

LEAVEWORTHY



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pwood@nysba.org

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Justice Henry J. Scudder: A Colleague's View

By Hon. Erin M. Peradotto

Associate Justice, Appellate Division, Fourth Department

On December 22, 2006, approximately ten minutes after I had received the telephone call from the Governor's office regarding my appointment to the Appellate Division, Fourth Department, I received a telephone call from Presiding Justice Henry Scudder asking me to meet with him at the Appellate Division courthouse in Rochester. He also said, I thought jokingly, that he hoped that my car had a big trunk for the records and briefs they were packing up for me. His comment was no joke! When I arrived in Rochester, court officers loaded my car with records and briefs for approximately 100 cases on which I was scheduled to sit during the January 2007 term!

December 22, 2006 was Justice Scudder's 36th day as Presiding Justice of the Appellate Division, Fourth Department; December 31, 2015 was his last. Except for his first 36 days, I had the good fortune of serving with Justice Scudder during his nine-year tenure as the fourth-longest-serving Presiding Justice of the Fourth Department.

I was not yet on the Court when Justice Scudder presided over his first full-court



Henry J. Scudder

conference, sometime in November 2006. Those who were there have told of the wonderful welcome he received from his colleagues when he entered the conference room—all of the judges and the consultation clerk were wearing cowboy hats, Justice Scudder's signature accessory! Fortunately for all of us, he was a better lawyer than country and western singer!

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Justice Henry J. Scudder: A Colleague's View (cont'd)

Among his early challenges as Presiding Justice was shepherding the four new members of the 11-member court. As one of those new members, I appreciated that his door was always open, that he was generous with his time, and that he always gave sound advice. I also noticed early on that he is a tireless worker—when you knock on the door to his chambers in Rochester or call him at his chambers in Bath, he is always there.

As Presiding Justice, Justice Scudder was completely committed to the court as an institution and to the judges with whom he served. He was a truly effective leader of the court in the finest traditions of the profession. Justice Scudder has a great appreciation of the significance of the work of the Appellate Division, and his focus always has been on the best interests of the court.

He recognizes the importance of respect and collegiality among the members of the court and, in that regard, he leads by example. This year, as the court moves forward under the new leadership of Presiding Justice Gerald J. Whalen, Justice Scudder continues his commitment to the Fourth Department by serving the court as a certified justice.

Justice Scudder has been on the Appellate Division, Fourth Department since 1999. He is quiet, extremely

humble, and unpretentious. He is not a fan of the spotlight. If he knew in advance about this article, I am quite sure he would have made every effort to quash it!

On his last argument day as Presiding Justice, much to the disappointment of his colleagues, he insisted that there be no speeches or ceremony. It was, appropriately, business as usual. After all, it is the business of the Appellate Division—the cases—that Justice Scudder enjoys more than anything.

He is a clear thinker whose colleagues regularly seek out his views on cases. He sets the bar high for himself, his colleagues, and the lawyers who appear before him. On a personal note, I am forever grateful to Justice Scudder for the kindness he has shown me. I have such great respect for the intelligent and thoughtful way he approaches the work we do.

Justice Scudder is an exemplary appellate judge. It has been, and continues to be, a privilege to serve with him. He has made lasting contributions to the Appellate Division, Fourth Department—a court that for nine years he quietly guided with humility, a steady hand, a lot of common sense, and a 10-gallon hat! In the words of this extraordinary Presiding Justice, “ba-doop—ba-doop—a-doo.”

M. Dolores Denman
Courthouse of the Appellate
Division, Fourth Department
located in Rochester,
New York



If I Knew Then What I Know Now

EDITOR'S NOTE: *Many members of the Committee on Courts of Appellate Jurisdiction have had decades-long careers. A few reflected here on lessons they have learned along the way. In future issues, we'd like to offer similar insights from other appellate attorneys, including non-Committee members.*

By Dolores Gebhardt

McCarthy Fingar, LLP, White Plains



Dolores Gebhardt

Once upon a time, I was groomed to be a labor lawyer. I loved my classes at Cornell University's School of Industrial and Labor Relations. I did my serious studying in the stacks in Olin Library, a silent citadel of delights where undergraduates could enter only with a pass. I was a reference desk assistant at the ILR School's Catherwood Library, where I

became an expert researcher. I spent half my junior year at the National Labor Relations Board, Region 29, in Brooklyn. Heady stuff!

