

JUDICIAL INDEPENDENCE: CONTEMPORARY PRESSURES AND APPROPRIATE RESPONSES

Patricia Hughes*
Fredericton

Traditionally judicial independence has been concerned primarily with threats from government. Today the threat from public criticism, the purpose of which is to undermine the authority or legitimacy of the judiciary, has become more significant. The author argues that this criticism can be related to constitutionally entrenched notions of citizenship since 1982 in a manner similar to the way in which the emergence of the principle of judicial independence three hundred years ago was related to the contemporaneous recognition of the "autonomous citizen." The author also considers the importance of the Supreme Court of Canada's response to public challenge.

Traditionnellement, ce sont les menaces provenant du gouvernement qui pouvaient porter atteinte à l'indépendance judiciaire. Aujourd'hui, les menaces provenant de la critique publique, dont le but est de miner l'autorité ou la légitimité du pouvoir judiciaire, sont devenues beaucoup plus significatives. L'auteure soutient qu'on peut faire un lien entre cette critique et les notions, constitutionnellement enchâssées depuis 1982, de droits de citoyenneté, de la même manière que, il y a trois cents ans, l'émergence du principe de l'indépendance judiciaire était reliée à la reconnaissance, alors, du «citoyen autonome». L'auteure aborde aussi l'importance de la réponse de la Cour suprême du Canada au défi posé par le public.

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* Patricia Hughes, of the Faculty of Law, University of New Brunswick, Fredericton, New Brunswick.

I. Introduction

The significance of independent courts as “the last bulwark of the citizenry against the arbitrary encroachments of the state”¹ remains as true today as it has ever been. In the Canada of 2000, however, the courts have acquired another function for which their independence must be maintained: their role as arbiter of constitutional entitlements, particularly under the *Canadian Charter of Rights and Freedoms* and section 35 of the *Constitution Act, 1982*. The capacity of governments to threaten judicial independence is well-recognized; it is equally understood that the state’s interest in controlling the judiciary is directed at enhancing the state’s control over its citizens. I argue here that public commentary about the judiciary’s newer role also has the potential to undermine judicial independence.

While on the surface any threat to judicial independence posed by public commentary may seem quite different from that deriving from the state, I suggest that there is a direct link between the two and between the emergence of the principle of judicial independence three hundred years ago and the contemporary debates about the “proper role” of the judiciary today. This link occurs along three interrelated dimensions: institutional struggles for dominance; the ideological underpinning of the institutional struggles; and the conception of citizenship and the legal status of citizens.

I first consider the meaning and significance of judicial independence. I then discuss how judicial independence and two important periods of constitutional change are related; the first period occurred three hundred years ago in England, culminating in the emergence of the principle of judicial independence, and the second occurred nearly twenty years ago in Canada, introducing a “new” role for the courts. I follow this comparison with consideration of how public commentary is potentially a threat to judicial independence, along with appropriate responses.

II. The Meaning and Significance of Judicial Independence

A. Placing the Principle in Context

As has often been observed, judicial independence is not an end in itself, but rather a means by which we realize other principles or values, especially the rule of law and judicial impartiality.² Nor is judicial independence the

¹ J. Deschênes, “Toward an Independent Judiciary: Canadian and International Perspectives,” in Shimon Shetreet and Jules Deschênes, eds., *Judicial Independence: the Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985) 514, 514.

² See A. Lamer, “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change,” (1996) 45 UNB L.J. 3, 7. Wayne Renke makes the extreme case that “[j]udicial independence, by itself, has no social value. It draws its value from its contribution to the ‘rule of law,’ a technology of conflict resolution which in turn draws its

property of the judiciary; rather they hold it in trust for those whom the judiciary are meant to protect. Judicial independence is not to allow judges to avoid a decrease in wages or paying into their pension plan; it is to ensure that they can safely insert themselves between the citizen and government and resist the intimidations of all "outsiders."³ Judicial independence is not about privilege, it is about obligation. Judicial independence imposes the responsibility to exercise judicial courage. Failure to exercise that courage makes a mockery of judicial independence.⁴ Failure to understand that the benefits of judicial independence rebound to the citizen may result in missing the crucial connection between contemporary attacks on the judiciary and resistance to the constitutional changes which underlie citizens' appeals to the judiciary.

value from our particular, more-or-less vague and more-or-less shared Canadian vision of the individual and common good:" *Invoking Independence: Judicial Independence as a No-cut Wage Guarantee* (Edmonton: Centre for Constitutional Studies (University of Alberta, 1994) 2 (footnote omitted). In *Tobiass*, the Court stated that the personal aspect of judicial independence "is sometimes called 'impartiality':" *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, para. 68. This is an unnecessary confusion. Cf. McLachlin J. (as she then was) in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, para. 57: "It should be noted that the independence of the judiciary must not be confused with impartiality of the judiciary . . . [T]he question in a case such as this is not whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the independence which is the underlying condition of judicial impartiality in the particular case."

