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**THE CHANGING NATURE OF THREATS TO JUDICIAL INDEPENDENCE:  
THE PANDEMIC, POPULISM, AND THE LOSS OF FAITH**

In November of 1999, at the meeting of the Central Council here in Taipei, the IAJ adopted its first iteration of The Universal Charter of the Judge. It seems fitting, therefore, that when we come together here again, we consider the changing nature of the challenges facing us as judges.

The Universal Charter was subsequently updated in Santiago in 2017, and I was honored to be a part of that effort. But ongoing vigilance in support of the rule of law and an independent judiciary is always warranted, as is an examination of the relationship between the two. An independent judiciary is less an end in and of itself than it is a means of ensuring and supporting the rule of law. Only by being free from outside influences can judges decide cases on the law and facts alone.

**I. RULE OF LAW OR RULE BY LAW :**

I want to start by reinforcing the principle that the rule of law is not the same thing as rule by law. The former reflects the ideal that the law should stand above every powerful person and agency in the land. Rule by law, in contrast, connotes the instrumental use of law as a tool of political power. Even more disturbing are those instances in which the laws as written are sound, but they are either disparately applied or simply ignored.

In the latest version of the Constitution of the Russian Federation that I was able to find, for example, Article 19 of Chapter 2, Rights and Freedoms of Man and Citizen, provides as follows: *[SLIDE TWO]*

**Art. 19**

- 1. All people shall be equal before the law and court.**

2. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, convictions, membership of public associations, and also other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned.

This sentiment is as honorable in principle as it is disregarded in reality. But it is a useful backdrop against which to consider the trends I wish to discuss.

## II. The Changing Nature of Threats

I want to talk about the extent to which the nature of challenges to judicial independence and the rule of law has changed, focusing briefly on the three factors in my title : the Pandemic, a worldwide populist sentiment, and a loss of faith in the judiciary. Because these forces are interrelated, they pose a significant threat to the rule of law as we know it.

### A. The Pandemic

A major American think tank called Brookings recently released a report on the extent to which the Rule of Law took a hit during COVID. Accumulating evidence from a diverse set of countries, the report demonstrated that Executive branches of government used states of emergency to seize more power. And although it may have seemed necessary given the gravity of the pandemic, they did not always follow the rules. Fundamental freedoms of movement, assembly and expression were curtailed, often by repressive regimes that manipulated the situation to muzzle critics in political opposition, civil society, and the media. Also, rights to health, education and decent work were severely set back, especially for women. The UN Policy Advisor for Gender Equity noted that a woman's road to accessing justice was already precarious prior to the pandemic, but became even more so thereafter. The combination of social isolation, rising rates of domestic abuse, and declining access to social services, health care and the courts, made the situation even more dire.

*[SLIDE THREE].* 2021 data released by the World Justice Project shows that key elements of democratic governance deteriorated since the pandemic hit the year

before. In fact, more countries declined than improved, in every rule of law category the study measures other than “law and order.” Moreover, the negative trends held for every region of the world, in rich and poor countries alike. For the fourth year in a row, the rule of law in a majority of countries declined. The data showed pronounced declines in indicators of constraints on government powers, civic space, timeliness of justice, and the absence of discrimination, with fully two-thirds or more countries backsliding on these key governance factors.

## **B. Populism**

As the Pandemic has posed a threat to judicial independence, so, too, has a growing wave of populist sentiment around the world.

### **TURKEY :**

Backing up for just a moment, though, challenges to judicial independence have traditionally tended to come from the executive branch. We are, of course, painfully familiar with the situation in Turkey. There, the executive branch used the pretext of a failed coup to detain numerous judges and prosecutors on suspicion of being members of a terrorist organization or of being involved in the coup attempt in some way.

*[SLIDE FOUR].* According to a report of The Arrested Lawyers Initiative issued January 18, 2023, as of that date 3885 judges and prosecutors had been dismissed, 4,646 judges and public prosecutors had been subjected to judicial proceedings and 2238 had been convicted. 157 are still under investigation by the public prosecutor’s office and 411 are still on trial. And of course, this number includes some of our dear friends and former colleagues.

### **ISRAEL :**

More recently, Prime Minister Benjamin Netanyahu’s efforts to reform the Israeli judiciary to give more power to the Knesset, both with respect to the actions taken by judges and how they are selected, encountered enormous public opposition. Specifically, the override clause would give the Israeli parliament the ability to pass laws previously invalidated by the Supreme Court—in other words, overriding them. Interestingly, supporters of the law said that the Supreme Court should not be allowed to thwart the will of the people. In response to the

opposition, the Prime Minister has pulled back some of the more objectionable provisions but the debate goes on.

