

The Culture of Judicial Independence

Conceptual Foundations and
Practical Challenges

Edited by

Shimon Shetreet
Christopher Forsyth



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PREFACE

This volume is a natural academic continuation of the volume co-edited by this author and Chief Justice Deschenes, *Judicial Independence: The Contemporary Debate* (1985) published by the same publishers.

The focus of this volume is the culture of judicial independence, the conceptual foundations of judicial independence and accountability and the practical challenges to judicial independence.

The creation of a culture of judicial independence is of central significance both for national domestic legal systems, as well as for the international courts and tribunals. The main aims of this volume are to analyze the development of a culture of judicial independence in comparative perspectives, to offer an examination of the conceptual foundations of the principle of judicial independence, and to discuss in detail the practical challenges facing judiciaries in different jurisdictions.

The judiciary must be both independent and impartial – both requirements are necessary for fair adjudication. Both conditions are necessary in order to avoid the opposing risks of infirmity and tyranny. The risk of infirmity exists when the judiciary is dependent on other branches of government or exposed to outside pressures. The risk of tyranny is associated with a biased judiciary and a lack of judicial accountability.

Judicial independence is critical for the proper functioning of civil society. Without impartial and independent dispute resolution, there is no substantive protection of human rights, no true economic security or free market, and no good government or civil order. The rule of law requires judicial independence as a precondition.

Judicial independence is of central importance, not just in regard to human rights, constitutionality and the rule of law, but also in regard to globalization and free and efficient economic activity and international trade and investments. The legitimate expectation of fair and independent adjudication is one of the reasons for investment in a global economy.

The issues of judicial independence have undergone dynamic development in both the national and international spheres. In the last five years, a group of distinguished experts from many countries – The US, Canada, The UK, Israel, Australia, Belgium, Poland, Malaysia, India, Italy, China, Brazil, Austria, Liechtenstein and others – joined forces in an international project on judicial independence. In the course of this project, the experts studied conceptual and theoretical aspects of judicial independence in national and international levels. In addition, the group of experts developed detailed standards of judicial

independence, dealing with different aspects of this matter applicable to both national and international judges.

The principal initiators of this volume, the undersigned, Professor Shimon Shetreet, and Professor Christopher Forsyth believe that the study of judicial independence is significant for all jurisdictions, in that contemporary, detailed debate is required. This is due to the absence of a modern, thorough revision of standards for both national and international judges. In order for standards to remain relevant and in order to assure that they continue to serve as active and useful guidelines for the substantive protection of human rights and a healthy economic state, it is critical that they be contemporary, up to date, and fully responsive to the dynamic needs of the economic and political realities.

This volume offers analysis insights and opinions from academics, judges and practitioners across jurisdictions – both national and international – on the subject of judicial independence, providing both an in-depth and a broad analysis of this important subject.

The volume is based on the papers presented at the six conferences held in the framework of The International Project on Judicial Independence of which the undersigned is the General Coordinator, cosponsored by the Hebrew University of Jerusalem faculty of law and the Centre of Public Law of the University of Cambridge, UK.

The seven conferences in this project were held as follows

- 1) Jerusalem, 26–27 June, 2007. Chaired by Prof. Shimon Shetreet and Prof. James Crawford
- 2) Vaduz, 30 November – 1 December, 2007. Co-chaired by HE Markus Buechel and Prof. Shimon Shetreet
- 3) Jerusalem, 18–20 March, 2008. Co-chaired by Prof. Christopher Forsyth and Prof. Shimon Shetreet
- 4) Krakow, 25–26 November, 2008. Co-chaired by Prof. Fryderyk Zoll and Prof. Shimon Shetreet
- 5) Cambridge, 14–16 August, 2009. Co-chaired by Prof. Christopher Forsyth and Prof. Shimon Shetreet
- 6) Salt Lake City 1–3 October 2010. Co-chaired by Prof. Wayne McCormack, Dean Hiram Chodosh, and Prof. Shimon Shetreet
- 7) Vienna 20–22 May 2011. Co-chaired by Prof. Walter Rechberger and Prof. Shimon Shetreet

Shimon Shetreet
Mt Scopus, Jerusalem

May 2011

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This project has been conceived during Professor Shetreet's appointment as the Herbert Smith Visiting Professor at the Faculty of Law at the University of Cambridge and as Senior Academic Visitor at Clare College. He would like to express his personal thanks for the privilege of these appointments and the opportunities they offered and he is grateful to the colleagues who helped in developing and realizing the idea Christopher Forsyth, Neil Andrews, James Crawford and David Feldman.

The University of Cambridge, Centre of Public Law, and the Hebrew University, Harry and Michael Sacher Institute of Comparative Law co-sponsored the international project on judicial independence and we are grateful to them for their support. Special thanks are due to the Sacher Family Trust which supported the project all along.

We wish to express our deep thanks to Mr. Daniel Jacobson and the Jacobson Foundation at the Hebrew University for the support granted to this project. We also want to thank the Mizock Chair and the Faculty of Law at the Hebrew University, and the holder of the Chair, Professor Alon Harel for their support.

We wish to express our deep gratitude to the universities and the hosts of the conferences on judicial independence. We wish to thank HE Markus Buechel for hosting the Vaduz conference in December of 2007. We wish to express our thanks to the Jagellonian University and the co-Chair of the Conference Professor Fryderyk Zoll for the November 2008 conference. We are deeply indebted to Professor Christopher Forsyth and the University of Cambridge for hosting the fifth conference in August 2009. We wish to express our thanks to Dean Hiram Chodosh and Professor Wayne MacCormack of the College of Law of the University of Utah for hosting the sixth conference in Salt Lake City in October of 2010. Thanks are due to the Hebrew University for hosting the conferences in Jerusalem in 2007 and 2008.

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