Dean Eric Schmertz, a giant in New York City labor relations, personally invited me to attend Hofstra University School of Law, a labor law hotbed at the time. I became the editor-in-chief of the Hofstra Labor Law Journal. I won an award for excellence in labor law courses at graduation. But my favorite activity was my job as a reference assistant in the law school's library. Do you see a pattern here? Wish I had!

I have enjoyed a 30-year career in labor and matrimonial law, where the common denominator is dispute resolution. But there was something missing. I finally found it 15 years ago, when, as an associate at McCarthy Fingar, I was assigned to prepare the respondent's brief in a caustic matrimonial appeal. I discovered intellectual joy in researching and crafting an argument in powerful and engaging prose to persuade judges more experienced and learned than I.

Had I known this during my college days in Catherwood Library, when Shepardizing meant having to check one case citation in five or eight or ten books—assuming you could find all the books—I would have stayed in the library where I belong. I would have become law secretary to an appellate judge and then perhaps become an appellate judge myself. To me, that is the highest calling—to shape and interpret the law. Instead, I complement my litigation skills with an appellate practice, where I hope that I help to shape the law from the other side of the bar. It also gets me in the library for a necessary fix.

The Hon. Sondra Miller, with whom I work on civil appeals at McCarthy Fingar, gave me the greatest compliment I ever received. She turned to me and said, "You would have made an excellent law secretary."

By Risa Gerson

New York State Office of Indigent Legal Services, Albany and NYC



Risa Gerson

As a young lawyer, interviewing at New York City Legal Aid, I was asked what drew me to the work of criminal appeals. Easy answer: I wanted to shape the law. The interviewer looked at me for a beat and said, well the most important thing is representing individual clients, not shaping the law, although that sometimes occurs. I managed to get hired

anyway. I focused on the dispassionate mechanics of appeals: spotting legal issues, researching, and writing persuasive briefs.

About 10 years ago, some appellate offices representing indigent clients began adopting a holistic, client-centered model of representation. My office instituted a policy that each lawyer should meet with the client when possible. I spent hours on the road, meeting with my incarcerated clients in every corner of the state. My

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If I Knew Then What I Know Now (cont'd)

job satisfaction rose immensely; and I started winning more cases. Why?

First, there were instances in which clients focused on issues I may have passed over that turned out to be viable, and in some cases, winning. In rare instances, I was alerted to off-the-record information that became the basis for a post-conviction motion. Second, in cases in which the client had received a beneficial plea bargain, a face-to-face meeting inevitably resulted in the client understanding that the best course of action would be to withdraw the appeal. In the past, clients would balk when I suggested this, assuming I was lazy. After I drove hours to meet with the client, that assumption disappeared. Third, by making a personal connection with my clients, the tasks of reviewing the records, researching the issues, and writing briefs became far less tedious. I felt more passionate about the cases and became a far better appellate practitioner.

By Cynthia Feathers

Rural Law Center of New York, Castleton

Early on, I found a nice niche in appeals, but it took years to learn many valuable lessons. When I worked at the State Attorney General's office, I wrote a respondent's brief filled with counter-punches and defensive retorts. The reviewer helped me see that the respondent can re-frame the issues; the brief could affirmatively state why the challenged decision should be sustained. Learning to welcome such criticism helped me later when I became a solo practitioner and dared to share my drafts with colleagues and to seek to be mooted by others.



Cynthia Feathers

It took years at the AG's office and a few CLEs, listening to appellate judges, to learn the importance of not showing "attitude" in briefs. To this day, if my first drafts are sometimes tainted by attitude, a goal in editing is to try to scrub away the heated anger, leaving only quiet logic. Another important lesson I learned while a solo practitioner was when to say no to poten-

tial private clients. If your arguments will be specious, don't take the case. Now it's rewarding to provide objective evaluations and help clients determine when not to appeal.

