms where the adversarial logic is replaced by collaborative and participative procedures in search of amicable settlements of controversies. After all, ADR is about generating real dialogue processes that enable small scale consensus, and if applied massively and consistently, will result in great impact.

The **extra-procedural** perspective, on the other side, supposes the installation of participation spaces or channels that consider the real or potential justice system users opinion at the moment of discussing and selecting the courses of action towards reforming processes.

What it is interesting about this is that the conception about the design of justice services oriented to human development with a human rights based approach, involves a series of previous operations to install internal dialogue in organizations aiming to generate basic consensus in order to search external participation lines that while collaborative, are sustainable and adaptable through time too.

To this means, a concrete and effective exercise to the judiciary begins by our own recognition as subjects belonging to the national and international community, as active

321 In Chile this situation has been discarded since the presentation to Congress of the Message of the Code of Criminal Procedure of 1894, which stated that "The institution of the jury has seemed completely inadequate to our social situation, the shortage of our resources, and our lack, especially in the peoples of the second order, of competent citizens who could be called upon to perform the delicate functions of good men. The approach of this system would also require a too numerous staff in the courts of justice, which would mean for our treasury a burden that is not yet in a state of support ". (National Congress Library. "Mensaje del Código de Procedimiento Penal". Santiago, 31 december 1894, paragraph 5°. [Online] https://www.leychile.cl/Navegar?idNorma=1116259).

citizens of our democracy, and from there identify the participation channel or structures that enable people to lie on equal basis with the State.

Even though in both cases there is a clear limit residing on the due independence that shall be safeguarded to judges on their judicial activities, the exercise of citizen participation inside the Judicial Power gives notice of what Hart would call 'a grey area'[322], where the limit fixation comes more by the transfer of sovereign power that the judiciary makes in representation of the state (always outside the proper jurisdictional functions), aimed to democratically construct an organization that many times appears as countermajority[323].

From this angle, it is possible to link the reform processes with the objectives that the members of the United Nations Organization have set in their Sustainable Development Agenda, in terms of building just and peaceful societies and solid institutions that serve that end[324].

The compromise with this new vision is not simple, as it demands to recognize that "*in order to access to justice it is necessary to know the rights and its content, as well as its enforceability; It is because of this that the training on rights and enforcing mechanisms becomes indispensable to trespass from a traditional paradigm towards people's empowerment*"[325] and the consequent focalization on the justice service internal adaptations.

Thus the orientation of any action towards promotion, protection and guarantee of the right to access to justice demands a justice system "*open equally to everyone, with no discriminatory barriers of any kind –either economic, cultural, ideological, religious, ethnical, geographical or even linguistic-*"[326].

322 Cfr.: Hart, Herbert. "The Concept of Law". Oxford, Clarendon Press, 1961.

323 Bickel, Alexander. "The Least Dangerous Branch". Yale University Press. 1986. [In] Gargarella, Roberto. "La dificultad de defender el control judicial de las leyes". Isonomía, N° 6, April, 1997, p. 60. [Online] http://www.cervantesvirtual.com/research/la-dificultad-de-defender-el-control-judicial-de-las-leyes-0/0062fc1c-82b2-11df-acc7-002185ce6064.pdf.

324 UN. "Objetivos de Desarrollo Sostenible. Objetivo 16". [Online] https://www.un.org/sustainabledevelopment/es/peace-justice/.

325 De Stefano, Juan Sebastián. "Acceso a la justicia. Análisis y perspectivas de los nuevos desafíos". Eudeba, 1ª edition, Buenos Aires, 2012, pp. 99 y 100.

326 Ramos, M., "Algunas consideraciones teóricas y prácticas sobre el acceso a la justicia". [In] Ahrens, H. et al. "El acceso a la justicia en América Latina: Retos y Desafíos". Universidad para la Paz, Costa Rica, 2015, p. 57.

Thereupon, "*Justice and permanent access to it must be understood beyond the right to an effective judicial protection and a simple institutional service of the state. Access to justice is a permanent public service that requires a public policy that includes conflict resolution, education programs on the ways citizens can access to justice, in the understanding that since the recognition as subjects of rights, it is possible that people whose rights have been violated ask for the reestablishment of them, knowing how and where to go to activate jurisdictional apparatus*"[327].

5. Sustainable Development Goal N° 16 (UN): Peace, justice and strong institutions

Having shared a prospective vision about the judiciary, its development and challenges, I would like to end my presentation by reviewing the goals that the Chilean Judicial Power has achieved, particularly in relation to the issues of number 16 of the Sustainable Development Goals: equal access to justice for everyone, prevention of corruption and strengthening of transparency and accountability.

At an institutional level, the court I preside participated in 2017 in the working groups for the elaboration of measuring indicators of the SDG N° 16, integrating the judiciary institutional vision with the self-evaluation issued by the State of Chile to the United Nations.

Also recently, we have participated on the Open Justice working group, initiative leaded by the Probity and Transparency Commission of the Chilean Government in association with the Government Laboratory, in order to create the 4th Chilean Open Government Action Plan in the context of the Open Government Partnership (OGP)[328].

Moreover, in matter of corruption, Chile has been developing a permanent work along the General Comptroller of the Republic, United Nations Development Programme (UNDP) and other institutions, both public and private, aimed to implement the dispositions of the United Nations Convention Against Corruption (UNCAC), which resulted –among other

327 Vásquez, A. "El acceso a la justicia como derecho fundamental". [In] Ahrens, H. et al. "El acceso a la justicia en América Latina: Retos y Desafíos". Universidad para la Paz, Costa Rica, 2015, p. 257.

328 Cfr.: Chilean Government. Open Government Chile. "Cuarto Plan de Acción 2018-2020". [Online] http://www.ogp.gob.cl/es/cuarto-plan-de-accion-2018-2020/.

initiatives- in a proposal to the Chilean Government with the main legislative reforms needed to fully comply with the aforementioned mandate[329].

Regarding to the channels of access we have opened, the labour of the Transparency Commission stands out, which in 2012 started standardizing criteria to solve citizenship requests. In total, during 2017, this Commission solved 1.428 claims received by channels as diverse as State Transparency Portal, e-mail (transparencia@pjud.cl), queries for concealment of information in specific cases, other requests arising from the declaration of incompetence of various public services and the use of telephone and face-to-face information channels[330].

Additionally, at present, the Chilean Judicial Branch has an institutional television channel called "Judicial Power TV", in which hearings of high public incidence are transmitted through the incorporation of a single camera in the room. There is a spokesman project that reaches both the superior courts and the courts of first instance and a successful management of institutional social networks too[331].

On the same path of technology, I must emphasize the importance of the enactment of the Law on Digital Processing of Procedures[332], which aiming to overcome "*a series of problems that are generated in our modern society, in order to allow a sustainable development, more friendly with the environment and reducing the maintenance cost of the state apparatus*"[333], has not only allowed to overcome the obstacles of the physical processing of the files, evolving towards a Judicial Power environmentally sustainable, but at the same time has become a tool for transparency and accountability of the actions

329 UNDP. "Anticorrupción: ocho iniciativas legislativas en favor de la probidad". Santiago, 13 june 2018. [Online] http://www.cl.undp.org/content/chile/es/home/presscenter/articles/2018/anticorrupcion.html.

330 In 2017, 6,692 face-to-face visits were made to people without legal knowledge who have a judicial process in a court and are unaware of the steps to be followed for processing it, and 4,899 telephone consultations.

331 This has allowed, for example, that in January 2018, it has 95,931 fans on Facebook, 77,928 followers on Twitter, 15,208 subscribers on YouTube and 8,181 followers on Instagram. (Judicial Power of Chile. "Cuenta Pública 2017. Dirección de Comunicaciones", p. 21. [Online] http://www.pjud.cl/documents/10179/10264695/4.5.+Direcci%C3%B3n+de+Comunicaciones.pdf/421c96e5-6403-4ea0-98df-1453ac13f820).

332 Law N° 20.886.

333 National Congress Library. "Historia de la Ley N° 20.886", p. 3. [Online] https://www.bcn.cl/historiadelaley/fileadmin/file_ley/4681/HLD_4681_37a6259cc0c1dae299a7866489dff0bd.pdf.

of the courts, facilitating access to information and citizenship auditing to the Judiciary in the context of a democracy.

Particularly with regard to vulnerable groups, a project of access to justice for vulnerable persons was also carried out, the objective being "*to disseminate within the Judicial Power and towards the community, the instruments of the Ibero-American Judicial Powers Summit on principles and practices related to favoring or improving access to justice for vulnerable individuals and groups; that is, children and adolescent, women victims of violence, migrants, people with disabilities, and members of indigenous peoples, among others*"[334].

Also, last September, and in accordance with its mission declared in the Strategic Planning[335], the Plenary of the Supreme Court approved a User Attention Policy[336], which aims to standardize and enhance the justice service, having as a central principle the human right of access to justice, and as transformative axes the human rights-based approach and the public service approach.

Last but not least, childhood -or may I say the rights of children and adolescents- has been insufficiently served until now, preoccupation which led the Judicial Power to the creation of a Technical Secretariat to facilitate the generation of a particular policy that recognizes such rights in a timely manner.

This is the vision that, as a member of the Judicial Power of Chile, I am pleased to share with you, in which citizen participation (both internal and external) resonates as the main tool to keeping the margins of the independence of magistrates intact, effect the human right of access to justice through judicial reforms, from an institutionality built from the perspective of the dignity and consideration of its recipients (people), and whose

334 Judicial Power of Chile. "Cuenta Pública 2017. Acceso a la Justicia de Personas y Grupos Vulnerables", p. 3. [Online] http://www.pjud.cl/documents/10179/10264695/8.16.+Acceso+a+la+Justicia+de+Personas+y+grupos+Vulnerables.pdf/7080e5fb-8106-48e5-af48-f1b6f74a79c6.

335 The mission can be resumed in: "*Solve the issues of its competence in a clear, timely and effective manner, with enforcement of all the rights of all people, thus contributing to social peace and strengthening of democracy*". (Judicial Power of Chile. "Planificación Estratégica del Poder Judicial. Plan 2015-2020", p. 9. [Online] http://www.pjud.cl/documents/10179/104862/Planificaci%C3%B3n+Estrat%C3%A9gica+2015-2020++%28Versi%C3%B3n+extendida%29.pdf/15b039c1-97f5-46ce-99ca-3ab2cbef2ee0).

336 Supreme Court of Chile. AD-1148-2018. Santiago, 10 september 2018.

malleability enable the service to adapt quickly to generational, needs and expectations changes.

That is the path that we have set as a country since the dawn of the reform process, in which with a great democratic effort we have managed to agree on the most fundamental bases of our institutions, incorporating broad participation of various sectors of society too: Government, Parliament, Judiciary, academia and civil society[337].

Since then, we have had the awareness and conviction that changes in justice can only be made when the whole community is behind them.

It is this respect, this dialogue, the tool that has allowed us to install solid, permanent and sustainable reforms; reasoned and reasonable reforms that can persuade even to the fiercest opponent about the need to surrender to the benefits attracted by the practical and philosophical effectiveness of these changes.

A reforming spirit that through its democratic disposition to change, has legitimized the system from its bases, generating adherence not only to processes but also in the widespread use of the tools by the citizens.

This historical consistency of consensus and the democratic sustainability of its results is what, following Mr. Andrés Bello, inspires us to continue on a modernizing path where "*Only the unity of the people and the solidarity of its leaders guarantee the greatness of the nations*"[338].

337 For example, there were more than 61 people invited to participate on the drafting of the bill that introduced the criminal procedure reform. Cfr.: *Op. Cit.*, Biblioteca del Congreso Nacional. “Historia de la Ley N° 19.696”, 12 october 2000, pp. 7 a 9.

338 Bello, Andrés. Santiago, Chile, circa 1850.

NETHERLANS

JUDICIAL REFORM

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One of the important challenges to be met with judicial reform is, as aptly phrased by the organisation committee: What are the changes that should be implemented for the judicial system to be more responsive to the expectations and needs of the people?
This challenging question prompts me to determine the expectations and needs of the people concerning judicial decisionmaking.
In my opinion the people expect and need **A**. a judicial decision within a reasonable time as the European law requires but in household words as quick as possible. **B**. They expect and need to be heard in the proceedings that lead to the judicial decision. They should be able to ascertain that the judge did actual hear their statements. **C**. They expect and need that the Court states its reasons for the decisions given and responds to the core of the arguments put forward. Moreover the grounds for the judgment should not only be legally sound but should also be formulated in a way that the parties are able to understand why the court decided as it did. The motives provided for in the judgment should be precise and clear so the party that was ruled against might in principle be able to be convinced or at least understand why the judgment went against him.
In the Dutch judicial system concerning civil law, penal law and tax law, there are three instances in which a case can be heard. A court of first instance, a court of appeal and the Supreme Court. I will concentrate my contribution on the possibilities for the Supreme Court to fulfill aforesaid expectations and needs of the people. To be completely honest with you, the Supreme Court of the Netherlands does not always match these expectations. First of all: the drafting of major judicial decisions by the Supreme Court takes quite some time, as such cases are mostly very complex. Then almost no one is

ever heard in person during the Supreme Court's procedures. And finally the reasoning of the Supreme Court is in major cases often very complex and technical and I seriously doubt that an average citizen understands what the Court is saying. Nevertheless, and this may sound contradictory, the Supreme Court does contribute largely to the aforementioned expectations. I will explain this within the next few minutes.

