

01680

YALE LAW SCHOOL
THE GLOBAL CONSTITUTIONALISM SEMINAR
16 SEPTEMBER 2000
COURTS & POLITICS: JUDICIAL INDEPENDENCE

SUMMING UP

Michael Kirby

YALE LAW SCHOOL

THE GLOBAL CONSTITUTIONALISM SEMINAR

16 SEPTEMBER 2000

COURTS & POLITICS: JUDICIAL INDEPENDENCE

SUMMING UP

Michael Kirby

DIVERSE CHALLENGES TO JUDICIAL INDEPENDENCE

The closing session of the Yale Global Constitutionalism Seminar in September 2000 addressed an issue important to all of the participants. This concerned judicial independence and the way that it could be assured and protected in the environment in which all courts, but especially final constitutional courts, operate. Inevitably, courts, especially final courts, are involved in decisions about sensitive and controversial topics, often of great significance to the societies affected. It is in this context that judicial independence is at once essential and sometimes endangered.

Judicial independence is expressly or impliedly guaranteed by the constitutions of virtually every country. It is also recognised in international instruments expressing fundamental human rights. Thus Article 10 of the *Universal Declaration on Human Rights* provides that "everyone is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Similarly, Article 14 of the *International Covenant on Civil and Political Rights* provides that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Regional charters of human rights and other transnational instruments reinforce and supplement these universal principles. The three indispensable features of a modern judiciary are therefore: competence, independence and impartiality. The judiciary itself must defend these essential characteristics. But they also require support from governments, legislators, administrators, the media, civil society organisations and the community generally. Without a judiciary exhibiting these qualities, it is impossible to sustain democracy, respect for human rights or the rule of law.

It was recognised that, in particular national circumstances, special issues are presented, involving challenges to the independence of the judiciary. Thus, whereas most participants in the seminar were from developed countries with established judicial and legal systems, many countries of the world (perhaps most) do not enjoy these blessings. For example, in a country such as Cambodia, where the judicial and legal systems were destroyed by successive invasions, revolutions, wars and genocide, the presuppositions of judicial independence have to be completely rebuilt or established, effectively for the first time. Many countries are in this position.

Moreover, in some developing countries, which inherited judicial and legal systems from colonial times, it remains necessary to establish and reinforce judicial independence in circumstances where expatriate judicial officers are being replaced by locals and indigenous notions of justice are being called on to replace or supplement imported ways.

Even in countries with established courts and legal systems, it is sometimes necessary to tackle extremely sensitive questions affecting judicial independence. Thus the Seminar considered the special challenges presented to a number of societies of Europe as they had moved from autocratic to democratic governance. The way in which, in such societies, incumbent judges, appointed by the previous regime, were continued in office or removed presented acute challenges to the principle of judicial independence where that principle was invoked to preserve the maintenance in office of judicial incumbents discredited by past associations and service.

A reflection upon the variety of the challenges to judicial independence in the foregoing circumstances, and the differing ways in which different countries have responded to such challenges, suggested a need to avoid hard and fast rules. Instead, the diversity of the problems for judicial independence called forth a recognition of the need for diverse answers to the question of how, in a particular society, judicial independence could be defended and strengthened, consonant with the defence of other human rights and fundamental freedoms.

THE VARIED RESPONSES TO SUCH CHALLENGES

Much of the session of the Seminar was devoted to identifying initiatives that might be considered, depending upon local needs and traditions, to reinforce judicial independence and to defend it from attack. The following list of ideas, assembled in no particular order of priority, illustrates the variety of initiatives that have been taken to uphold judicial independence around the world:

1. *Reinforcing a culture of respect:* Several participants emphasised the need to build, and constantly to reinforce, a culture of respect for the value of judicial independence. One suggested that, in some legal traditions, this would effectively require a "cultural revolution" because of past attitudes of disrespect for, and interference in, judicial activity. Somehow it is necessary for other organs of power in society to realise that the independence of the judiciary is needed not for the judges personally but for the proper performance of the judges' duties as such for the people they serve. In this sense, such independence is a value belonging to the people, a fact emphasised by its inclusion amongst the statements of fundamental human rights. Participants paid a special tribute to one of their number, Justice Aharon Barak, President of the Supreme Court of Israel, for his sustained efforts, over an extended time, in sometimes difficult circumstances, to assert and maintain the independence of judicial office. But Justice Barak is not alone. There are many judges who, in circumstances of danger and difficulty, daily exhibit the qualities of independence from external pressure that afford

the surest foundation for the culture essential to sustain constitutionalism and the rule of law.