³ *Beauregard v. Canada*, [1986] 2 S.C.R. 56, para. 21 (per Dickson, C.J.C.).

⁴ As it has been argued was the case in South Africa when the apartheid-era judges used the principle of judicial independence to justify their refusal to appear before the Truth and Reconciliation Commission: D. Dyzenhaus, *Judging the Judges, Judging Ourselves; Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998). As Dyzenhaus writes, the issue of the meaning of "justice" which the judges had sworn to uphold is at stake: either it can be synonymous with the law (in that case apartheid law) or with a broader understanding of the purpose of law as resting on natural justice principles: *ibid.*, 34. Ultimately, of course, these natural justice principles also have a normative base which could just as easily be the inherent superiority of the few compared to the many as it can be the inherent moral equality of all human beings. At the same time, the decision of judges not to appear before the Commission was complicated: *ibid.*, 39-40. The question really is whether judges should refuse to apply laws they perceive to be unjust; one might equally question doctors who participate in state-ordered executions. It raises the issue of the relationship between law and morality: are the moral obligations of legal actors *qua* legal actors different from our moral obligations as persons? Faced with an *incompatibility* between law and justice/morality, should judges resign or seek whenever possible to use the law to make a morally justifiable decision? See *ibid.*, 56-57, discussing the debate between two South African academics on the proper conduct of liberal judges in apartheid South Africa. For an assessment of judicial independence written during the apartheid period, see G.D. Andrew, "South Africa," in Shetreet and Deschênes, eds., *supra* note 1, 286.

It follows that judicial independence is not a shield behind which judges can shelter themselves from criticism: responsibility entails accountability.⁵ Sometimes accountability and independence are rather testy friends, since attempts to hold judges accountable might be seen as threats to their independence. Indeed, former Chief Justice Lamer maintained that “[a]t one level, the notion of accountability is fundamentally inconsistent with the maintenance of the rule of law and judicial independence.”⁶ Yet it is the notion of accountability which underlies much of the contemporary challenge to the judiciary: unelected judges, it is claimed, are usurping the role of the legislatures by striking down or rewriting legislation in direct contravention of our democratic principles.

Public debate of judges’ decisions is crucial to judicial accountability and to the maintenance of the integrity of judicial independence. Some would argue that it is one of the best ways to make judges accountable.⁷ Accountability does not mean that judges should make decisions on the basis of opinion polls; it does not change the requirement that judges should reach their conclusions on the basis of the evidence and arguments in the case before them. But it does mean that they must recognize that their decisions have an impact not only on the parties before them, but also in the world beyond. In a democracy, the efficacy and legitimacy of law relies on a widespread public acceptance, even while it can and must be able to countenance a certain level of disagreement. At the same time, when law is unjust citizens have an obligation to contest and dispute it. I do not claim, then, that either the law or the judges should be above criticism.⁸ Far from it, in fact. Nevertheless, it is important to understand the potential in challenges to the legitimacy of the judicial enterprise for pressuring not only judges into making different decisions, intentionally or otherwise, but also legislatures into removing certain decisions from the judiciary – or, for example, into implementing judicial “report cards” or performance reviews.⁹

⁵ Only four years ago, the former Chief Justice of Canada called judicial accountability a “somewhat novel notion.” Lamer, *supra* note 2, 4.

⁶ *Ibid.*, 13. Lamer went on to point out that there are already ways in which judges are held accountable, including complaints to the Judicial Council. (The other means are public hearings, requirement of reasons, criticism from various sources and the appeal process.)

⁷ M. Cappelletti, “‘Who Watches the Watchmen?’ A Comparative Study on Judicial Responsibility” in Shetreet and Deschênes, eds., *supra* note 1, 550, 560. At least this is so in countries with a strong tradition of freedom of expression. Cappelletti concludes that the model which best combines independence and accountability is a “responsive or consumer-oriented model.” The terminology may be questionable, but by it he means that judges are responsive to “society’s needs and aspirations” and judicial functions are seen within a “framework of a . . . democratic conception, that of the consumers of law and government.” *Ibid.*, 574-75.