A. A prompt decision

1 The decision of the Supreme Court as such

2 The decision of the Supreme Court viewed as a contribution to the development of the law.

Ad A 1 The judgment of the Supreme Court as such

To give a decision as quick as possible it is necessary for the Supreme Court to have control over its workload. It is possible that no differentiation is made between cases with an interest limited to the parties to the dispute and cases that call for a judgement that is of an interest that goes beyond the interests of the parties. But a Supreme Court that is the highest ranking court has a particular responsibility with regard to uniform interpretation of the law and with regard to the development of the law. A non-differentiated approach to all cases will have as a consequence that cases that are relevant to the special responsibilities of a supreme court will be treated in the same manner as cases that are of particular importance. This runs the risk of neglecting the task of ensuring uniform interpretation and legal development, a responsibility which distinguishes a supreme court form courts of first instance and appellate courts. By fulfilling this responsibility a supreme court moreover enables the courts of first instance and appellate courts to decide their cases in a more prompt way because the application of the law is clear on the points decided by the supreme court.

In the Netherlands we don't have a filtering mechanism by the virtue of which the Supreme Court is able to select the cases that will be decided. However since 1988 an appeal which has no prospect of success because it can be decided by applying standing case law can be rejected by the Supreme Court without giving any substantive statement

of reasons (art 81 RO, law on the organisation of the judiciary). The provision only eases the obligation to state reasons, it does not however simplify the appraisal of the submissions put forward by the parties. Use of this provision is only possible if the decision in question is not relevant for legal unity of for the development of the law.
After introduction of new legislation (art 80a RO) the Supreme Court is since 2012 enabled to concentrate more effectively on its task of ensuring uniform interpretation of the law and of contributing to the development of the law. This legislation complements the provisions in force since 1988 (art 81 RO). According to the provisions introduced in 2012 the Supreme Court can decide cases without providing grounds after a simplified procedure. This procedure enables the Supreme Court to declare an appeal inadmissible at the start of the proceedings so even before a defence is lodged. The appeal can be declared inadmissible if it is evident that the appeal has no chance of success or if it is evident that the party concerned has insufficient interest in its appeal. It usually takes only a few months to decide a case with this simplified procedure.

2017	Civil Chamber	Criminal Chamber	Tax Chamber
Total number of judgments	440	4557	816
Art 81 RO	57	359	345
Art 80 RO	2	1434	124

The Supreme Court applies the simplified procedure in many cases, especially in criminal cases. In order to make use of this procedure to full extent, all cases are screened immediately after they are lodged, to determine whether or not they are eligible for this form of disposal (docket control of as we like to call it: selection at the gate). A large proportion of the selected cases are appeals that fail to recognize that the Supreme Court is a court of cassation and does in principle not deal with the establishment of facts and evaluation of factual findings. A court of cassation is not a third fact finding instance.

Ad A 2 The judgment of the Supreme Court as a contribution to the development of the law

The Supreme Court can promote a speedily delivery of justice by the courts of first instance and the appellate courts in various ways.

a. By providing a more detailed account of the legal reasoning. That means that the Supreme Court not only outlines its final legal conclusion ('that is how it is') but also includes the arguments that reveal how the Supreme Court arrived to that conclusion. In that way the predictability is increased as to how the Supreme Court will decide in other cases raising comparable legal questions.
b. By giving a broader-than-necessary reasoning. A supreme court may also state a legal rule in a judgment which is more extensive and more broadly applicable than necessary to decide the case at hand. By doing so the Supreme Court clarifies what the implications of the judgment are for a whole range of other cases, including future cases. Such reasoning provides guidance to courts in first instance and appellate courts. Furthermore it makes clear what can be expected from courts and therefore it is often valuable for legal practice and might promote that cases are settled in a friendly way. It will also promote that intervention by the judiciary, including the Supreme Court, is less often required.
c. By stating general principles that underlie the specific rules to be applied the Supreme Court is able to provide legal guidance of which the importance is not limited to the interpretation and application of the specific rules.

This usually can be done in one or more paragraphs in the judgment preceding the application of these principles. In these paragraphs the court sets out in general terms the legal framework which it adopts when deciding upon the application of rules in this type of cases. This technique can be regularly found in judgments of the European Court of Human Rights. The scope of such preceding paragraphs may of course vary. When it is clear that the courts of first instance and the appellate courts are faced with a broad

range of specific aspects of a more extensive issue, the Supreme Court might find it useful to give a ‘panoramic’ ruling in which the entire issue is mapped out. By applying this method a legal issue is settled in a comprehensive way and a clear overview is provided to legal practitioners.

It is possible with this method that legal questions are answered that had not been submitted to the Supreme Court previously and which were not at stake in the case under judgment.

The drafting of such panoramic rulings is time-consuming and the deliberations in chamber are not always easy. It is only by making an extensive use of the possibility to decide cases without extensive reasoning and of the power to apply the simplified procedure that the Supreme Court is able to focus itself increasingly on such rulings.

d. Apart from a statement relating to the relevant general principles preceding the considerations that are specific to the legal issue of the case at hand, it is possible that the Supreme Court adds superfluous statements to its ruling. These are statements that do not have a direct bearing on the decision in the case at hand, but which the Supreme Court deems necessary because it is aware from its contact with society and legal practice that the issue is leading or will lead to controversy. The Supreme Court restricts the use of this technique to matters which to some extent are related to the subject of the case in which the judgment is made. Otherwise it would result in regulation with no genuine link to adjudication.

Preliminary rulings

Next to the techniques that enable the Supreme Court to deliver judgements with a bearing that is not limited to the specific case at hand, the procedure to obtain a preliminary ruling is an important instrument to foster uniform interpretation of the law or contribute to the development of the law. This procedure, that is initiated by a court of first instance or an appellate court by submitting a question to the Supreme Court, is intended for cases that raise not yet resolved legal issues that are under discussion in a large

number of cases. By deciding that question of law the Supreme court will provide legal clarity without the need that all the cases have been decided first by the courts of first instance and the appellate courts before that legal issue will eventually be decided by the Supreme Court. This procedure will accelerate the administration of justice in large numbers of disputes by the courts of first instance and the appellate courts. In the Netherlands this procedure is applicable in civil cases since 2012 and in tax cases since 2016 and the experiences up to now are very positive. There is one aspect of the preliminary ruling that has to be taken into account. In an 'ordinary' procedure the Supreme Court has a certain amount of freedom to decide whether to answer a particular question of law to the fullest extent, to keep its legal motivation more restricted, or even to 'evade' a tricky or sensitive question. By submitting a preliminary question a court of first instance or an appellate court can more or less 'force the hand' of the Supreme Court because it asks clearly for an explicit answer to that question.

B. The need to be heard

When people want to be heard, it usually means that they wish to elaborate on the factual elements of their case. As the Supreme Court is a court of cassation and not a third instance that establishes the relevant facts of the case, a hearing before the Supreme Court does not fulfil a need in the cassation procedure. If a party holds that a certain point of law requires a hearing, that party can ask for a hearing. Only lawyers admitted to the bar, or in civil cases admitted to a specialized bar, are allowed to represent parties at the hearing.

C. An underlying reasoning

We assume that parties are interested in their case. But by that assumption we usually suggest that they are interested in the 'story' of their case, the factual elements on which it rests. The judgements of the courts of first instance and the appellate courts viewed from the story telling perspective are definitely more interesting than a judgement of the Supreme Court. A court of cassation as the Supreme Court of the Netherlands takes the

factual elements of the case into account as the court of appeal has established them in its judgment. Basically the Supreme Court applies the law to the facts as they are procured by the court of appeal. Nevertheless we can assume that in any case the legal advisors will be interested in the reasoning that leads to the outcome of judgment of the Supreme Court.

Future developments

It is always an impossible task to say something about the future as it is uncertain. Even within the relatively safe and stable borders of the EU recent developments (Poland, etc.) have shown that nothing is sure. And that the rule of law should never be taken for granted. But nevertheless, I do think it is safe to say that the Supreme Court will continue his course as mentioned before and provide the people with rulings that are useful for society but also for the judges in the courts of first instance and the appellate courts. Furthermore, I believe that the use of digital-proceedings will speed up judicial decision making in the Netherlands, although in this regard some serious bumps have still to be taken.

SINGAPORE

JUDICIAL REFORM:
RESHAPING THE CIVIL JUSTICE SYSTEM IN SINGAPORE

Justice Steven Chong, Judge of Appeal, Supreme Court of Singapore[339]

I. Introduction

1. The theme of this paper is judicial reform. In exploring this theme, I will focus on reforms to the civil justice system in Singapore.

2. In his 1986 Hamlyn Lectures, Sir Jack Jacob QC observed that "the system of civil justice is of transcendent importance … for the people of every country".[340] I entirely agree. The civil justice system of any society serves two critical functions. First, it enables individuals and businesses to vindicate and enforce their civil law rights. The system "giv[es] life to the rule of law".[341] I will refer to this as the "Vindication Function". Second, the civil justice system provides mechanisms for the authoritative resolution of disputes. I will refer to this as the "Dispute-Resolution Function".

3. In this paper, I discuss two principal reforms to the Singapore civil justice system. Our Judiciary played a key role in driving both of these reforms. The first reform is the impending transformation of our civil procedure. Our overarching aim is to enhance access to justice, thereby enabling our civil justice system to better achieve the Vindication Function. The second reform is the creation of the Singapore International

339 I wish to acknowledge the valuable assistance of my law clerk, Tan Ee Kuan, for his research in the preparation of this paper.

340 Sir Jack I H Jacob QC, *The Fabric of English Civil Justice* (Stevens & Sons, 1987) at p 1.

341 John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014) at p 10.

Commercial Court ("the SICC"). The SICC offers the business community an alternative to international arbitration and municipal litigation for the resolution of international commercial disputes. It augments the suite of dispute-resolution options under our civil justice system, and thereby furthers the Dispute-Resolution Function.

II. Proposed reforms to civil procedure

4. I will begin by sketching the historical background to the proposed reforms.

Our historical inheritance

5. Singapore was a British colony. Consequently, much of our law derives from English law. Our civil procedure is no exception. The first statutory code on civil procedure in Singapore, the Civil Procedure Ordinance 1878 (SS Ord No 5 of 1878), was based on the English procedure in the Schedules to the Supreme Court of Judicature Act 1875 (c 77) (UK).[342] As English procedure evolved, we transposed the developing English rules into our law. Today, parts of our civil procedure are set out in primary legislation, case law, practice directions, notices and the court's inherent powers.[343] But much of our civil procedure is found in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules of Court"), which largely derives from the English Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) ("the 1965 English Rules"). In England, the 1965 English Rules have been replaced by the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK). This has been a model for the proposed reforms which I discuss below.

6. The system we inherited from England may be summarised as follows.

342 Jeffrey Pinsler, *Civil Justice in Singapore* (Butterworths Asia, 2000) at p 10.

343 Eunice Chua and Lionel Leo, "Civil Procedure: Autochthony for Efficiency and Justice" in *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015) (Goh Yihan & Paul Tan gen eds) ch 6 ("*Chua & Leo*") at para 6.1.

(a) First, in terms of the *structure* and *spirit* of our system, we inherited an adversarial system under which the court had a passive, non-interventionist role. The parties were left to control the pace and progress of the proceedings.

(b) Second, in terms of *content*, our civil procedure consisted of a suite of intricate and overlapping rules derived from English law.

(c) Third, in terms of *language*, much of our procedure was formulated in archaic legalese such as "plaintiff", "writ of summons", *etc*.

The first wave of reforms

7. By the early 1990s, a substantial backlog of cases had built up in our courts.[344] Our High Court faced more than 2,000 pending cases for which trial dates were only available three or more years later. Almost half of all cases took between five to ten years to be disposed of. This state of affairs was highly unsatisfactory; justice delayed is justice denied. It was certainly not conducive to Singapore's ambition to be a leading financial centre. To remedy this situation, our Judiciary led a first wave of reforms to our civil procedure.

8. The delay in the progress of cases could be traced to our adversarial system and more specifically, the parties' ability to dictate the pace of proceedings. We therefore sought to refine our system by providing for the court to have a more active role in the proceedings. This was achieved in two main ways.[345]

(a) First, we made incremental modifications to our procedural rules. For example, we introduced pre-trial conferences to enable case-management at an early stage, and an automatic discontinuance regime to incentivise plaintiffs to promptly pursue their claims.

344 *Chua & Leo* at para 6.18.
345 *Chua & Leo* at paras 6.23–6.41.

(b) Second, there was a sea change in judicial attitudes towards the monitoring of cases, with an emphasis on statistics in relation to clearance rates, case lifespans and waiting periods, and the adoption of a firm approach towards procedural non-compliance.