Once I was on the receiving end of a spectacular Second Circuit appellee's brief. In an appeal involving a fascinating matter of first impression, I was appointed to represent the criminal defendant-appellant. The U.S. Attorney's Office countered with surgical precision and compelling logic. At oral argument, opposing counsel was very prepared, animated, articulate, and respectful. That appeal brought home key lessons—the importance of being scrupulously honest in reciting facts and the value of observing far more accomplished appellate attorneys in action.

Learning how to lose often, yet keep on fighting hard and go the extra mile in every case, was the chief lesson from doing criminal appeals for an institutional defender in New York City. That office also taught its attorneys the value of trying to turn straw into gold—that is, transforming a garbled, chaotic, redundant trial record into a cohesive, gripping narrative that pointed to the desired result before the argument section even began.

I learned other lessons along the way, but still have to remind myself to apply some—like don't let conviction cloud objectivity; don't brood too much about your brief or argument—get away from them to gain perspective; and keep cool when opposing counsel plays fast and loose with the rules.

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Appellate Perspectives

Independence of the Judiciary is Fundamental

By Professor Shimon Shetreet



Professor Shimon Shetreet

The judiciary plays an important role in society, and its independence is essential for performing its role. In this report, I will analyze briefly the concept, its theoretical elements, and its modern conceptual dimensions, such as collective independence vis-à-vis individual independence and internal independence.

Judicial independence is one of the fundamental

values of the administration of justice. Together with colleagues from many countries,¹ I have been privileged to play a leading role in the promotion of judicial independence for four decades within the International Project of Judicial Independence of the International Association of Judicial Independence and World Peace, over which I preside.² The challenge of maintaining the independence of the judicial system is very serious. Contemporary challenges have been recorded in many countries on many issues.

Collective independence concerns the institutional independence of the judiciary as a whole, while individual independence refers to the independence of the individual judge. Within the latter concept, a further distinction has to be made between two essential elements: substantive independence and personal independence.

Judges Must Be Free of Entanglements

Substantive independence means that, in exercising judicial duties, delivering judicial decisions, and exercising other judicial duties (as distinguished from administrative aspects), the judge should be free from any executive interference and any political pressures and entanglements. Also, he or she must be free from any financial or business entanglements that might have an

impact on his decisions. In order to achieve this desired independence, statutory rules and judicial traditions have been established. Their goal is to remove any such entanglements from the lives of the judges.

Personal independence relates to personal terms of office of the judge and is secured by ensuring that appointment is maintained until a designated retirement age or by lifetime appointment, as is the case in the U.S. federal court system. It is also ensured by adequate remuneration. The executive branch has no say in matters of judicial administration relating to judges, such as case assignment or court scheduling.³

Along with substantive and personal independence of the individual judge, judges must also have collective independence. Together with my colleagues at the International Project of Judicial Independence, I have advocated extensively for the recognition of collective independence;⁴ and the concept has been recognized by transnational jurisprudence. It has been implemented in the Mt. Scopus International Standards for Judicial Independence.⁵ Institutional independence may call for judges to prepare the entire budget independently, as does the federal judiciary in the United States.

Internal Independence is Significant

The adjudicative responsibilities of judges should remain separate and independent, not only from outside pressure, but also from peers and superiors.⁶ This is referred to as internal judicial independence,⁷ which is very significant. Among the judiciary, there is a hierarchy that may at times conflict with the concept of independence. Internal independence refers to a judge's independence from his administrative superiors and senior colleagues. This aspect of independence transcends both the substantive and the personal independence of the judge regarding his relationships with his colleagues and superiors.

The implementation of these concepts is possible only when there is a culture of judicial independence—a

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Independence of the Judiciary (cont'd)

topic addressed by the Mt. Scopus International Standards of Judicial Independence,⁸ in a detailed provision.⁹ Judicial independence is one of the basic values underlying the justice system.

