The Importance of Judicial Independence to the Rule of Law (Justices in Conversation series)

14 June 2018
Hosted by the City Bar of New York
Co-Sponsored by American College of Trial Lawyers Foundation

Speakers

Justice Stephen Breyer, Associate Justice, US Supreme Court
Lord John Dyson, Former UK Supreme Court Justice and Master of the Rolls
Justice Beverley McLachlin, Former Chief Justice of Canada

Moderator

Murray Hunt, Director of the Bingham Centre for the Rule of Law

What is judicial independence? Why does it matter to the Rule of Law? How can emerging democracies build an independent judiciary, and what does it take to sustain it at a time when political debates are highly polarized and judges have found themselves in the firing line?

In conversation with Bingham Centre Director, Murray Hunt, a panel of three Justices offered personal reflections from their long and distinguished careers on the highest courts of the US, the UK and Canada.

Judicial independence is, fundamentally, a state of mind, Justice Breyer argued. It exists when a judge's opinion is the honest product of their efforts to establish the facts and interpret the law. Lord Dyson noted that many judges learn their independence as practicing lawyers at the bar, where professional and court-room ethics are inculcated.

The Rule of Law requires judicial independence so that people can take their disputes to court and have them resolved according to law. Without judicial independence, other Rule of Law principles such as clear and public laws, applying equally to all without discrimination, would be undermined. Justice McLachlin, former Chief Justice of Canada, noted that some authoritarian societies have Rule *by* Law, in which laws are generally enforced against ordinary people but there are no independent courts to hold the powerful to account.

The panel provided many insights into the challenges of building and sustaining an independent judiciary. Lord Dyson set out the necessary practical groundwork: a well-trained judiciary, adequate remuneration, an appointment process that selected high-quality judges and a tightly defined disciplinary process that respected security of tenure but enabled judges to be removed in extreme cases of wrongdoing, though resignation would sometimes be the more proper action.

In the US, constitutional safeguards for the federal judiciary had quickly given rise to a tradition of respecting their security of tenure. What took much longer was to ensure respect for *all* court rulings, even in cases of high political controversy. Justice Breyer traced the history from the 1830s when President Andrew Jackson urged officials to disobey a court ruling, through the 1950s when President Eisenhower had to send in paratroopers to a state resisting school desegregation and years of civil society and political activism were needed to secure full adherence to that principle, up to the point reached in 2000 with the election case of *Bush v Gore* that had divided the nation. The Supreme Court decided the case 5:4, but the result was universally accepted without violent protest. In Canada, Justice McLachlin noted that a period of considerable criticism of the courts after the Charter of Fundamental Rights was introduced in 1982 has increasingly given way to recognition of the value of judicial review for good governance.

Public confidence in the judiciary had been crucial to this growth and strengthening of judicial independence and the Rule of Law, and Lord Dyson and Justice McLachlin observed that, in general, the UK and Canadian judiciary also enjoyed public confidence as surveys had regularly found. However, there was no room for complacency in a changing world. The panel discussed two current challenges of particular importance. First, how could the process for appointing judges maintain public confidence? The old UK and Canadian practice of appointing a judge with a 'tap on the shoulder', without open competition or parliamentary scrutiny of nominees, had become outmoded. Important changes included the introduction of judicial appointments commissions in the UK, and, in Canada, parliamentary hearings for Supreme Court nominees. The US process of Senate confirmation, provided an important public "window" on judges who would serve for life, Justice Breyer confirmed.

The second issue addressed by the panel was how judges should deal with criticism of their decisions, particularly when the critics were government politicians. Justice McLachlin acknowledged that it would be inappropriate for judges to respond to criticism by conducting a media campaign, but argued that they did have an obligation to set out the facts, and sometimes this would be enough to resolve a political controversy. Lord Dyson recounted how the courts had been subjected to the headlines "Enemies of the People" and "Judges versus the People" by major newspapers for ruling that government required legal authority from Parliament to commence withdrawal from the EU. He lamented that government ministers remained silent when they had a legal obligation to defend judicial independence and the Rule of Law. Justice Breyer recalled that criticism of the judiciary was an occupational hazard. He agreed that judges could not resort to media campaigns to defend themselves, and that therefore there was a great need for others to speak out in defence of the Rule of Law. Lawyers and bar associations had an important role. Ultimately, the panelists returned to need to foster public understanding and support for the Rule of Law. In today's polarized climate and with growing disregard for truth in public discourse, the legal community had to redouble its efforts to explain the role of independent courts and their great value in underpinning the Rule of Law.

Watch the event on YouTube: https://www.youtube.com/watch?v=KpL2HyLIK9w.