9. The reforms succeeded. The backlog of cases was cleared, and our courts continue to efficiently dispose of cases today. Yet deeper issues with our civil procedure endured. The first wave of reforms tempered the adversarial nature of our system. But it did not substantially change the content and language of our civil procedure, which remained complex and cast in outdated wording. Moreover, significant time and expense is still spent on procedural matters instead of the merits of a dispute.

The impending reforms

10. The time for more sweeping change has come. In January 2015, our Chief Justice constituted a Civil Justice Commission ("the CJC") with a view to studying and proposing radical change to our civil procedure. The Terms of Reference of the CJC stated that its overall objective was "to *transform, not merely reform,* the litigation process by modernizing it, enhancing efficiency and speed of adjudication and maintaining costs at reasonable levels".

11. The CJC included members of the Judiciary (I was the Co-Chairman), the Bar and academia. In late 2017, after three years of study, we submitted a report proposing bold reforms to our civil procedure. A public consultation is imminent. I will briefly set out the main themes of the proposed reforms.

12. First, in terms of the *structure and spirit* of our system, the proposed reforms would further enhance judicial control of the litigation process. For example, our present system of case-management would be overhauled through the introduction of Case Conferences, held soon after an action is commenced, to enable the court to take control of proceedings at an early stage. Our judges and judicial officers would also be given more discretion to tailor, modify or disapply procedural rules to advance the interests of

justice in any given case. In short, the reforms would take the changes to our adversarial system effected by the first wave of reforms one step further, by providing for the court to play an even more active role in proceedings. It is our hope that this would further reduce delay in and costs of proceedings.

13. Second, regarding the *content* of our civil procedure, the proposed reforms would retain the core concepts of our law. But they would simplify and restructure our rules for better understanding and coherence. For example, our rules on the commencement of proceedings and service both in and out of Singapore would be substantially simplified and consolidated.

14. Third, as for the *language* of our civil procedure, the reforms would strip away outdated terminology and reformulate our law in plain English. For example, references to “plaintiff” would be substituted with references to “claimant”. And instead of referring to a “writ” or an “originating summons”, we would refer to Originating Claims and Originating Applications.

15. The CJC also proposed two more significant changes to our civil procedure which I will briefly allude to. The first reform is to our law on the production of documents (also known as discovery). The reforms would create a new regime based on the principle that a claimant should sue on the strength of its case, not on the weakness of the defendant’s case. The proposed regime would hopefully be less expensive, time-consuming and intrusive than our current regime, under which a party must generally disclose documents that may adversely affect its case or support its opponent’s case.

16. The second proposed reform is to our costs regime. In this regard, one key aim of the proposed reforms is to signal to litigants that there is, in general, a fixed cost for bringing a dispute in court. The parties can then decide whether to litigate in that light. And in the light of this fixed cost, solicitors should not have an incentive to prolong or complicate the proceedings.

17. Civil procedure constitutes the process by which parties may vindicate their substantive rights under the civil law. This process must be simple, swift and reasonably affordable, to enable the civil justice system to better achieve the Vindication Function. This vision of our civil procedure has guided the proposed reforms discussed above.

III. The creation of the SICC

18. The SICC was officially launched on 5 January 2015. Before I describe the main features of the SICC, I will briefly explain its raison d'être.

The raison d'être of the SICC

19. Globalisation has led to a proliferation of cross-border trade, especially in Asia, and thus, the number and value of cross-border commercial disputes has risen exponentially. What is the appropriate forum for resolving these disputes? Municipal civil courts have not been the preferred choice of the international business community for three main reasons. First, there are perennial concerns about the competence and neutrality of national courts. Second, in the absence of an agreed forum, municipal litigation carries the risk of the fragmentation of disputes across jurisdictions and the corollary expense and delay associated with resolving such disputes. Third, there are often difficulties with enforcing the judgments of national courts abroad.

20. For these reasons, international commercial parties have typically turned to international arbitration to resolve their cross-border disputes. International arbitration promises a flexible, relatively inexpensive and speedy mode of dispute-resolution. Disputes are decided by specialists, whose decisions are not subject to appeal, and the enforceability of awards is not a concern due to the widespread adoption of the New York Convention.

21. But the drawbacks of international arbitration have become increasingly apparent. First, arbitration proceedings are very costly and are increasingly protracted. A key reason for this is, ironically, what is often seen as an attraction of arbitration – the finality of arbitral awards. The "one-shot" nature of arbitration has incentivised parties to expend a tremendous amount of resources in advancing their cases in arbitration with the aim of obtaining a favourable award. Second, because arbitration is premised on the parties' consent, arbitral tribunals do not have the power to join related parties to a dispute unless they consent. Such parties typically have little incentive to do so. The consequence has been the fragmentation of disputes across multiple fora, leading to the duplication of resources. Third, ethical concerns about arbitration, many of which stem from the fact that arbitrators are appointed by the parties, have grown. Finally, as Lord Thomas of Cwmgiedd ("Lord Thomas"), the former Lord Chief Justice of England and Wales, noted in 2015, commercial arbitration has arguably stunted the development of a *lex mercatoria*, a body of jurisprudence governing commercial disputes.[346]

22. There is therefore space for a mode of dispute-resolution that marries the advantages of arbitration and litigation, and seeks to avoid their drawbacks.

The main features of the SICC

23. The SICC is a branch of our High Court, established by local legislation, with jurisdiction to decide international commercial disputes. The jurisdiction of the SICC is based on the parties' consent, albeit cases commenced in the (non-SICC branch of the) High Court may also be transferred to the SICC.

24. The distinctiveness of the SICC lies in the fact that it is (1) an international commercial court, (2) with the traditional advantages of litigation, (3) yet with modified evidential, procedural and professional rules, all of which are (4) underpinned by a core

346 The Rt Hon the Lord Thomas of Cwmgiedd, "The Centrality of Justice: Its Contribution to Society, and its Delivery" (10 November 2015) <https://www.judiciary.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf> at para 23.

theme of flexibility to meet the needs of litigants. I will now elaborate on these four points in turn.

25. First, the SICC is an international commercial court. This is reflected in both the jurisdiction and the composition of the court. In terms of jurisdiction, the SICC's jurisdiction extends only to international and commercial actions. With regard to the composition of the court, the bench of the SICC includes International Judges from both common law and civil law jurisdictions, all of whom are eminent jurists in commercial law. They are – (a) from England: Justice Sir Jeremy Cooke, Justice Sir Henry Bernard Eder, Justice Lord Neuberger of Abbotsbury, Justice Sir Vivian Ramsey, Justice Sir Bernard Rix and Justice Simon Thorley; (b) from Australia: Justice Patricia Bergin, Justice Robert French, Justice Roger Giles and Justice Dyson Heydon AC; (c) from the USA: Justice Carolyn Berger; (d) from Canada: Justice Beverley McLachlin PC; (e) from France: Justice Dominique Hascher; (f) from Japan: Justice Yasuhei Taniguchi; (f) from Hong Kong: Justice Anselmo Reyes.

26. Second, the SICC possesses many traditional advantages of litigation that arbitration does not enjoy. I will simply list three such advantages:[347]

(a) *The power to join third-parties*: First, unlike arbitral tribunals, the SICC has the power to join third parties to a dispute even if they do not consent to its jurisdiction. The SICC can thus ensure that related disputes involving multiple parties that raise similar factual and legal issues are resolved by one tribunal, thus eliminating the risk of inconsistent findings. This is particularly important in construction, shipping and insurance disputes, which often arise out of chain contracts and involve multiple parties, not all of whom may be party to an arbitration or jurisdiction clause.

347 The Hon the Chief Justice Sundaresh Menon, "The Rule of Law and the SICC" (10 January 2018) <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf> at para 28.

(b) *A default right of appeal*: Second, there is by default a right of appeal. This may encourage parties to eschew an over-inclusive approach towards evidence and submissions. I would add that there is provision for expedited appeals and that the first appeal to the Court of Appeal, which was an expedited appeal, was decided barely a month after the notice of appeal was filed, with the written judgment released less than a week later.[348]

(c) *Public proceedings and published judgments*: Third, by default, the SICC's proceedings are in open court, which lends transparency to them. Further, the SICC's judgments are published. They will hopefully contribute to the development of a body of jurisprudence that will give guidance to the international business community.

27. Third, the SICC applies modified evidential, procedural and professional rules with the aim of providing a dispute-resolution mechanism that meets the need of commercial parties. I will give three examples:

(a) First, foreign law may be decided based on submissions. This will eliminate the cost and time of laboriously proving foreign law through foreign law experts.

(b) Second, discovery in the SICC is based on the "reliance discovery" process in arbitration: there is no "general discovery". This will reduce the expense and delay due to the production of documents.

(c) Third, foreign lawyers have liberal rights of audience before the SICC. Parties who regularly instruct certain preferred lawyers will thus be able to retain their counsel of choice to represent them.

348 *Jacob Agam and another v BNP Paribas SA* [2017] 2 SLR 1, discussed in Justin Yeo, "On Appeal from Singapore International Commercial Court" (2017) 29 SAcLJ 574.

28. Finally, a core theme of flexibility runs through the SICC's procedure. The SICC allows parties to tailor its procedure to their dispute. Again, I will give three examples which illustrate this theme of flexibility:

(a) First, although there is a right of appeal by default, the parties may exclude this by agreement.

(b) Second, the parties can agree that rules of evidence other than the evidential rules under Singapore law will apply to their dispute.

(c) Third, in certain cases, parties can apply to have their cases heard *in camera*, and for orders to be made to preserve the confidentiality of the proceedings.

The progress of the SICC

29. As noted above, the SICC was launched on 5 January 2015. Since then, in a span of less than 3 years, 30 judgments have been issued, including 6 appellate judgments, most within 3 months after submissions, and at least one judgment has been reported in overseas law reports.[349] Significantly, in February this year, the first writ of summons (based on a jurisdiction clause conferring jurisdiction on the SICC) was filed with the SICC.[350] (The earlier SICC cases had all been transferred from the High Court.)

30. Three years after its inception, the SICC's Bench has expanded to include, as noted above, Lord Neuberger of Abbotsbury IJ, ex-President of the UK Supreme Court, and Beverly McLachlin PC IJ, ex-Chief Justice of Canada, among other eminent jurists. Both of these towering figures of the common law sat with our Chief Justice in an appeal earlier this year.[351]

349 *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 5 LRC 186; (2016) 167 ConLR 93.

350 *SICC News – Issue No 11* (April 2018) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-newsletter-issue-no-11_8239f5c5-8e7f-42bf-81b0-cb581c33a349.pdf> at p 1.

351 *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2018] SGCA(I) 05.

31. The SICC is also an active member of the Standing International Forum of Commercial Courts ("the SIFoCC"), a forum that brings together commercial courts from all around the world to facilitate collaboration and pursue best practices. The first meeting of the SIFoCC was held in London on 4–5 May 2017. A second meeting was held less than two weeks ago in New York, on 27–28 September 2018. The SIFoCC has worked on, among other things, a multilateral memorandum on the enforcement of judgments of commercial courts, creating a working party to identify best practices to make litigation more efficient and introducing a structure to enable commercial court judges to spend time as observers in other commercial courts.[352]

32. In sum, the SICC is a significant addition to the dispute-resolution options available to litigants in our jurisdiction. It advances the Dispute-Resolution Function of our civil justice system.

IV. Conclusion

33. In conclusion, I will draw together two common themes that underlie the two reforms to Singapore's civil justice system discussed above.

34. First, both reforms reflect a desire to boldly reshape the civil justice system. The proposed reforms to our civil procedure are the product of a root-and-branch rethinking of our existing law. If they come into effect, they will substantially change our civil justice system. The establishment of the SICC was no less revolutionary. It required significant and unprecedented changes to our Constitution and other primary legislation – for example, to provide for International Judges to become members of our High Court. Transformative changes of this nature will be necessary to ensure that our civil justice systems meet the needs and expectations of our users.

352 *SiFoCC: Report on the first meeting; London; 4–5 May 2017* <https://www.sifocc.org/wp-content/uploads/2018/03/First_SIFOCC_Report_-_FINAL.pdf> at p 4.

35. Second, although our Judiciary was a key leader of both sets of reforms, both were a product of collaboration between the Judiciary, practitioners and the Ministry of Law. The Judiciary bears primary responsibility for the judicial system. However, other stakeholders also have an interest in the judicial system and have a role to play in reforming it.

SPAIN

A SERIES OF REFLECTIONS ON THE SPANISH SYSTEM OF LEGAL CERTAINTY AND THE SUPREME COURT

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Summary

Judicial Reform. The importance of the Supreme Court in producing case-law that provides legal certainty and uniformity within the enforcement of regulations, as an essential value of a democratic state grounded on the rule of law. The need to undertake legal reform to ensure that access to the cassation appeal is restricted to those cases that evidence a truly objective cassational interest.

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1. Introduction

In the majority of countries, including those with a democratic system, the enforcement of the law via an independent, modern and agile legal system is one of most prevalent concerns of the state. Spain is no exception and evidences a long-standing tradition of relentlessly striving towards a legal system that constantly advances and improves as it operates, although this necessarily occurs within complex budgetary constraints where the resources that might be assigned to this task are limited, as there are many other essential social needs that the State must simultaneously address.