I outlined the Fundamental Values of the Justice System in a public lecture published in the UBC Law Review.¹⁰ These basic values are judicial independence and impartiality; efficiency of the justice system; ensuring access to justice; maintaining public confidence in the courts; and fairness and high quality of adjudicative process.

Without the confidence of the public, a court cannot render a judgement that will be adhered to. Article 6(1) of the European Convention on Human Rights represents the formulation of the core values of the justice system. It refers to the position of the judge and the tribunal that adjudicates and also the rights accorded to everyone who stands before the tribunal. Article 6(1) of the Convention provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." There are several more treaties which have a clause aiming to secure judicial independence and the rights of individuals to be heard before a fair and impartial tribunal.¹¹

Independence of Judiciary Began in 1701

The historical analysis of the development of the independence of the judiciary suggests that it was established in 1701 in the Act of Settlement in England. This Act provided that the King could no longer terminate the office of the judge at his discretion as before. The judges served during good behaviour and could be removed only by the address of both houses of Parliament. Later on, in the U.S. Constitution, Article III, it was also provided that federal judges shall serve during good behaviour and that their remuneration shall not be diminished during their term of office.

The principle of judicial independence was adopted in numerous constitutional laws in many domestic jurisdictions. Following the Second World War, it was included in most international and regional Human Rights treaties and conventions.¹² However, judicial independence is under constant pressure from several directions and forces. These challenges can come from other branches of government, social and economic change, and changing political circumstances. Violations of judicial independence occur all over the world, in countries of both common and civil law legal systems, regard-

less of when they became a democracy and introduced judicial independence. Challenges can occur via legislation, such as laws lowering the retirement age of judges, removing the security of tenure or even closing courts, and by doing so effectively removing judges.¹³

This past year, the Polish electorate voted in the Law and Justice Party to the majority in parliament. Within days of its election, the Law and Justice Party ("Party") sought to appoint five new judges to the Constitutional Tribunal ("Tribunal"), as well as to void judicial appointments to the Constitutional Court of Poland made by the previous parliament two weeks before the election. This move would have effectively given control to the Party over the Tribunal, whose function it is to rule on the constitutionality of laws passed by parliament. When the Tribunal declared the move unconstitutional, the Party refused to recognize their ruling. It attempted, by legislation, to require a two-thirds majority in the Tribunal's rulings.¹⁴ The opposition continues, including by an organization called "The Committee in Defence of Democracy" (KOD).¹⁵

Justice Scalia's Vacancy and Politics in U.S.

A similar issue has arisen regarding the vacancy in the U.S. Supreme Court following the passing away of Justice Antonin Scalia. President Obama announced that Merrick Garland, Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, is his nominee for the replacement for Justice Scalia, and he submitted his name for confirmation by the Senate. In response, Senate Republicans expressed strong objection to the nomination, or any Supreme Court justice nomination by President Obama, calling upon him to leave the replacement for the next president, who will be elected in November 2016 and enter office in January 2017.¹⁶ Judicial independence thus threatens to become a campaign issue.

An example of legislative restrictions on judicial independence occurred in Kansas.¹⁷ Last year, the state legislature passed a bill that removed the authority of the State Supreme Court to appoint chief judges of the state's trial courts. The legislation further provided that if the Supreme Court were to strike down a state law, the budget of the court would be eliminated. This was a clear violation of the independence of the judiciary. The law was later declared unconstitutional, as it interfered with the judicial branch and as such was a breach of the separation-of-powers doctrine. The court's ruling was unanimous.

On February 8, 2016, the Kansas Governor signed the repeal measure into law. The repeal of the uncon-

stitutional aspect of the law was done by adding a severability clause. The law in its original format was unseverable. The repeal made the section severable and declared that any provision deemed to be unconstitutional would be severed from the rest of the law and only it would be null; the rest of the law would continue to be in force. Judicial independence continues to be challenged, and every element of every society must work at maintaining judicial independence.