What is interesting and disturbing about these more recent encroachments on the judiciary is the extent to which political branches have cloaked their efforts to acquire power in the guise of needing to carry out “ the will of the people. “

Hungary is an example. The autocratic regime of Prime Minister Viktor Orban has weakened the judiciary by lowering retirement ages to create vacancies, appointing political favorites and targeting opponents. Also, he has adopted an unsavory characteristic of populism in stigmatizing politically vulnerable groups. This has manifested itself in a war of words between the Orban government and Hungarian-born Jewish billionaire George Soros. The primary charge against Soros is that he has been behind immigration efforts. Until the government ended the campaign in 2017, anti-migrant billboards featuring the picture of a smiling George Soros and the words “Don’t let Soros have the last laugh” appeared around the country. [SLIDE FIVE]

While rescinding the poster campaign, the Orban government nevertheless used its parliamentary majority in 2018 to pass the so-called « Soros legislation, » banning helping illegal immigrants from seeking asylum or resident status, and carrying punishments of up to one year’s imprisonment. The EU Court of Justice found that the provision infringed EU law.

#### UNITED STATES :

Similar forces are playing themselves elsewhere, and the United States is no exception. It’s fair to say that the relationship between the Supreme Court and Congress at the moment is not at its best.

Putting it in perspective, though, friction between the courts and the political branches of government in this country is nothing new. President Thomas Jefferson challenged the role the Chief Justice claimed for the federal judiciary. President Andrew Jackson openly defied it. [SLIDE SIX]. President Abraham Lincoln had grave doubts about the legitimacy of the courts in meddling in national policy. And President Franklin Roosevelt tried to expand the Supreme Court from nine to fifteen judges to stop it from interfering with his economic

recovery efforts following The Great Depression. The suspicions of the role of an independent judiciary haven't changed : What has changed is the complexity, political context and polarized nature of the policy issues coming before the Court. This polarization has created extreme dissatisfaction across the political spectrum.

On one hand, politicians opposed to the current conservative majority on the Supreme Court have, yet again, advanced the idea of expanding its membership from nine to thirteen. Legislation to that effect was introduced in the House of Representatives in 2021 and gained 50 sponsors. The bill died at the end of the legislative session, but was re-introduced in May of this year.

A majority of Americans, however, disagree. According to a recent National Public Radio/Public Broadcasting System survey taken immediately after the Supreme Court's recent abortion decision, a sizable majority rejected the idea. Even in the context of the controversial ruling overturning the prior abortion decision in Roe v. Wade, respondents opposed expanding the court by 54% to 34%.

On January 6, 2021, the rule of law faced a violent assault from a different direction. On the basis of scant, if any, evidence, an estimated minimum of 10,000 people stormed the Capitol to protest the legitimacy of the 2020 presidential election. More than 2000 of the rioters entered the building, vandalized and looted it, assaulted Capitol Police officers and reporters, and attempted to locate lawmakers. Federal estimates of property damage approach \$3 million. Groups behind the riots argue that civil disobedience in support of principle is a part of the American tradition. Their supporters contend that the actions involved did not constitute a riot.

The courts and the people did not agree. According to USA Today, of the 62 lawsuits challenging the 2020 Presidential elections, 61, decided by judges of both political parties, have failed. The criminal justice system has proceeded, with overwhelming public support, to investigate and prosecute those involved.  
**[SLIDE SEVEN]**

### **C. Losing Faith**

I serve on the editorial board of a publication called *Judicature*, a scholarly journal focused on the Judiciary, the Administration of Justice, and the Rule of Law. In 2022 it featured a significant piece entitled “Losing Faith : Why Public Trust in the Judiciary Matters and What Judges Can Do About it.” I have asked the Secretariat to place a link on the IAJ website, and the address is here : [SLIDE EIGHT]. *It’s a thoughtful piece of work that warrants consideration.*

I will draw few points drawn from it, and then close with the words of Justice Stephen G. Breyer:

1. Education and understanding are key.

The members of Congress who are trying to expand the Supreme Court inevitably criticize the court for not “following the will of the people.”

The Court is not supposed to follow the will of the people. It is by structure contra-majoritarian—designed to protect individuals from the excesses of the majority. The congressional objections to the Court are not to the institution itself, but rather to jurisprudence some people find objectionable. It is unfortunate that they do not understand the distinction.

Students used to be required to take courses in Civics. That is no longer the case. This was a frequent lament of Justice Sandra Day O’Connor, and our citizenry suffers in consequence. The Federal Judges Association, the Federal Bar Association and the National Center for State Courts all have essay and video contests encouraging young people to participate and learn about our system of justice. [SLIDE NINE]

2. Focus on the issue

As I alluded to a moment ago, when individuals are asked what they object to about the Court, it is invariably a controversial piece of jurisprudence—such as the abortion decision. No one mentions or probably knows anything about, the dozens of other decisions the Court churns out every session.

And I cannot end this discussion without a reminder that in the 1950’s, when the Supreme Court issued its landmark decision in the case of Brown v Board of Education, desegregating public schools, there were

**wide-spread calls for members of the Supreme Court to be impeached. Some even suggested that the Chief Justice be hanged.**

- 3. And finally, to paraphrase Justice Stephen Breyer, the rule of law relies on peoples' understanding of its protections. Therefore, we need to explain it to our children and to our grandchildren, hoping they, too, will understand its importance. We have to rededicate ourselves to civil education and participation.**

***[SLIDE TEN]***

**“Trust in the Court, without which our system cannot function, requires knowledge, it requires understanding, it requires engagement—in a word, it requires work.” J. Stephen G. Breyer, April 7, 2021.**

**THANK YOU.**