The assignment of the necessary resources to enable such a legal system to be truly effective and ensure that it attends to the needs of the society and citizens that is was set

up and maintained to serve, is essentially a political problem that is to be resolved in the broadest sense accepted by all sectors involved, where possible in the context of a National Agreement taking in all political groups, which was put into effect in Spain in 2001, although this clearly involves a basic and general text that must be renewed and updated, given its age, its substitution proving impossible to date as a new consensus has not been reached in recent times, despite certain political initiatives in this regard.

Justice, as is the case with education or health, should not see its core affected by successive regulatory changes brought about by the political rotation of governments formed by different parties. Therefore, what is required is recognition of the urgent need to address, in a decisive and systematic manner, the root of the problems that traditionally affect justice and to afford this framework for consensual regulation with the necessary coherence, stability and permanence, to ensure that the result is a model that goes beyond particular positions to attend to the general interests of citizens.

2. Legal Certainty and the Supreme Court

a) The approach and value of case-law

It is a universal aspiration that justice act quickly, effectively and with quality, employing the most modern methods and the least complicated procedures, via independent, irremovable, responsible judges, subject only to the rule of law (article 117 of the Spanish Constitution), with the aim of guaranteeing, within a reasonable time-frame, citizens' rights and affording legal certainty, by acting with logical and predictable behavioural guidelines.

Legal certainty (article 9.3 of the Spanish Constitution) is one of the essential values that must form a part of any system for the administration of justice that is truly set up to serve

society, as the concept itself makes direct reference to the fundamental right of effective legal protection (article 24.1), which implies that it is reasonably to be expected that a court, providing that it acts in conformity with proper procedure and the facts on which the claim is grounded have been accredited, will rule on litigation in accordance with the law and in keeping with the interpretation of the law carried out by the jurisdictional body charged with producing case-law, that is, the Supreme Court, thereby unifying interpretation of a regulation throughout the entire national territory.

Irrespective of what might prove desirable, in Spain, the case-law of the Supreme Court is not directly binding on legal bodies that are on a lower hierarchical level, which can, with reasoned grounds, diverge from such case-law without incurring responsibility. Furthermore, the Constitution is the pre-eminent regulation within the legal system and binds all judges and courts, forcing them to interpret and enforce laws and regulations in accordance with constitutional precepts and principles, in keeping with the interpretation afforded to them via the rulings issued by the Constitutional Court in all nature of proceedings, whereby the case-law of the Supreme Court must adhere to the decisions on the interpretation of regulations and fundamental rights produced by that Court. Indeed, Spanish judges and courts, including the Supreme Court, cannot refrain from enforcing a regulation with the force of law where they deem that it contradicts a constitutional precept, but rather, in such cases, they must specifically make a referral to the Constitutional Court on the grounds of unconstitutionality, and the court that made the referral and all other courts must abide by its decision.

Moreover, the case-law of the Supreme Court is not a source of law, but it must be taken into consideration in accordance with article 1.6 of the Civil Code: *"Case-law will complement the legal system with the doctrine that, in a reiterated manner, is established by the Supreme Court when interpreting and enforcing the law, customs and general legal principles",* and article 123 of the Constitution, in its capacity as the highest judicial body in all jurisdictional spheres.

In Judgment 683/2017, issued by Chamber Four of the Supreme Court on 18/09/17, we are reminded that in prior judgments issued by the same court and in Constitutional Court judgment 72/2015, of 14 April, within the civil law system in which the task of producing case-law is assigned to the Spanish Supreme Court, case-law is not, in itself, a source of law (judgments do not create regulations), whereby the rules governing the system for the enforcement of laws are not mimetically transferable. In contrast to the common-law system, wherein precedent acts as a regulation and overruling, or a change of precedent, affords innovation within the legal system, making it possible to limit the retroactivity of a judicial decision, in European law, courts are not bound by the doctrine of overruling, but rather are governed by retrospective overruling (notwithstanding the exception that, via a legal provision, might establish an exclusively prospective effect of a judgment, as envisaged in article 100.7 of the Law on Administrative Jurisdiction relating to cassation appeals in the interest of law).

Furthermore, the European Court of Human Rights has pointed out that the demands of legal certainty and the protection of the legitimate interests of the litigants do not generate a vested right to certain case-law, even where it has proved consistent (ECHR Judgment of 19 December 2008, case of Unédic v. France, § 74). The evolution of case-law doctrine is not in itself opposed to the proper administration of justice, as this would impede any change or improvement to the interpretation of law (ECHR Judgment of 14 January 2010, case of Atanasovski v. the Former Yugoslav Republic of Macedonia, § 38).

b) Supranational European Courts and the case-law of the Supreme Court

The incorporation of the Spanish system into the sphere of supranational courts, particularly European courts of this nature, requires us to succinctly make reference at this stage to the importance of their rulings for national courts on which such multi-level justice has bearing.

With regards to the Court of Justice of the European Union, article 4 bis of the Organic Law on the Judiciary stipulates that Spanish courts and judges will enforce the Law of the European Union in accordance with the case-law of the Courts of Justice of the European Union, and may make referrals for preliminary rulings *sua sponte* or at the behest of a party where doubt or certainty exists in relation to a national regulation contradicting a European regulation that proves applicable, in which case the judgment issued by Court of Justice of the European Union is binding (article 267 of the Treaty on the Functioning of the European Union - TFEU).

The dominance or primacy of European case-law over the doctrine or case-law of the courts of the member states when interpreting or enforcing precepts or provisions of Union Law must be affirmed, given that, in accordance with article 267 of the TFEU, doctrine established by the Court of Justice of the European Union is binding on the national supreme court that must adhere to it, not only in matters decided by a judgment resolving a referral for a preliminary ruling, but rather, at a general level, in all cases taken in by the interpretation that is established (Supreme Court Judgments, Chamber Four, of 17/12/97 -rec. 4130/96 -, 20/10/04 -rcud 4424/03 -; 27/10/04 -rcud 899/02 -; and 09/04/13 -rcud 1435/12 -). This is due to the fact that the affirmations of the CJEC transcend the specific case wherein the referral for a preliminary ruling is made, as they do not resolve any form of litigation, but rather are intended to ensure uniform interpretation, throughout all member states, of the provisions of European law: the Court of Justice restricts itself to deducing, on the basis of their wording and spirit, the meaning of the European laws in question. [CJEC Judgments of 08/11/90, Case of Gmurzynska-Bscher ; 15/06/06, Case of Acereda Herrera ; and 06/07/06, Case of Salus].

Thus, the decisions of the Court of Justice of the European Union are binding, in terms of the interpretation of European regulations, on all national courts that are to enforce these Union regulations, which clearly results in an advantageous interpretative homogeneity of

this law and these regulations and, in short, contributes to the establishment of legal certainty at European level, for all 28 member states.

With regards to the European Court of Human Rights, it should be pointed out that, in accordance with article 46 of the European Convention on Human Rights, its rulings are not only binding for those states to which the specific case refers, but also such judgments are effective as a form of shared European law on the scope and limits of the fundamental rights outlined in the Convention. In Spanish law, the Constitution recognises this binding force in article 10.2, which states that "*regulations relating to fundamental rights and the freedoms recognised in the Constitution will be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on such matters that have been ratified by Spain*", such as the European Convention on Human Rights, necessarily undersigned by the 47 member states that form the Council of Europe, on which the doctrine of the judgments of the ECHR has bearing.

c) The Supreme Court of the Kingdom of Spain and the legal, social and economic importance of case-law

Whilst we have outlined the value of the case-law of the Supreme Court above, it is clear that in all countries the existence of a higher judicial body that indicates interpretation of regulations that is in keeping with the law throughout the national territory affords obvious benefits of legal homogeneity, which equates to legal certainty, a synonym, in turn, for equality within the enforcement of the law.
This special value of case-law as a unifying force within the enforcement of the law, in addition to the distinctly legal values the fundamental rights of citizens recognise, also has significant complementary connotations.

It is clear that justice, as such, does not possess a markedly economic value; however, it cannot be disputed that a legal system that affords certainty and uniformity in the enforcement of law, with trained and qualified judges, which, within a reasonable period of time resolves the cases that it hears, has an obvious economic effect deriving from certainty, whereby business activity and transactions in general are provided with legal support in the form of reasonably predictable results in the face of the enforcement of the regulations in question within inevitable litigation, which can clearly encourage social and economic development within a legally stable context.

In addition to the effect entailing homogeneity in the interpretation of regulations that is an intrinsic part of case-law, it also results in essential diffusion towards lower courts, whereby rapid awareness of the decisions of the Supreme Court when interpreting regulations, particularly where this entails unprecedented cases or regulations that have recently entered into force, implies an effect of industrial harmony deriving from this uniformity that makes the same solution reasonably predictable in other similar cases, which ultimately should lead to a decline in litigation.

On the other hand, a Supreme Court overburdened with cases that prove impossible to resolve within a reasonable time with the personal and material resources afforded to it for this end, within the framework of the procedural regulations governing the resources of bodies charged with hearing cases, represents a negation of all the benefits we have outlined above. In recent years and at present, this is precisely the situation in which the Spanish Supreme Court finds itself, particularly its Chamber 1 (which hears civil, commercial and family matters) and Chamber 4 (cases deriving from employment contracts, collective labour law and Social Security matters).

During the hard years of the unprecedented crisis that has pummelled the Spanish economy since 2008, various far-reaching regulatory changes were made, which in the sphere of labour law were primarily implemented from 2012 onwards, and the enactment of this reform, along with unacceptable unemployment levels, has led to an exponential increase in litigation before the labour jurisdiction and before the Chamber of Labour Matters of the Supreme Court, consisting of twelve judges and the president.

By way of example, in 2012, 3600 cassation appeals were filed, with gradual but unrelenting increases from that point to reach 5076 appeals in 2017, and this growth is maintained over the course of the current year, in which 3500 were lodged by the month of July. X

Whilst the Chamber, as is the case with all chambers within the Supreme Court, boasts a Technical Office made up of 12 lawyers who classify cases and propose the inadmissibility of those cases that fail to meet the requisites to be admitted for processing, in reality, at the point of passing judgment, no technical or legal assistance of any nature is provided, whereby judges must deal with the entirety of their study and drafting, which last year entailed 1100 judgments and 3623 cases wherein rulings of inadmissibility were delivered.

Inevitably, where such a large number of cases are lodged and the number of human resources is highly limited, the number of pending cases increases and response times clearly become longer. Thus, whilst a few years ago the average time employed in processing up to the judgment was eight months, currently, this figure stands at sixteen months, despite the clear efforts made by the thirteen judges that make up the Chamber, whose numbers have also been reduced considerably over the course of these critical years, given the restriction on the date of retirement, currently set at the age of 72 for all posts within the judiciary.

The improvement of response times within the administration of justice is clearly one of its most important values; however, it is of even greater importance in jurisdictions that resolve litigation within the sphere of labour law and Social Security benefits. In this area, industrial harmony is essential, as is ensuring that employees are afforded rapid decisions to the issues they place before the courts to be heard. Nevertheless, as we have seen, given such high numbers of cases in Chamber Four of the Supreme Court (Chamber One suffers a similar situation), it is impossible to offer such a reasonably rapid response, and therefore nor is it possible to provide legal certainty or effective legal protection within an acceptable time frame.

3. The cassation appeal as an essential instrument for the improvement of Justice

In the last meeting of the presidents of the supreme courts of the countries making up the European Union, held in Tallinn, Estonia, in October 2017, many of the problems that have a significant effect on the operation of such courts were drawn to light and in many instances the problem of the huge accumulation of cases was identified as one of the most concerning issues that would prove difficult to address, because, in reality, delay in resolving the appeals that amass prevents uniformity in the enforcement of regulations from reaching lower courts as soon as possible to enable them to undertake their essential role of affording legal protection and legal certainty to citizens.

Therefore, for some years the necessary reforms have been implemented with regards to criminal cassation and, in particular, the administrative sphere, in this case via the new Law Regulating Administrative Jurisdiction, to bring about quicker and more efficient operation of the Supreme Court, thereby enabling it to strengthen its role as a higher judicial body, a guarantee of doctrinal unity throughout all jurisdictional spheres.

To this end, and in the same manner, the cassation appeal requires reform in other jurisdictional spheres, drawing closer to its regulation in the various procedural laws, specifically considering the concept of "*objective cassational interest*" as the basis of a modern and efficient cassation, a task that remains pending in other chambers of the Supreme Court, particularly in Chamber One and Chamber Four, as we have attempted to highlight.

Therefore, efforts must be made to find a regulatory formula that enables courts to apply a filter that limits access to cassation in cases that are irrelevant, replications, unimportant or lacking doctrinal impact, doing away with automatic access, which occurs where all-embracing general requisites are established that ultimately enable cases without true objective interest to become the source of reiterated analysis in the judgments of the Supreme Court.