2. *Constitutional protection:* The special necessity of building an effective means of upholding constitutional government and public law review of governmental decisions by the judiciary was recognised. It is here that the interface between the judiciary and the other organs of government becomes most apparent. It is here also that political retaliation against judges who make decisions unpopular to powerful interests can sometimes occur. Because of that risk, the need for effective constitutional protections for the tenure, salary, immunity and pension rights of judges must be provided. Effective redress in the case of attempted retaliation for undesired judicial decisions should also be afforded under domestic constitutional provisions. Such protection is necessary. But it is not sufficient.
3. *Judicial councils:* Several participants mentioned the desirability of affording a collective means for protection of, and support for, judges the subject of calumny or threatened retaliation for their decisions. Where judicial councils exist, there is a need for them to perform their duties mindful of the necessity, on occasion, to speak up for judges who are subject to attack.
4. *Support from leaders:* When the courts come under attack for performing their judicial duties, it is important that political leaders, Attorneys-General, leaders of the legal profession, legal academics and others should come to the defence of the judicial institution. The need to inculcate the importance of such defence was accepted; but it was recognised that in some countries the old conventions by which the judicial institution was formerly defended by the Attorney-General or some other such political officer, were less commonly observed today than it had previously been.
5. *Independence and impartiality:* Maintenance of a high reputation for competence and impartiality was seen by many as a prerequisite to the defence of judicial independence. In a

sense, courts must constantly earn and retain the respect of the other institutions of government and of the general community. It cannot be assumed or simply demanded. Such respect is largely dependent upon the manifest integrity with which judges perform their duties. This depends largely on the judges themselves.

6. *Appointments:* The participants discussed the importance of systems of appointment and transfer of judges for the assurance and maintenance of judicial independence. The different systems in force in several countries were examined according to the criteria of how they contributed to the defence of judicial independence.
7. *Misuse of promotion:* The dangers for the independence of the judiciary commonly lay not only in monetary corruption or bullying and improper pressure from external forces. More subtle pressures could sometimes be deployed by governments where they enjoyed the powers of judicial appointment and promotion. The dangers to vigilant independence on the part of judges, ambitious for appointment or promotion to a new or higher office, was described (by analogy with the cardinalate) as "scarlet fever". Peer pressure for maintaining an appropriate distance from politicians and appointing authorities, and the improvement and greater transparency of systems of appointment and promotion, were mentioned as means for preventing abuse of such powers.
8. *Social context:* It was generally agreed that courts, operating in the real world, had to respond to the societies they serve but without falling victim to hyper-politicisation. The participants discussed the merits of creating separate constitutional courts or maintaining constitutional law as an integral part of the general law administered in the ordinary courts. The greater capacity and willingness of separate constitutional courts to develop doctrines defensive of judicial independence was discussed but without any clear consensus, given the different institutional traditions represented at the Seminar.

9. *Discipline:* Where, occasionally, it is necessary to consider discipline of a judicial officer for an alleged breach of non-criminal rules of conduct or ethics, it was generally felt desirable that this should be initiated internally within the judiciary rather than externally by other organs of the government. Whereas judges should have no immunity from the general criminal law, the performance of their duties was almost certain to leave at least some parties to litigation before them disappointed and aggrieved. Because this is the very nature of the judicial function, it necessitates appropriate protection for judges from malicious, ill-informed or misconceived complaints. The provision of an effective procedure for discipline, in a way respectful of judicial independence, presented a challenge which has been addressed in different ways in different countries.
10. *Court funding:* In several countries, provisions have recently been adopted to ensure the independent funding of the courts so that they are removed from inappropriate financial pressures from the legislature or the executive government. The introduction of a court's control of its own budget protected the judges from some political pressures imposed by the power of the purse. On the other hand, it diverted them, to some extent, from the performance of judicial duties and inevitably involved the giving of a close account to the legislators who were accountable to the people for the funds raised by taxation.
11. *Specialised reporting:* Accounts were given of the ways in which, in particular countries, specialist reporters covered the work and decisions of the highest courts. By providing information to the community through the media, such reports can contribute to reinforcing general appreciation of the work of the courts and of the importance of defending judicial independence. The appointment by courts themselves of media liaison officers is also a feature in many countries. Such initiatives recognise the practical constraints within which the media operate and their need for assistance to communicate, simply and quickly, the often complex concepts of legal reasoning contained in the decisions of the courts, so that they

will be understood, reported accurately and not trivialised or misrepresented.

12. *Court correction:* In some cases of misreporting, facilities exist in particular courts for the publication of a court statement correcting the misreport and putting the record straight. Such corrections are normally very brief. But whether they will be published by the media, to repair erroneous information about a particular court decision, is largely in the gift of the media themselves.
13. *Courses for reporters:* In some countries, to repair misreporting and misunderstanding of judicial decisions and functions, briefings are given to reporters and even short courses instituted to explain the working and functioning of the court and the meaning and significance of particular decisions. The extent to which courts themselves should be involved in such activities was the subject of debate.
14. *Response to criticism:* Differing views were expressed concerning the desirability and wisdom of responding to criticism of the judiciary generally or criticism of particular judges or decisions. Some participants favoured the maintenance of a dignified silence. Many spoke for the general wisdom of self-restraint. Some suggested the facility of off-the-record briefings for the media to explain the judicial function and role, not always understood by the media, the general community or even political leaders or officials. The designation of particular judges to perform liaison with the media was instanced as an initiative that might sometimes be appropriate.
15. *The contempt power:* In those societies where the power to punish critics of the judiciary for contempt of court is constitutionally available, it was generally agreed that such provisions should be reserved to the most serious cases. Normally, where any criminal offence had occurred, it was preferable that those alleged to be guilty should answer only for such crimes and not for contempt. On the other hand, instances were given to the Seminar of sustained media

harassment of particular members of the judiciary for decisions unpopular to the particular interest concerned, including the media. The need in extreme circumstances to afford an effective institutional response on the part of courts to such conduct was considered with particular reference to some recent glaring examples.