⁸ See M.E. Turpel, “The Judged and the Judging: Locating Innocence in a Fallen Legal World,” (1991) 40 UNB L.J. 281.

⁹ S. Bourette, “Legal community warns against judicial report cards,” *The Globe and Mail* (May 16, 2000) A10. The MPP who introduced the proposed *Judicial Accountability*

The criticism provides support for legislative or executive actions which may more directly undermine judicial independence than simple public criticism itself.

As with most of our constitutional principles, however, the security of judicial independence relies on a political culture which considers it worth maintaining, on the one hand, and which is prepared to demand its integrity, on the other. Should our government suddenly decide to close the courts, what would be the result? Of what worth judicial independence then? We would hope for judicial courage to stand against such a flagrant disregard of our Constitution, but we would also have to look to ourselves for an assertion of *our* right to judicial independence or more broadly and accurately, the independence of justice. But this is the easy case. No less so do we need to maintain a vigilance against less dramatic incursions by government and those seemingly innocuous threats to judicial independence from non-governmental actors. At the same time, if judges blatantly ignore the constitutional strictures placed on them, we have a civic obligation to call them to account in order to maintain the integrity of the judicial role. Judicial independence has been said to depend on "the strength of tradition"¹⁰ which exists separately from or even without actual constitutional guarantees of the principle. True, LeDain J. concluded in *Valente* that tradition alone is not sufficient to ensure judicial independence and that legislative or constitutional provisions are required.¹¹ This is no doubt the case, but it remains that even constitutional guarantees can be ignored if there is no fear of public outcry when they are disregarded.

B. *The Scope of and Threats to Judicial Independence*

The *reason* for judicial independence in the modern Canadian state has been articulated thusly: "The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."¹² The *goal* has been succinctly phrased as follows: judges should be "placed in a position where [they have] nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that [their] best efforts will be devoted to the conscientious performance

Act in Ontario stated that the courts have "completely failed law-abiding citizens" and suggested that the list of sentences given by judges could be used for performance reviews of judges by government." T. Blackwell, "Lenient judges targeted by Ontario Tory's bill," *National Post* (May 5, 2000) A04. Also see S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in Shetreet and Deschênes, eds., *supra* note 1, 656; he refers to the activities of interest groups in monitoring judges.

¹⁰ *R. v. Valente*, [1985] 2 S.C.R. 673, para. 34, where LeDain J. quotes Howland C.J.O. in the Court of Appeal decision who in turn quotes a number of authorities about the importance of tradition.

¹¹ *Ibid.* at para. 36.

¹² *Beauregard*, *supra* note 3, para. 30.

of [their] duty.”¹³ But what does this mean in practice? There is widespread agreement on the most basic or minimal *indicia* of judicial independence and it is generally agreed that judicial independence is both an individual and a systemic, institutional or “collective” quality.¹⁴ Beyond that, however, the meaning of judicial independence covers considerable territory.

While judicial independence applies most obviously to independence from interference by the executive or legislature, the principle has also been related to the accessibility of the courts; administration by the judiciary, particularly with respect to matters related to adjudication; adequate institutional resources to ensure that cases are heard and decided in a timely fashion; respect by the general population and the rulers; obedience to judicial decisions; and not establishing “rival tribunals devoid of proper judicial safeguards and procedures.”¹⁵ Viewing judicial independence as a way to ensure that judges will be impartial leads to the inclusion in this list of the importance of judges’ recognizing their own predispositions.¹⁶ A report on judicial independence in

¹³ R. MacGregor Dawson, *The Government of Canada* (University of Toronto Press, 1954), 486, cited in M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), 2.

¹⁴ Appointment, tenure and fixed salaries are generally considered crucial to individual independence, while judicial involvement in the administration of the courts is particularly relevant to collective independence: see, for example, S. Shetreet, “The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration,” in Shetreet and Deschênes, eds., *supra* note 1, 393, 398-399. “[A]n individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.” Valente, *supra* note 10, para. 20. In Canada, a distinction has been made between administration related to adjudication (the assignment of judges, for example) and administration not specifically related to adjudication (the provision of physical plant), although this distinction is not always accepted.

¹⁵ J.S. Read, “The Constitution, Parliament and the Courts: Towards a Commonwealth Model,” in J. Hatchford and P. Slinn, eds., *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (London: Cavendish Publishing, 1999) 35, 36.