This occurs within cassation in labour matters in the Spanish system, wherein, in essence, the so-called cassation appeal for the unification of doctrine is heard, which

may be lodged against all judgments issued by the Chambers of Labour Matters of the High Courts of Justice (21 chambers throughout Spain) where they contradict judgments delivered by the Constitutional Court, the Supreme Court or another Chamber of Labour Matters of a High Court of Justice. Where, in the face of facts, grounds and claims that are substantially the same, the appealed judgment and the judgment put forward as contradictory make conflicting pronouncements, the Chamber of Labour Matters of the Supreme Court must issue a judgment to unify doctrine, irrespective of the nature of the case or the possible objective cassational interest that the matter might entail, even where such interest is inexistent.

On the other hand, where such conflict does not arise, the Supreme Court is unable to unify doctrine, even where the case proves of extraordinary importance, as occurs, by way of example, when new regulations enter into force that require rapid homogeneous interpretation throughout the national territory, when the doctrine of the appealed judgment proves seriously detrimental to general interests or when it has bearing on a large number of situations, or in those cases wherein the appealed judgment deliberately deviates from existing case-law that it deems erroneous.

By way of conclusion, we might affirm that the legal certainty that supreme courts are to afford as an essential element within their unifying role in the enforcement and interpretation of the law necessarily entails a commitment on the part of the legislature aimed at adapting procedural regulations in accordance with the need to regulate cassation in a reasonable manner, grounded on a certain degree of discretion on the part of the supreme court that applies the legal filters envisaged to access cassation, with the procedural regulation overcoming possible mistrust between the powers of state.

The legal certainty that is required and expected from supreme courts must also entail collaboration and efficiency on the part of those charged with drawing up laws, the legislature, establishing regulations that are thoughtfully drafted, clear and precise, with the highest possible degree of stability, not only in procedural terms, but also in terms of substantive law, as the proliferation of abstruse legal regulations or highly unstable regulations runs contrary to the reiterated concept of legal certainty.

Finally, the Executive must also actively collaborate in the necessary and urgent improvement of the administration of justice at a general level and in particular with regards to the operation of supreme courts. Assigning the necessary human and material resources towards this end has remained a pending task for many years and there is clear room for improvement, given that the Spanish Supreme Court depends on the Executive, the Ministry of Justice, to obtain and administrate such resources, bearing in mind that, in contrast to the Spanish Constitutional Court and the General Council of the Judiciary, the Supreme Court does not boast its own budgetary capacity, which is not the case in other countries within the European Union.

Madrid, 14 September 2018

CARIBBEAN COMMUNITY

JUDICIAL REFORM

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Summary
Courts are service providers whose customers, the public, should be satisfied. Satisfying the public requires consistent judicial reform which must be undertaken in ways that are responsive to the expectations and needs of the public. Only in this way will public trust and confidence be maintained and enhanced. This short paper examines these principles through the prism of reforms and initiatives undertaken at the Caribbean Court of Justice (CCJ). These measures include the selection of its judges; the institutional measures to assure the court's independence; judicial accountability; the promotion of human rights and the Rule of Law; the reform of court rules, structures and procedures; innovative court technology; strategic management; and a number of other measures.

Keywords: judicial reform – access to justice - judicial independence - accountability – rule of law – court management – technology – funding – Judicial outreach

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JUDICIAL REFORM – What are the changes that should be implemented for the judicial system to be more responsive to the expectations and needs of the people?

Because we live in a dynamic world, it is natural for people to expect that the justice system should keep pace with, or at least, not retard the progress of society as a whole.

People have an ongoing vital stake in the administration of justice. Only a just society can guarantee the opportunity for the human potential of each citizen fully to be unlocked.

Access to Justice is therefore of fundamental importance both to the individual and to the society. Essential public goods such as democratic governance, health, education, recreational opportunities, all require a sound justice system to underpin them if all of society is to benefit equally from them. When we consider the question of judicial reform we must keep uppermost in our minds the notion that the court is a service provider. The court is not a place. It is a service and the public are our customers. It is their expectations and needs that the justice system should aim to satisfy. The critical yardstick for measuring the effectiveness of judicial reform is the degree to which the needs of the public are satisfied, and public trust and confidence is enhanced. The public wishes to see judges that are impartial, ethical, competent, efficient and effective. They desire a justice system that is accessible, efficient, modern and one that produces fair and reasonably predictable outcomes.

Effective judicial reform should go beyond mere modernisation of processes. Modern technology alone would not necessarily improve systemic deficiencies. Technology is a mere tool. It is people assisted by technology who make the justice system work. Judicial reform should therefore equip judges and court staff to serve the public better and ultimately, judicial reform should lead to national stability and social and economic progress.

In this paper, in light of the above, I wish to address briefly some of the reforms and programs that the Caribbean Court of Justice has been engaged in so as to be more responsive to the expectations and needs of the people.

The approach I will take to the topic is to break down into discrete areas certain facets of judicial reform and to give an indication of what we have undertaken or are currently undertaking in the Caribbean.

Judicial Reform and the Quality of Judges

My court, the Caribbean Court of Justice, is actually two courts in one. We exercise two distinct jurisdictions. Firstly, we are a court that interprets and applies a regional economic treaty. In this jurisdiction, we function almost like the Court of Justice of the European Community or the Court of Justice of the Andean Community does. In our second jurisdiction, we exercise final appellate jurisdiction for those independent English-speaking Caribbean states that alter their Constitutions to accommodate us as their apex court.

In each jurisdiction Caribbean people expect that their judges will be independent and courageous, competent, ethical, efficient and effective. How do we meet that expectation? What reforms have we been putting in place to meet the same? The first and paramount issue is the method by which the judges are selected. The English-speaking Caribbean follows a common law tradition. There is no formal training to be a judge at an academic institution. Instead, senior or experienced lawyers or law academics are recruited for judicial appointment.

Judicial appointments to the CCJ are made by a Commission comprising representatives from: regional Bar Associations, regional law schools and civil society. The Commission is chaired by the President of the Court. Typically, when there is a vacancy on the court, the vacancy is advertised in the regional and international Press. The advertisement sets out the qualifications for appointment. Each applicant must submit a mountain of pre-determined information about herself or himself. The best of the applicants is then interviewed by the Commission and a selection is made partly on this interview and on the basis of a due diligence check done by the Commission. In making appointments to the office of Judge, the Commission pays careful regard to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society.

The President of the Court is appointed by a similar process except that the person selected by the Commission must be approved by the Executive Authority. The latter cannot itself select a president but must be content to approve or reject the nominee of the Commission.

The appointment method just outlined has the advantage of being fair, transparent, merit-based and completely independent of the political directorate. On the other hand, it has been suggested that a deficiency in the appointments process is that there is no public participation in the process. The public is unaware of who the applicants for judicial office are.

Once appointed, a judge is expected to engage in periodic judicial education seminars and conferences. These might address new competencies or approaches to judging. Consistent judicial education and a fair and transparent appointment process are critical to meeting the public's need for independent, competent, ethical, efficient and effective judges.

One of the areas of judicial education that has been consuming the attention of judges in the Caribbean in recent times is the issue of Gender sensitive judging. A few years ago, we came across a document prepared by the Mexican judiciary that was in effect a Gender Protocol for Mexican judges. It was a Guide that assisted judges to adjudicate cases utilising an appropriate gender lens. The Protocol also referenced the jurisprudence of international bodies that interpreted and applied important conventions on the rights of women and sexual minorities.

The Caribbean Association of Judicial Officers, with the support of the CCJ, has encouraged Caribbean judiciaries to devise similar Gender protocols and this has already begun to make a difference in the approach that judges take in this area of the law.

Judicial Reform and Financial Independence of the Judiciary

A reasonable degree of financial autonomy is another core element of judicial independence. When the CCJ was being established in the early part of this century, careful thought went into the creation of institutional arrangements that would enhance this aspect of the court's independence. The idea was conceived of utilizing the unique mechanism of a trust fund to secure the court's financial independence. A sum of US$100 million was borrowed by the Caribbean Development Bank (CDB) and that money was loaned to the various States that subscribe to the Court. The US$100 million was then placed in the hands of a group of trustees whose responsibility it is to manage and invest those monies so that the Court's expenses could be met from the interest or yield on the investment. The court's funding is therefore assured for many years ahead and the court does not have to interface with the political directorate in order to obtain its funding.

Judicial Reform and Accountability

Judges and courts are understandably often quick to claim and assert their independence. Judicial accountability is the converse side of independence. If the public is to give the judiciary their trust and confidence the judiciary must establish and publish performance standards and measures for which it is prepared to hold itself accountable.

Similarly, a judge of the CCJ must subscribe to the court's published Code of Ethics. This code is patterned off the Bangalore Principles. The court seeks to update the code periodically through a process that involves all of the judges themselves. We have found that a collegial process of updating the Code is as valuable as the finished Code itself. Judicial ethical violations are often the product of ignorance. Going through and discussing the provisions in detail causes one to reflect on the various clauses in ways that strengthen one's awareness of them.

Judicial Reform and the Promotion of Human Rights and the Rule of Law

The CCJ in recent times has issued a series of judicial decisions aimed at advancing the rule of law and the enjoyment of human rights of Caribbean citizens. In *Gibson v The Attorney General*[353] the court developed the concept of a fair trial to include the provision of non-legal expert assistance by the State to an indigent accused in circumstances where the accused was on trial for murder and the only evidence against him was of a highly scientific nature. The Court held that the State either had to make available to the accused the services of a forensic odontologist or else it had to withdraw the indictment.

The court has also developed the concept of the rule of law and its application. So, for example, the rule of law is now clearly established as a constitutional norm that can be independently enforced by a citizen even where the citizen is unable to point to a specific breach of the human rights chapter of the Constitution. This approach allowed the court to give relief to the Maya community in the southern part of Belize when they alleged that their right to the protection of the law was infringed because the existing property law regime failed adequately to protect Mayan interest in the lands within villages customarily occupied by the Maya.[354]

Judicial Reform and Court Rules, Structures and Procedures

Over time, court rules, court structures and court procedures become obsolete, or else need to be revised in order for optimum court efficiency to be maintained. Such revision exercises therefore constitute a type of judicial reform that must be engaged in periodically so as to meet, for example, concerns about delays in the processing of cases. This is actually one of the chief areas of complaint from court users in the Caribbean, i.e. the inordinate time that elapses between the filing and final disposition of cases.

353 [2010] CCJ 3 (AJ)
354 See *Maya Leaders Alliance* [2015] CCJ 15 (AJ)

In the Caribbean, it has been easier for courts to introduce reforms of court rules and procedures in civil, i.e. non-criminal cases. Over the last 20 years new civil procedure rules have been adopted in most of the Caribbean states. The new civil procedure rules have not only addressed problems of delay. They have also dealt with other serious challenges. These included the existence of complex, arcane rules written in legalese; a civil justice system in which the role of the court was re-active and not pro-active; court rules that made no provision for the early settlement of disputes; a system that often countenanced a severe disproportion between the value of the thing in dispute and the time, effort and cost involved in adjudicating the dispute; and finally, a system that engendered a pervasive sense, on the part of the litigants, of alienation from the adjudication process.

These new rules have introduced modern methods of case management and a suite of alternative dispute resolution methods that provide less expensive and quicker alternatives to a full trial where appropriate. The new rules also assist the parties to reach agreement as early as possible and they seek to restrict the scope of the dispute to relevant issues.

It has been far more problematic to introduce similar reforms in the criminal justice system. Reform in the criminal justice sector is intractable because there is not a single criminal justice system. The criminal justice sector comprises a variety of systems each with its own roles and priorities and command structures. There is the parliament that makes law; there's the police service; the private Bar; the Office of the Public Prosecutor; the Prison Service; the Probation and Welfare Department; Trial and Appellate judges; the Registry and court offices and so on. Fundamental reform of the criminal justice sector cannot succeed if each of these elements is not on the same page marching in step with each other. That is a goal that courts by themselves cannot accomplish. The difficulty in coordinating the activities of these various entities has impeded thorough comprehensive and successful reform in the criminal justice system.

Finally, under this head, one can speak to appropriate Court Structures. Several courts in the Caribbean have begun to establish a range of specialist courts with specialised procedures to treat with special areas. So, there are Drug Courts, Juvenile Courts, Sexual Offences Courts and so on. The advantage of specialisation is too obvious to detail.

Judicial Reform and Public Outreach

In its appellate jurisdiction, the CCJ is the court that replaces the London based Judicial Committee of the Privy Council. This is the court which, from colonial times, has in effect functioned as a Supreme or Apex Court for all British colonies. Only in 2005 did English speaking Caribbean states establish their own Supreme Court. Even after its establishment, however, some Caribbean states still maintain the Privy Council as their final appeal court. Some of these governments would like to leave the Privy Council and accede to the CCJ but they are faced with national Constitutions that require a two thirds majority vote at a national referendum in order to effect the requisite constitutional change.

Maintaining appeals to the Privy Council is an expensive option for likely appellants. Indeed, it is a denial of access to justice for all but those with substantial means. Moreover, the Privy Council, comprised of British judges, is obviously not as well suited as a Caribbean court is to make decisions in Caribbean cases. Interpretation and application of the law at any level, but particularly at the level of an apex court, is often about assessing competing reasonable choices. In constitutional matters, for example, Courts must often decide whether in any particular case public interests should prevail over individual rights.