16. *Mutual independence:* Part of the discussion at the Seminar turned to the necessities and limits of total judicial independence. Whereas a judge in modern circumstances could be expected to cooperate with colleagues and, within the law, to perform duties assigned to him or her, it was also recognised that judges, particularly in collegiate courts, must maintain a measure of independence from each other. Judicial independence included independence from inappropriate pressure to join in, or change, opinions to accord with those of other judges. Maintaining independence of mind in a practical context of an efficient judicial institution presented something of a paradox but one that was ordinarily resolved in a satisfactory way.
17. *Codes of judicial conduct:* There was much recognition of the fact that a feature of judicial independence was the accountability of the judiciary to the hierarchy of appeals and judicial review and to proper systems of determining complaints about misconduct, capacity and judicial performance. Differing views were expressed about the desirability of having a formal code of judicial conduct, such as exists in several countries. In others, where such a code has not been introduced, a fear is sometimes expressed that specification of rules of conduct, hitherto governed by convention and common sense, will afford critics of the judiciary new weapons with which to attack the independence of its members.
18. *Erosion of professionalism:* Encouraged by reflections on Dean Anthony Kronman's book *The Lost Lawyer*, there were a number of observations about contemporary erosions of professionalism in the legal profession generally and of the judiciary in particular. The pressures imposed on the judiciary by increasing case loads, new methods of case management

and the shift from oral to written advocacy presented needs to maintain an ethos of high professionalism in a rapidly changing work environment. It was recognised that today's judiciary could not simply assume the continuance of attitudes of deference and respect that had existed in the past. New ways had to be found to earn community respect which was the surest reinforcement for judicial independence.

19. *Expecting criticism:* The participants were reminded by members of the Faculty of the strong traditions of the First Amendment in United States constitutional law and of the right of citizens to criticise every branch of government, including the judicial branch. To varying degrees, this tradition finds reflection in public and constitutional law of virtually all of the countries represented. Moreover, to the extent that contemporary judges are more candid in acknowledging the influence of policy and principle, as well as of legal authority, in deciding cases, they invite legitimate criticisms of the policies and principles to which they give effect. The declaratory theory of the judicial function, generally observed in common law countries in the past, and often still maintained in the civil law tradition, sometimes masks the creative choices which judges (especially of ultimate courts) must face and resolve. Whilst there would be no return to the declaratory theory as previously practised, it remained for judges to recognise and obey the limitations proper to judicial rather than elected office. Criticism, even vigorous criticism, of suggested excesses of judicial "activism" or inventiveness was a useful assurance against untrammelled abuse of judicial power. All participants acknowledged the legitimate role of criticism of judges, their decisions and conduct. However, several called attention to the new phenomenon of personalised criticism as an aspect of media entertainment, which judges were not well placed to answer.
20. *Meetings and exchanges:* Towards the conclusion of the Seminar, there was a general consensus that meetings, such as the Global Constitutionalism Seminar itself, provided a useful reinforcement for the principle of judicial independence. Bringing together judges from courts in developed countries

with judges from new courts in countries facing special problems and difficulties, had the beneficial effect of reinforcing their mutual dedication to the principle of judicial independence. It also strengthened the personal and institutional commitment of each participating judge to the principles of competence, independence and impartiality that are essential to an effective judicial branch of government. Realising the common features of the contemporary challenges to judicial independence, and sharing ideas about the responses that could be adopted when such challenges came, were useful contributions which themselves helped to strengthen judicial independence and integrity.

THE ULTIMATE FOUNDATION OF COMMUNITY CONFIDENCE

At the end of the session, there was general consensus with the reflection of one of the participants, Justice Frank Iacobucci of the Supreme Court of Canada. Each judge with the privilege of serving on an ultimate appellate or constitutional court of his or her country, indeed each judicial officer of whatever rank, had to accept the real world of criticism and even political attacks, in which the courts today operate. The best advice that could be offered to such judges was to take each day at a time, attempting with true humility to perform the duties of office with fidelity and devotion to duty.

When opinions are criticised, the proper approach is not normally one of annoyance or demand for redress or correction, still less punishment. Sometimes it is a judicial commitment to attempt to explain things better. Sometimes it is re-examination to consider whether, in the particular case, the criticism has merit. By the provision of better explanations of what judges do and how they decide particular cases, members of the communities served by such judges may ultimately come to appreciate the complexity of the questions presented for judicial decision, the difficulties of the choices that must be made and the arguments that support the particular decision arrived at.

Judges in the contemporary world must rest their decisions on reason, not on force, fear or the deployment of state power. Thus, the ultimate foundation for judicial independence lies not in the

words of international instruments nor even of domestic constitutions. It lies in the manifest integrity of the judiciary itself and the general acceptance of that integrity by the communities whom the judges serve.