In Turkey, the High Council of Judges and Prosecutors (HSYK) unlawfully and arbitrarily suspended 49 judges and prosecutors for nearly five months in 2015. The HSYK was under the complete control of the government and, as such, lost its independence and impartiality totally. Thousands of judges and prosecutors were reassigned against their wills, and contrary to all principles of the HSYK, administrative and criminal investigations were initiated against many of them. The common point of these judges and prosecutors is that they rendered judgments or decisions against the will of the government; thus they were thought of as obstinate and could not be influenced by any means.

Violations Occur in Many Nations

Violations can occur anywhere and by other methods. The *Baka v. Hungary*¹⁸ case of 2012 of the European Court of Human Rights is an example. The case revolved around the premature termination of the Supreme Court Chief Justice in Hungary for expressing his personal political views. The Mt. Scopus International Standards were relied upon by the European Court of Human Rights (ECtHR) in its decision.¹⁹

Another example of international jurisprudence influencing domestic laws in Western Europe is *Procola v. Luxembourg*,²⁰ in which the European Court of Human Rights upheld the claim of the plaintiffs that their rights to a fair and impartial tribunal²¹ had been infringed upon. The complaint was based on the ground that members of the Judicial Committee of Luxembourg who ruled on Procola's application for judicial review had previously given their opinion on the lawfulness of the impugned provisions in their other role as members of the Conseil d'Etat. They claimed that this was mixing both judicial and executive functions, in violation of the impartiality of the tribunal in question, thereby breaching Article 6, paragraph 1.

In the case of *McGonnell v. United Kingdom*,²² the claim was that a bailiff in the Court of Appeals was not impartial, as he had both executive and legislative roles as a representative of the U.K. government. The case of *De Haan v. The Netherlands*,²³ involved a judge, presiding

over the appeals tribunal, who was called upon to decide an objection to a ruling that he himself had made. In that case, the court found that the applicant's fears regarding the judge's participation were objectively justified, notwithstanding an absence of prejudice or bias on the part of the judge.²⁴

These challenges to judicial independence mentioned are only illustrations. There are many cases from all over the world. Both new democracies of Eastern Europe, as well as older democracies of Western Europe, have had challenges and violations of judicial independence. In many cases, they upheld judicial independence.²⁵ But clearly the struggle for true judicial independence continues.

Professor Shetreet has an LLB and LLM from Hebrew University of Jerusalem and a MCL and DCL from the University of Chicago School of Law. He is the Greenblatt Chair of International and Public Law, Hebrew University of Jerusalem; a member of the Royal Academy of Arts and Science of Belgium; President of the International Association of Judicial Independence and World Peace; a former Cabinet Minister in Israel; and a former Senior Deputy Mayor of Jerusalem. He has been a member of the Israeli Bar since 1969.

- 1 Including my distinguished colleagues Marcel Storme, James Crawford, the late Marcus Buechel, Christopher Forsyth, Fryderyk Zoll, Wayne McCormack, Walter Rechberger, Hiram Chodosh, Anton Cooray, Wang Guiguo, Maimon Schwarzschild, Daniela Cavallini, Giuseppe Franco Ferrari, Neil Andrews, HP Lee, Chandra De Silva, Sir Louis Blom-Cooper, QC, Dmitry Maleshin, Cyrus Das, Sophie Turenne, Dmitry Magonya, Jonathan Entin, Ada Pellegrini, Sean McConville, Yuval Shany, Keith Uff, and K.K. Venogopal.
- 2 www.jiwp.org.
- 3 Shimon Shetreet, "The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges" (2009), 10 *Chicago J. of Int'l Law* 279.
- 4 Shimon Shetreet, *Judicial Independence: The Contemporary Debate* (Jules Deschenes ed, Martinus Nijhoff, Dordrecht, Boston, Lancaster 1985).
- 5 See Mt. Scopus International Standards:
 - 2.3. The Judiciary as a whole shall enjoy collective independence and autonomy vis-à-vis the Executive.
 - 2.4. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence, as long as they are in accordance with Principles 4.
 - 2.5. No executive decree shall reverse specific court decisions or change the composition of the court in order to affect its decision-making. See <http://www.jiwp.org/#!mt-scopus-standards/c14de>.
- 6 Shimon Shetreet, "Judicial Independence and Accountability: Core Values in Liberal Democracies," as editor (H.P. Lee), *Judiciaries in Comparative Perspective* (Cambridge Univ. Press 2011) (H.P. Lee, editor).
- 7 The Mt. Scopus International Standards:
 - 9.1 In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.
 - 9.2 Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of judges to pronounce their judgments freely.
- 8 See Mt. Scopus International Standards:
 - 1.4 Every society and all international bodies, tribunals and courts shall endeavour to build and maintain a culture of judicial independence that is