Where a country must proceed to a national referendum, the CCJ considers it to be part of its responsibility to provide information to the public so that they can exercise their franchise in an informed manner.

The court otherwise maintains a regular extra-judicial dialogue with subordinate courts and their judges. This is aimed at promoting judicial collegiality and discovering the precise ways in which the CCJ can assist the subordinate courts in their judicial reform initiatives. The CCJ has always stood ready to make available to those courts, human or material resources or simply to share with them the court's experience.

Judicial Reform and Innovative Court Technology

As people become more acutely aware of their rights and less tolerant of any interference with them there is a proliferation of cases filed in the courts. The resources made available to courts have not kept pace with this increase in the caseload. Innovative ways must be found to cope with the increased caseload. The problem for courts is that the administration of justice tends towards conservatism and there is usually a reluctance to embrace new or innovative solutions. Courts and Judges must consciously overcome this tendency towards a conservative approach to their work. Sometimes radical solutions must be fashioned to ensure that court processes are continually customer friendly, effective and designed to enhance independence, efficiency and public trust. This will entail the harnessing of modern information technology and management systems in order to expedite case flow, afford better and greater access to justice and generally enhance justice delivery.

To this end, the CCJ has invested time and resources in developing an electronic filing platform for our case processing. All our filing and service of case documents are now done electronically. This has considerably increased efficiencies and reduced costs. It has also enhanced access to justice and given the court far greater flexibility in the preparation of hearings. In May of this year, for example, we accepted, at 5:30PM on a Friday afternoon, an extremely urgent appeal for filing. The 500 plus pages comprising

the appeal record were filed, served and the appeal heard and determined by five judges within 48 hours.[355] This would not have been possible without an electronic filing system.

The Court has also taken other measures to improve transparency and keep our customers and stakeholders fully abreast with information about the court. These measures include the use of modern communication tools. The CCJ live streams all its hearings and makes the video permanently available on our website. The court has also been increasing its social media footprint and plans to utilise Twitter and Facebook more robustly in the future.

These modest measures of judicial reform are embraced by the court in the full recognition that securing and enhancing public confidence is at the core of the court's mission.

Judicial Reform and Strategic Management

Judicial reform will hardly be successful without enlightened leadership. As has been made clear by the International Framework for Court Excellence, "strong leadership also requires the creation of a highly professional management capability as well as a focus on innovation within the courts and the anticipation of changes in society (which can lead to changes in demands for judicial services)."[356] Judges are usually not trained in management. Successful judicial reform therefore requires that courts build up a cadre of competent court managers who can anticipate, recognise and manage change.

Judicial reform must also be part and parcel of strategic planning and management. To this end the court is working on our second strategic planning cycle. Each of the Units of the court is currently engaged in creating management action plans to locate the work of the unit and each member within it within the context of the court's overall Strategic Plan.

355 See *Ventose v Chief Electoral Officer* [2018] CCJ 13 (AJ)
356 International Framework for Court Excellence, 2nd edn March 2013

Judicial Reform and Partnerships with Funders

Finally, I wish to say a few words on judicial reform and partnering with international funding agencies. Notwithstanding, the existence of the Trust Fund, the court is always on the look out for opportunities to augment its funding to support special programmes that strengthen either its own judicial infrastructure or the regional justice system. Internationally reputable donor agencies are correspondingly always ready to support well thought out judicial reform programmes.

Partnering with donor agencies must be on the clear basis that the relevant judicial reform programmes are locally developed and locally driven. If this occurs, then such programmes not only afford benefits to the recipients of the aid provided but also help to build much needed management capacity among court staff.

The CCJ is currently implementing a Canadian funded project that has been engaged in a series of reform activities throughout the Caribbean. These include the development of a Sexual Offences Model Court and the promulgation of Sexual Offences Model Guidelines. Both of these initiatives are aimed, among other things, at ensuring that the best possible evidence in such cases is obtained; expediting case flow; and avoiding the re-traumatization of survivors of sexual offences. The project has also developed a comprehensive Bench Book for first tier judges that, for the first time, sets out in one place the law and procedures relevant to the most commonly adjudicated cases before these judges.

Conclusion

These brief remarks are in no way intended to suggest that we in the Caribbean regard ourselves as the embodiment of excellence. That would be so very far from the case. Our court has tremendous challenges like all other courts. But we do hold to the view that, far from being a destination one reaches, excellence is really a continuous process of seeking an unattainable goal. The most important need of the poor and disadvantaged, of the vulnerable and the weak, is justice. Business persons and investors also require a strong and fair justice system. And state institutions too, if they are to be respected, if they are to function effectively, they must also embrace just principles. Justice, "embodying fundamental notions of fairness and equality, is elemental to social well-being and lies at the foundations of human civilization."[357] Continuous and effective judicial reform will always go a long way to meeting these demands.

357 Livingstone Armytage, **Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience,** Oxford University Press, 2009, page 4

THE GLOBAL DEMOCRACY AND THE GLOBAL MARKET-PLACE

INDONESIA

THE GLOBAL DEMOCRACY AND THE GLOBAL MARKETPLACE

Dr. Anwar Usman, S.H., M.H., **Chief Justice of the Constitutional Court Of The Republic Of Indonesia**

Bismillahirahmanirahim.
In the name of God, the Most Gracious, the Most Merciful.
Assalamu'alaikum Wa Rahmatullahi Wa Barakatuh.
May the peace, mercy, and blessings of the Almighty be with you.
In the name of God, the Most Gracious, the Most Merciful.
May the Lord keep us always in His grace.

First of all, I would like to express my gratitude for the invitation to the Indonesian Constitutional Court to participate in this significant event, and to thank the Argentine Supreme Court for organizing this event. The theme of this session, "*The Global Democracy and the Global Marketplace*", is a very important theme to be discussed in this meeting, given that the issue of democracy and global markets are two interrelated issues, whose implementation is inevitable in the international community today.

The concept of democracy and state governance that applies democratic principles is something that is currently generally accepted in almost all countries in the world, even though the country is not a republic or is implementing another system. Democratic values have become a necessity that must be implemented, because by applying them, the people as the main stakeholders in the state are included in the making of every decision and policy in the country.
In a country that adheres to and implements democratic principles, the people are not placed as objects of state decisions or policies, but rather as subjects or actors in the

decision-making process in determining state policies. The principles and values of democracy are important to be carried out, given that the decisions or policies of the state regulate, limit, and even reduce the rights of citizens, so that in principle, the regulation, limitation, and reduction of these rights must be given back to the right owners, that is the people or citizens. With such an implementation of democratic values, the state avoids authoritarian attitudes and behaviors that violate human values.

The implementation of democracy in a country is closely related to its economic progress because it cost a lot to drive democracy, both incurred by the state as well as independently and collectively from citizens, politicians, and political parties. Therefore, the index of the progress of democracy in a country cannot be separated from the index of economic progress. Thus, the discussions on improving democracy in a country must be accompanied by discussions on improving the economy because without economic progress, democracy almost certainly cannot be implemented as it should.

At present, democracy is developing in various countries anomalously. Democracy, which was originally expected to develop from the people, by the people, and to meet the needs of the people, is not going as it should. Many of democratic nations developing today are elitist because they are dominated by a small group people with capital. Therefore, the development of such democracy is often said to be capitalist democracy, that is a democracy that is owned and carried out by a small group of people, only those who have large capital.

Such reality of democracy has given rise to public apathy about the concept and implementation of democracy, which was expected to fulfill and protect the interests of society. Such democracy can actually give rise to and nourish only certain elite groups while the majority of the people only become objects in the implementation of democracy. In simple terms, the prevailing democratic concept will naturally give birth to capitalism, which will then give birth to minority tyranny, which in turn has the potential to violate the rights and public interests of the majority of the people.

To avoid such democratic practices, increasing state economy is a necessity, and if the economy has improved, public participation in the democratic process must also be improved. This aims to keep the democracy from turning elitist and be dominated by a

certain minority people. Thus, public apathy over the implementation of democracy can be overcome and deviant democratic practices can be avoided in favor of the original primary purpose.

However, improving the economy is not an easy feat. Not unlike the anomalous implementation of democracy, efforts to improve the economy today cannot be separated from the free market system that applies in nearly all countries and regions. The free market that applies today seems to be an absolute and unlimited condition for all countries without exception. This condition can actually endanger the lives and relationships of international countries.

That is because with current understanding of the economy, the law of nature will apply, where the strongest will win or, in economic term, who has the biggest capital and economy will tower ove other parties who have smaller capital and economy. Therefore, such a deviation from the original concept of a free market economy must be changed to fit the concepts and practices of democracy as described earlier.

Efforts to improve the economy for the weak economic group must be understood not as a threat to the large economic group. On the contrary, increasing the economy of the weak group will actually improve the welfare of human civilization. What needs to be noted as a basis for economic development is "if economic progress is only controlled by a handful of people or groups, it can create greed of a minority elite. The greed will create hatred and unfair competition for other groups, and will lead to hostility and division that will harm the survival and civilization of mankind."

On this occasion, I would like to share experiences on the implementation of democracy and economy in Indonesia. Indonesia also experienced the development of democracy as other countries did. Democracy in Indonesia developed and progressed over time. After the Indonesian Reform in 1997–1999 (approximately 19 years ago), democracy in Indonesia experienced rapid development. Indonesia's democratic system, which had initially elected member of the parliament, who then elected the President, transformed into election of President and Vice President by the people in an election that is direct, transparent, and fair.

Not only did the election of President and Vice President start to be done directly by the people, but so did the elections of regional heads (governors, regents, and mayors) and members of the parliament at the central and regional levels. Every Indonesian citizen has the same right to vote in every general election (one man one vote). Direct elections like this have started in Indonesia since 2004 after the amendment of the Indonesian Constitution in 1999–2002. The progress of democracy in Indonesia was also accompanied by freedom of press. Media companies, both printed and electronic, started to thrive. With the rapid growth of mass media, the democratic process started to run transparently and accountably, because everyone can oversee the democratic process at each of its stages.

Initially, there were a lot of doubts that the newly direct elections would run peacefully and smoothly. **Firstly**, Indonesia has a large population; in 2004 the total population of Indonesia was around 220 million. **Secondly**, Indonesia is an archipelago consisting of 17 thousand islands. **Thirdly**, Indonesia is highly diverse, both in terms of culture and religion (there are over 700 ethnicities and over 1,000 local languages, with the majority religion being Islam followed by Protestant, Catholicism, Hinduism, Buddhism, Confucianism, indigenous beliefs, and various other faiths. **Fourthly**, the electoral system is carried out manually (using ballots). **Fifthly**, election dispute resolution mechanism is complex, because it involves several state institutions (the Constitutional Court, the Supreme Court, the Election Organizer Ethics Council, the Elections Supervisory Agency, the Police, and Public Prosecutors).

Of the five reasons, many experts stated that the biggest challenge for Indonesia in conducting direct elections lies in its diversity. The diversity in direct election could lead to conflicts in the community as the community directly support candidates who run for elections. There were concerns of wide and prolonged conflicts. However, in the end, these concerns were not proven. The direct elections in 2004 went relatively smoothly and without significant issues. The community could use their right to vote independently and without pressure from any party, and the mass media monitored the electoral process in a transparent and objective manner.

The same holds true for the rate of community participation in each electoral process. The electoral participation rate in Indonesia is always above the 75% of the total number of voters. With the high rate of community participation, the parliament members, President and Vice President, as well as regional heads have strong legitimacy in the eyes of the community. This strong legitimacy has a positive impact on the implementation of a strong and stable government, as political and governmental stability is one of the factors of a good administration.

Currently, Indonesia is preparing for the 2019 simultaneous election, which will is the result of the Constitutional Court Decision in Case Number 14/PUU-XI/2013. The Indonesian Constitutional Court reformulated the interpretation of Article 6A and Article 22E of the 1945 Constitutionand used the original intent, systematic, and grammatical interpretation in interpreting the implementation of legislative and presidential elections. The new interpretation affect the implementation of the elections, in which the legislative election was originally held first and separately from the presidential elections. Now both are to be simultaneous. The decision of the Constitutional Court has been followed up by the President and the House of Representatives as legislators, with the enactment of Law Number 7 of 2017 on General Elections, which stipulates that the presidential and legislative elections at the central and regional levels must be carried out simultaneously.

This decision was handed down to strengthen the presidential system in accordance with the design of the constitutional system adopted by the Indonesian Constitution. In addition, the simultaneous presidential and legislative elections are expected to reach efficiency in several ways. *First*, the simultaneous elections are expected to control the state budget in financing the elections, so that the reserved state budget can be used to achieve other goals. *Second*, they are expected to achieve time efficiency for voters.

Moreover, the simultaneous presidential and legislative elections can be a medium for political education for the citizens in order to be able to use their right to vote smartly, because they have a stake in building checks and balances in the presidential government with their faith. Currently the number of contested legislative seats at the central level is 711 seats. The legislative seats at the provincial level (in 34 provinces) and the number of the Regional Legislative Council members at the district/municipal

level (in 542 districts/municipalities) reaches 19,817. The simultaneous elections will be attended by around 260 million people of the Indonesian population spread in 34 provinces, with an estimated turnout of 180 million people.
This concludes my presentation for this conference. Thank you for your attention.