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Independence of the Judiciary (endnotes cont'd)

essential for democracy, liberty, rule of law and human rights in domestic system of government and is a necessary foundation for world peace, orderly world trade, globalised markets and beneficial international investments.

1.4.1 The culture of judicial independence is created on five important and essential aspects: creating institutional structure, establishing constitutional infrastructures, introducing legislative provisions and constitutional safeguards, creating adjudicative arrangements and jurisprudence, and maintaining ethical traditions and code of judicial conduct.

- 9 Shimon Shetreet, "Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure," in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff 2012).
- 10 Shimon Shetreet, "The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts" (1979), 13 UBC L. Rev. 52.
- 11 E.g. Article 14 of the International Covenant on Civil and Political Rights; Article 8 of the American Convention; Article 7 of the African Charter on Human and Peoples' Rights; Article 47 of the Charter of Fundamental Rights of the European Union.
- 12 Shetreet, n 3.
- 13 Mark Tushnet, *Leadership in Constitutional Courts*, Conference Materials, Krakow (March 2008).
- 14 Editorial Board, "Poland's New Right-Wing Leaders Have Crossed a Line," *Washington Post* (Dec. 22, 2015) <https://www.washingtonpost.com/opinions/polands-new-right-wing-leaders-cross-a-line/2015/12/22/54d42ea4-a8d3-11e5-8058-480b572b4aae_story.html> last accessed Feb. 9, 2016.
- 15 Maria J. Stephan and Maciej J. Bartkowski, "Poland's Liberals Strike Back," *Foreign Policy*, Feb. 5, 2016. <http://foreignpolicy.com/2016/02/08/polands-liberals-strike-back>. Last accessed Feb. 15, 2016.
- 16 Carl Hulse, Mark Landler, "After Antonin Scalia's Death, Fierce Battle Lines Emerge," *NY Times*, Feb. 14, 2016, http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-death-cuts-fierce-battle-lines-in-washington.html?emc=edit_th_20160215&nl=todaysheadlines&nid=67841291&r=0. Last accessed Feb. 15, 2016.
- 17 For more details, see John Eligon "Court Budget Intensifies Kansas Dispute over Power," *NY Times* June 6, 2015. <http://www.nytimes.com/2015/06/07/us/courts-budget-intensifies-kansas-dispute-over-powers.html?emc=edit_th_20150607&nl=todaysheadlines&nid=66631261>. Last accessed Feb. 10, 2016.
- 18 *Baka v. Hungary*, 20261/12 (Eur. Ct. H.R., May 27, 2014) European Union; Hungary.
- 19 *Ibid* para.61.
- 20 *Procola v. Luxembourg*, 326 Eur Ct HR (ser A) (1995).
- 21 *Lisbon Treaty*.
- 22 *McGonnell*, 30 Eur Ct HR 289.
- 23 *De Haan v. The Netherlands*, 1997-IV Eur Ct HR 1392.
- 24 *Ibid* 1392, 1393 para. 50-51.
- 25 Marc Bossuyt, "The Independence of the Judiciary in Belgium," in Shimon Shetreet (ed), *The Culture of Judicial Independence: Rule of Law and World Peace* p. 137 (Brill, Nijhoff 2014).