Wassalamu'alaikum Warahmatullahi Wabarakatuh,
May the peace, mercy, and blessings of the Almighty be with you too.
May the Merciful God always be with us in carrying our state duties.

SPAIN

DEMOCRACY AS A JURISDICTIONAL PRINCIPLE

Juan Antonio Xiol Ríos, Justice of the Constitutional Court of Spain

Abstract

Globalization is basically understood as an economic phenomenon. However, since long ago, jurists are questioning its implications for law. Contrary to what may be expected, globalization implies a breakdown of legal principles that have so far been considered as basic. It reveals the existence of several centers of interest interacting through networks, each of them making rules and principles with an alleged legal rationality of their own. Thus, the myth of the rationality of law disappears, while skeptical and realistic conceptions are imposed and the role of the judges is transformed. In global society, the role of courts is transcendent but it ought to be organized under new principles. Yet, the question arises as to whether the democratic principle remains fundamental. Philosophy, Sociology and History offer elements for an affirmative response.

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1. Globalization

The main causes of the phenomenon of globalization are to be found in the technological transformations and improvements that human societies have experienced in the last decades. Globalization implies transmission of information and resources in real time and the possibility of intensifying exchanges and knowledge with unusual celerity, extension

and intensity. The result is the radical transformation –until its abolition– of the traditional organization into relatively independent and isolated areas.[358]

Globalization is basically understood as an economic phenomenon.[359] The rise of the scale in which communications between human communities and their members may take place results in a higher level, a deeper integration and a wider extension of the networks through which economical activities operate by means of transactions between different agents. Local and regional markets –historically limited to specific operating areas that allowed an organization with autonomous rules and an inclination for self-sufficiency– have integrated into a huge world market that implies a radical transformation of their nature.

Today the economical world cannot be understood without comprehending the globalization phenomenon. Nowadays, when speaking about market, we are not referring to it in a hypostatic sense, as an abstract concept, applicable to different geographically determined instances, but as a unique substantive reality: the global market.

2. Effects of globalization on Law

Since long ago, we jurists are questioning the implications that market globalization and globalization in general, as a basically economic phenomenon, have for law.[360]

A first simplistic response may consider that Law –which aims to bring stability to the social and economic systems relying on principles of justice and equity that have been obtained and applied by means of specific techniques– is not essentially affected by

358 Paraphrasing the title of Dworkin's book, Giddens holds that globalization must be taken seriously, by increasing efforts in the institutional field aiming at articulating answers to market globalization, integrating national policies into a worldwide perspective and stimulating international cooperation in certain basic areas requiring development of global institutions or improvement of those already existing. Giddens, A. (2007). *Europe in the Global Age*. Cambridge, Polity.

359 However, globalization is a phenomenon that affects all aspects of humanity. Prevalence of the economic view is the result of a mirage of our days based on the almost mythical belief in the existence of invariable and omnipotent economic laws. The great economist and Nobel laureate James Mead used to complain that the three main disasters of the twentieth century were the "infernal" combustion engine, the population explosion and the Nobel Prize in economics. Quoted by Deaton, A. (2013). *The Great Escape. Health, Wealth, and the Origins of Inequality.* Princeton University Press, p. 218.

360 Historically, the first reflection on globalization in the judicial field was on international relations. Excluding the opposing classical monistic and dualistic conceptions, a pluralistic conception of the international legal order, which perceives as an integrating solution the recognition of a space for discussion, tolerance, and mutual readjustments between different orders, has been gaining ground. Gordillo Pérez, L. I. (2010). *Las relaciones entre ordenamientos de naturaleza constitucional*. Doctoral Thesis. University of Deusto.

globalization, which would only imply adapting the functionalities of law to the new situation. At first sight, this seems to better suit the nature of an institution such as the legal one, based on apparently immutable standards of rationality and unity of principles as basic rules aimed at achieving the goals of stability and justice that must govern its actions. These principles are regarded as appropriate to legally approach any situation.

Yet, at this point, we come across a major paradox. Contrary to what may be expected, globalization implies a breakdown of legal principles that have so far been considered as basic.[361] Whoever claims that globalization –and the resulting phenomenon of globalization of techniques and principles from which the legal activity draws its inspiration– may promote, or at least favour, the unification of the legal technique and unanimity in relation to the principles under which it should develop, will be disappointed when observing that reality is quite different.[362]

Certainly, economic and social globalization implies market globalization and the universalization of communication. However, globalization cannot dispense with the existence of several centers of interest. In fact, these do not disappear. Rather, in the new situation of globalization, they try to interact through interrelation and interaction techniques through networks. The pressure that the global network of interrelations places on the management of interests of the different groups, institutions and societies, forces these centers of interest to enhance the protection of their own rules and principles, which are built with a peculiar legal rationality.[363]

Thus, the myth of the rationality of law disappears and is substituted by the rationality corresponding to each center of interest. In any dispute, a judge must interpret the

361 As Ferrarese says, in the legal sphere we are facing an actual genetic mutation: the actors of the legal process are changing, the mode of production and functioning of legal rules is changing, and, in essence, the legal field is radically changing. Ferrarese, M. R. (2000). *Le istituzioni della globalizzazione*. *Diritto e diritti nella società transnazionale.* Bologna: Il mulino.

362 Certainly, some believe that in the field of globalization, the search of a new rationality of the system is possible. The dialogue between courts and international bodies, which is characteristic of globalization, may be proof of a superior rationality based in the advancement towards an integrated global legal system according to the same principles (Delmas-Marty, M. [2004]. *Le relatif et l'universel*. *Les Forces imaginantes du droit*. Paris: Seuil), or proof of a convergence between the same systems based in the search of a common denominator and the harmonization achieved through processes of rapprochement (Slaughter, A. M. [2004]. *A New World Order*. Princeton University Press).

363 The fragmentation into social sectors is, according to Teubner, the main characteristic of global Law, which has been already foreseen by Luhman in 1971. Teubner, G. (2004). *Regime-Collision: How the Emergence of Private Governance Regimes Changes Legal Pluralism*. Lecture given at Ortega y Gasset Institute. Translation by Carlos Gómez-Jara Díez. Madrid.

interests underlying the issue raised. He or she must find the appropriate solution, not only by assessing the point of view of maintaining a balance of such interests, but also by considering whether the solution given to satisfy certain specific interests under those principles is acceptable in the global field of the interrelations between different human communities. What may be acceptable from, for example, the point of view of the interests of the entertainment may be inadmissible from the point of view of familiar or sports ethics or from the perspective of human rights. What is acceptable from the point of view of public security or the efficiency of business may be inadmissible from the perspective of the democratic principle or the rights of the citizens as consumers.[364]

In sum, a judge, as an arbitrator, must balance which interests should be sacrificed to the detriment of others, and this operation is no longer an operation of rational logic pertaining to traditional law, but an operation of complex assessments demanded by the global society.[365] The subjunctive syllogism or *modus ponens* is no longer the basic technique of law. It gives way to balancing solutions between principles and adaptation for the legal order. Thus, unsurprisingly, globalization is provoking a rise in arbitration as an institution founded on liberty of commitment, suitable for completing the action of justice without distorting its meaning.

3. The rise of skeptical conceptions

In the new global society, the classic configuration of law has substantially changed its nature and essence. The classic struggle between positivistic and jusnaturalistic conceptions has given way to the prevalence of realistic and skeptical stances.

Realism is not a constructive position, but a critical one. Realism departs from the absolute indeterminacy of law, that is to say, from the impossibility of establishing

364 Prieto Sanchís expresses this idea by saying that it is becoming more and more difficult to draw a sharp distinction line between the function of the constitutional jurisdiction and that of the ordinary jurisdiction, and the solution to the harmony between both systems is to be found, far from the application of principles of alleged hierarchy, in the search of patterns of compatibility distinctive of the coexistence of autonomous systems in the world of globalized Law. Prieto Sanchís, L. (2004). *Justicia constitucional y derechos fundamentales.* Madrid: Trotta.

365 It has been said that the judge transforms himself mainly into an organ of Law, or, even better, of the citizens' rights. Andrés Ibáñez, P. (2005). "La ética positiva del juez*". Claves de razón práctica*, No. 152. Madrid.

minimally safe logic or formal rules on the decisions the judge must take. Realists move between the optimism of those who claim that law is an instrument for society's transformation –admitting that we are to rely on the emotional assessments of a judge against the background of legal tradition– and the pessimism of those who hold that law is but an instrument of power through which what has been called sociolegality[366] is asserted.

Therefore, globalization entails a crisis of the rationality of law,[367] as well as a radical change of the judges' role and criticism on its certainty and utility. Whoever, explicitly or implicitly, claims that the role of courts in the new globalized world is to maintain legal certainty, stability of the system and prevalence of the written rule, must reflect seriously on the criticism voiced by skeptic conceptions about the legal system.[368]

These conceptions are founded on a radical criticism on the legal rationality as the result of a delineation formed from historical aggregations as the postmodern philosophers explain. Moreover, they assert the absolute indeterminacy of law and they maintain the necessity of studying, from a behavioral perspective, the predictable reactions of the judge by distinguishing between the discovery context and the justification context. Besides, they insist in the necessity that the legal system should support the disadvantaged groups through the so-called "alternative use of the law", or, in a more particular version, the "legal feminism".[369]

4. The role of the courts

I believe these precedents must not lead us to despair. On the contrary, they should be an incentive to investigate which is the role of courts in the new global world, in the

366 *Vid*. Atienza, M. (2006). *El derecho como argumentación*. Ariel Derecho.

367 *Vid.* Ferrarese, M. R. (2012). *Prima lezione di diritto globale*. Laterza.

368 Criminal law deserves a specific mention. As observed by Ferrajoli, globalization entails a crisis in criminal law in that it causes the breakdown of its two guarantee functions –prevention of offences and prevention of arbitrary punishments. The criminality that really threatens humanity is no longer a marginal phenomenon as was the traditional subsistence criminality; it turns into a criminality emerging from economic and political power. Ferrajoli, L. (2005). "Criminalización y globalización", *Claves de razón práctica*, Nro. 152, Madrid. – (1999). "Derechos y garantías (la ley del más débil)". Madrid: Trotta.

369 Lyotard thinks that from a postmodern perspective, the concerns of Law are meaningless since it is enough to make the shortcomings and the legitimacy crisis of the legal discourse public, without showing interest for the salvation of the structure of rationality. Lyotard, J. F. (1969). *La Condición Posmoderna*. Madrid: Cátedra S. A.

certainty that its mediation is more important than ever. In the new global world, the rationality of law as well as its imperative nature and the legitimacy of the conflicting interests are being questioned. The figure of the judge acquires extraordinary relevance from the perspective of the fundamental goals on which his or her function has always drawn inspiration: justice and equity, appropriate for looking for a new balance.[370]

The problem is that we can no longer naively believe that today the automatic application of the written law or the lexicographic activity in its regard, as Posner[371] has put it, represents a solution. This is because amongst other things, the law has also lost its pristine rationality, and today is affected by problems such as parliamentarianism, a crisis linked to multiplicity and complexity, and the alteration of its goals with political aims. All this implies an important modification of its nature and makes it necessary to permanently contrast the law with higher principles.

For these reasons, the most radical realistic positions and, in general, all the explanations about the legal world given within globalization, have one point in common: courts have the last word. Society can neither exist nor survive without believing in the existence of a fair trial.[372] The rise of alternative means of dispute resolution in no way opposes this thesis. In fact, the solutions these instruments give are in accordance with the standards set by the courts.

Accordingly, the question focuses on looking for those principles which today must guide judges' work in a globalized world. On the one hand, these principles must tend to make globalization –the great progress of humanity– feasible in the field of the economic transactions of the market. In fact, courts must put into effect (or assert as successful, in Dworkin's terminology) global interests of main importance against individual interests (respectable by themselves), since the former refer to humanity as a whole and cannot be sacrificed to local interests. On the other hand, the principles from which courts should

370 Allard and Gallapon defend the existence of a new world order as a consequence of globalization, which means that the so-called dialogue between courts is no other than a new form of an attempted hegemony by some States over others in the framework of universalism. Now to the classic domains of imposition of the power of the State within its territory and through the application of rules of international law, a new dimension arising from globalization is added. Allard, J. and Garapon, A. (2005). *Les juges dans la mondialisation. La nouvelle revolution du droit*. La République des idées, Seuil. *Vid.* my paper (2001): "El diálogo de los tribunales", in *Revista del Poder Judicial*, n° 90, *Consejo General del Poder Judicial.*

371 Posner, R. A. (2013). *Reflexions on Judging*. Harvard University Press, p. 81.

372 Kennedy, D. (1997). *A Critique of Adjudication*. Harvard University Press.

draw inspiration in the global world must rely on the intellectual and social achievements of humanity in the field of coexistence.

Which are these principles? It is obviously a difficult question to answer. I have asked it for no other purpose than a rhetoric one. Certainly, it constitutes an encouragement to continue thinking about the courts' work, which today develops within an environment that those of us who have a long career in the Judiciary would have never imagined.

Classical concepts used to overcome the positivist perspective of Law, such as principles, values and constitutional rights, are not sufficient to explain the new situation and the role of the judge within it.

5. Crisis of Democracy?

For this reason, in this brief presentation I would only like to address a question that I consider of capital importance. This question, as may be deduced from the subject proposed by the organizers of this meeting, is the value which should be attached to democracy –and the principles which constitute it– in global world legal organization. I could say, synthetically, that advancing in the determination of courts role in globalization requires determining to what extent the democratic principle constitutes a basic principle according to which a solution to global world conflicts has to be found, in relation to the pacifying function of the Judiciary.

In other words, it is worth considering whether democracy constitutes a universal value or, on the contrary, only a form of organization belonging to certain historic culture. If this were the case, it might be assumed that the position of the courts should not necessarily be based on the democratic principle, but, rather, that it would be necessary to accept the existence of other principles, incompatible or alien to democratic principle, which may constitute the architrave of courts performance in globalization.[373]

I intend to dedicate these lines to reflect on this issue.

373 Questions around the value of democratic principle in globalization –besides the matters regarding the crisis and defects of democracy which I will refer to– arise the need and, given the case, the possibility of extending such principle to regional and global governance, cf. Archibugi, D. *et al.*(2012). *Global Democracy. Normative and Political Perspectives.* Cambridge University Press. However, globalization is ordinarily perceived as a threat to democracy. In *The Global Trap* [*La trampa de la globalización* (1998), Taurus], Hans-Peter Martin and Herald Shumann ask: how much market can democracy withstand? From a similar perspective, cf. Bray, D. & Slaughter, S. (2015). *Global Democratic Theory.* Polity Press; as well as Kriesi, H. *et al.* (2013). *Democracy in the Age of Globalization and Mediatization.* Palgrave Macmilan.

Globalization has entailed a questioning of democracy. On one side, in global world, the weaknesses of liberal democracy, as it has been historically developed for centuries in the so-called western world, has become evident. At the same time, as experience has shown, the different human communities that have been joining the phenomenon of economic globalization adopt the democratic principle with slight differences and variations. On the other side, democracy in global world has undergone instabilities and crisis of great importance that encourage deepening the reflection on its fundamental and permanent value. I refer to economic crises, particularly to the crisis that took place in 2008, to migratory crises, as well as to the political crisis marked by the rise of populist politics.

Economic crises have especially presented difficulties regarding the compatibility between the idea of democracy and the idea of equality. Democracy, as Dworkin holds[374], has two senses: on the one hand, it involves the participation of the people in government, normally by the election of representatives, and, on the other hand, it involves a government according to the interest of the community. Equality constitutes, for this reason, an essential idea of democracy. However, recent economic crisis has crystallized into evident inequities within each society or State. It is nonetheless true that some authors have shown that this inequality has not been such, but quite the contrary, as it is revealed when comparing different societies with each other,[375] without considering each national perspective.

Economists or, generally, at least many of them, consider that economic laws, even if in a capitalist conception of democracy, do not involve a correction of inequality but its increase.[376] For this, it is necessary for democracy to be organized by institutions capable of restoring equality; that is to say, of carrying out inclusive policies.[377] Hence, the increasing importance conferred to institutions within the democratic principle. The problem of equality specially affects a typical phenomenon of globalization: migratory crises that underline how universal solidarity is becoming more and more necessary,

374 Dworkin distinguishes between a majoritarian and a participatory conception of democracy, in which democracy is presented as an ideal capable of being perfectible: Dworkin, R. (2011). *Justice for Hedgehogs,* Harvard University Press.
375 Deaton, A. (2013). *The Great Escape,* p. 261.
376 Piketty, T. (2014). *Capital in the Twenty-First Century.* Harvard University Press.
377 Acemoglu, D. and Robinson, J. A. (2012). *Why Nations Fail.* Profile Books Ltd.

since crisis situations evolve quickly from one place of the planet to other places where people who are in risk situations, or lack the means to survive, try to move —and such situation is possible because globalization allows to know about the welfare of other societies and facilitate such transfer.[378]

Other crisis that threatens modern democracies is populism. Populism is not exactly an ideology or a way of doing politics, but rather both things at a time.[379] We could say that it is and ideology of weak substance that easily parasitizes other ideologies. It constitutes, however, a very dangerous ideology for the democratic principle, for the reason that it calls into question the very idea of the will of the people, when trying to put into contrast the people and the elite through more or less artificial explanations that take advantage of the differences between them, and also when it rejects institutional plurality by contrasting people's will and institutional decisions. We have seen that modern democracy, in order to allow the fulfilling of equality and justice values, demands the effective functioning of institutions.

These characteristics of populism are accompanied by an unacceptable simplification in the approach to modern problems and solutions, which is incompatible with a global and complex world like ours, where everything is possible apart from basic solutions. Finally, populism is accompanied by a praise of leaders' personality and a demagogic and emotional language which, as well, could hardly agree with democratic values based on equality and freedom of opinion grounded on objective criteria. Opinion must be founded on circulation of ideas and not on the traffic of feelings: it has being said that populism tries to replace Stuart Mill's marketplace of ideas for the marketplace of emotions.[380]

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378 The migratory phenomenon, especially in western countries, the existence of indigenous cultures, especially in American countries, and the existence of cultures without State, within some traditional nation-States, raises issues about the extent to which the law and, with it, the role of the judge, can work as elements of discrimination or re-exclusion of the foreigner [*extranjerización secundaria*] (Gómes Martínez, C. [2004]. "El juez en una sociedad multicultural". *Jueces para la democracia. Información y debate,* n. 50, July). The judge deals with a global reality in which public authorities apply integration policies and, in view of the assimilation model failure, consider opting for policies that force integration, for non-intervention policies, that encourage multicultural atomization, or multicultural solutions, particularly defended by Kymlicka and Taylor. Satori, G. (2001). *La sociedad multiétnica. Pluralismo, multiculturalismo y extranjeros.* Madrid: Taurus.

379 Mudde, C. and Rovira Kaltwasser, C. (2017). *Populism: A Very Short Introduction.* Oxford University Press.

380 Western, D. (2007). *The Political Brain: The role of emotion in deciding the fate of the nation.* Public Affairs: New York, p. 35 *et seq*.

Globalization, then, has subjected and is subjecting democracy to tests of great significance for its own survival. The crises which I have referred to as well as the height of populism would probably be difficult to conceive without the phenomenon of globalization.

6. The Defects of Democracy

Furthermore, globalization subjects democracy to a test of authenticity. The mythic idea of democracy as a perfect system has never been completely accepted, especially by politicians who struggle in the arena. It should be recalled Churchill's idea according to which democracy is the worst form of government, except for all the other. Globalization, going further, has revealed the defects of democracy.

Today we see the proliferation of studies which show that democracy does not guarantee the government of the best, but governments prior to elections have not been in accordance with the interests of the citizens either. Democracy is subject to the cognitive[381] or emotional[382] deviation of those who are represented, and neither guarantees the best decisions nor the best of the policies. Practically, as Achen and Bartels hold,[383] the only noticeable advantages of democracy are that it allows electing representatives in an acceptable way for the majority of society; it allows a periodic replacement of those who govern in order to neutralize corruption, which is motivated by perpetuation in power; it allows, as well, opposing the government without being imprisoned, tortured or deprived of rights; lastly, it allows recognizing the dignity of human rights and of those who defend them, and working in order to set these rights, as well as equality for all, by establishing adequate institutions for fulfilling these goals and guaranteeing civil society participation, without negative consequences for activists.[384]

381 Kahneman, D. (2011). *Thinking Fast and Slow.* Penguin.
382 Caplan, B. (2007). *The Myth of the Rational Voter.* Princeton University Press.
383 Ache, C. H. and Bartels, L.M. (2016). *Democracy for Realists. Why Elections Do Not Produce Responsive Government.* Princeton University Press.
384 There are more optimistic interpretations, such as those which defend that the existence of a gap between the will of the voters and the actions of their representatives, as well as the so-called rational ignorance of the voters, that is statistically neutralized and results in the preponderance of the minority votes of the educated, lead to conclude that voter's decisions, especially in the economic field, are correct, provided that unexpected situations do not occur. Surowiecki, J. (2005). *The Wisdom of the Crowds. Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations.* Doubleday.

However, there are also studies that show how the insertion of democratic systems has been possible, in many occasions, if not in practically every occasion, within a context of authoritarianism and negotiation with the elites, in order to keep part of their privileges.[385] In sum, perfect democracy does not exist and every system has constitutional mechanisms which tend to maintain the *statu quo* of certain privileged classes, so that today it can be said that pure democratic systems constitute a pure entelechy.

7. Democracy as a jurisdictional principle in global community

These observations take us to a basic question —is democracy a general, basic idea that cannot be waived in global community?

From the point of view of social sciences, the field where law is developed, different answers have been given to this issue. The general tone of legal, philosophical and sociological thought is to understand that democracy, today, constitutes a value which is substantially linked to humanity and, therefore, a premise for the right development of global system.

According to some authors, democracy is, simply, a product of the evolution of humanity.[386] Humanity, at some point, needs to develop in wider communities, when immediate communication between citizens cannot be satisfied. This circumstance, ultimately, leads to the development of the democratic principle, since it allows an adequate articulation of equality among people within wide communities.

In the philosophical field, there are explanations which try to base democratic principle in human nature, such as the principle of dignity. This principle, according to Dworkin, is not just the foundation of ethics and law, but also of political community as democratically organized.[387]

Other explanations, which can be considered intermediate between the two previous theories, take democracy as a phase towards which society is naturally oriented, due to a kind of implicit or historic agreement between its different members in order to avoiding

385 Albertus, M. and Menaldo, V. (2018). *Authoritarianism and the Elite Origins of Democracy.* Cambridge University Press.
386 Harari, Y. N. (2014). *Sapiens: A Brief History of Humankind.* Harvill Secker. Fukuyama, F. (2011). *The Origins of Political Order.* Profile Books.
387 Dworkin, R. *Op. Cit.*

violence or achieving justice. This is, ultimately, the position of Hobbes,[388] Rawls[389] or Nozick,[390] all of them with different and worth considering characteristics. The common denominator between these authors is the postulate of an original social state of freedom, without any submission to rules, in which the purpose of avoiding violence, achieving justice or maintaining stability lead human beings to establish a pact or social contract. Such agreement results, ultimately, in a system of power or sovereignty, or directly in a democratic system. It becomes evident, in my opinion, that in most radical positions about social contract (such as Hobbes'), the transfer of power to the sovereign is equivalent, in contemporary society, to the recognition of people's sovereignty.[391]

8. Conclusion

We may conclude that the idea of democracy may be related to the basic principles to which legal organization of global system must be subjected. It cannot be forgotten that democracy implies the development of stable institutions, as well as the recognition of principles and values centred in universal consensus about human rights importance. Finally, we must accept that democracy is, essentially, an imperfect system. Democracy cannot be disqualified simply on the grounds of its imperfections, derived from different historic vicissitudes, according to the particular characteristics of each society and its specific background.

Democratic principle is, in conclusion, easily recognizable as a fundamental legal principle in global world. It constitutes today, in my opinion, the basic principle to which the performance of world courts must be subjected. The reason is that democracy does not only mean participation of citizens in government and government in accordance with people's interests, but also stability of institutions as well as recognition and protection of human rights. These are the principles regarding to which, today, in my opinion, legal system must be articulated and, thus, also the action of the courts, in order to give a sense to globalization, encourage the participation of different actors and try to extend the scope of action without sacrificing fundamental values.

388 Hobbes, T. (1996). *Leviathan.* Cambridge University Press.
389 Rawls, J. (1971). *A Theory of Justice.* Harvard University Press.
390 Nozick, R. (1971). *Anarchy, State and Utopia.* Basic Books.
391 Such is David Runciman position in Runciman, D. (2014). *Politics: Ideas in Profile.* Profile Books.

As Argentine philosopher Nino says,[392] the basic rules of recognition of any legal system, *i.e.* the rules by which it is recognized the legitimacy of the action of the courts that apply this system, are the democratic system, the recognition of human rights, the unenforceability of better legitimate alternatives –because it is necessary to admit imperfections within any system– and the lack of any serious objection.

I believe, ultimately, that the role of courts in global system or globalization is not, or not only, contributing to the stability and effectiveness of the system, as it could be understood in a merely positivist or formalistic conception of law which is largely exceeded by globalization. Instead, the role of courts must draw on democratic principle, from which its legitimacy derives. Democracy does not only mean periodic elections, but also recognising human rights, respecting guarantees and constantly willing to improve the system, by asserting the basic principles which humanity permanently keeps consecrating and perfecting through the building of universal consensus. Local or particular interests which are incompatible or impede these principles must be sacrificed in order to protect them.

392 Nino, C.S. (1989). *El constructivismo ético.* Madrid: Centro de Estudios Constitucionales.