¹⁶ The Hon. Justice Dame Silvia Cartwright, “The Judiciary: Qualifications, Training and Gender Balance,” in Hatchford and Slinn, eds., *ibid.*, 39, 39: “The discussion must start from the premise that judicial independence is a principle which exists to enable judges to deliver impartial justice, freed from any improper pressure and influence from any source. As a rule, judges will think first of improper pressure which might be applied from an external sources such as parliament, the media or lobby groups. There is, however, another influence which I suggest is a more insidious, potentially harmful and complex obstacle to judicial impartiality. The predisposition to particular world views in every human being is the product of life experiences which influence decision-making.” The Working Group Report on Judicial Independence coming out of the Joint Colloquium on Parliamentary Supremacy and Judicial Independence . . . Towards a Commonwealth Model, a gathering of senior parliamentarians, judges, lawyers and academics from 20 Commonwealth countries, included judicial training among its other recommendations for Preserving Judicial Independence, such as teaching of the law, judicial skills and the social context, for example, ethnic and gender issues: “Working Group Report on Preserving Judicial Independence” in Hatchford and Slinn, eds., *ibid.*, 134, 136.

The Netherlands identified four aspects or "types" of the principle: "independence from the executive (the separation of power)" (that is, "constitutional independence"); "the independence of individual members of the judiciary based on the safeguards surrounding their tenure of office and removal from office" ("personal independence"); "the statutory scope which judges have for reaching decisions" ("statutory independence"); and "the extent to which judges actually feel themselves free to arrive at a given decision" ("substantive independence").¹⁷

The narrow view of the scope of the principle was articulated by Lamer C.J.C. who identified "three core characteristics of judicial independence" (security of tenure, financial security and administrative independence) and "two dimensions" (individual independence and institutional or collective independence).¹⁸ The more commonly held view is that the concept is broader. In *Lippé*, the respondents (who had been charged with contravening municipal regulations and the Québec *Highway Traffic Code*) argued that judicial independence "requires... independence from all influences, including in this case, the parties appearing before the municipal judges."¹⁹ Three judges of the Supreme Court disagreed, saying that "[t]he content of the principle of judicial independence is to be determined with reference to our constitutional tradition and is therefore limited to independence from the government" which should be considered the executive and the legislature, as well as "any person or body, which can exert pressure on the judiciary through authority under the state." This would include the Canadian Judicial Council, Bar Society and Chief Justices. The majority, however, rejected this definition and, relying on *Beauregard* and *Valente*, viewed judicial independence in a more expansive

¹⁷ B.J. Van Heyst, "The Netherlands" in Shetreet and Deschênes, eds., *supra* note 1, 240, 241. The report referred to was published in 1979 by "a working party of the Judicature Department of the Dutch Courts Association." Van Heyst states, "judicial independence means that in deciding cases that come before them, members of the judiciary are free from interference by the executive and legislative powers, political social pressure groups, litigants, and fellow members of the judiciary..." *ibid.*, 241. "Substantive independence" was defined in the 1982 International Bar Association Code of Minimum Standards of Judicial Independence" as "in the discharge of his [sic] judicial functions, a judge is subject to nothing but the law and the commands of his conscience." Shetreet and Deschênes, eds, *ibid.*, 388, but was included under the heading "Judges and the Executive."

¹⁸ *Provincial Judges Reference*, [1997] 3 S.C.R. 3, para. 118. Lamer C.J.C. continued, "the core characteristics . . . and the dimensions . . . are two very different concepts. The core characteristics of judicial independence are distinct facets of the definition of judicial independence. Security of tenure, financial security, and administrative independence come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity – the individual judge or the court or tribunal to which he or she belongs – is protected by a particular core characteristic." A core characteristic may be relevant to both dimensions.

¹⁹ *R. v. Lippé*, [1991] 2 S.C.R. 114. Legislative provisions permitting part-time municipal judges in Québec to continue their legal practices were unsuccessfully challenged as a contravention of section 11(d) of the *Charter* (and as a contravention of the Québec *Charter*). The Court held that the issue was more properly one of impartiality, not judicial independence.

way to refer to independence from any "outsider," the term used by Dickson C.J. in *Beauregard* in speaking for the five person bench on this point:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.

Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community."²⁰

Some understanding of the scope of judicial independence can also be gleaned from a listing of claims of interference with the principle in Canada and elsewhere. Some of the most obvious situations are in systems governed by martial law (under martial law in Bangladesh, for example, judges could be removed from office by the Chief Martial Law Administrator without a reason and the Chief Justice became the Chief Martial Law Administrator).²¹ Others, some of which may not be as obvious or as amenable to general agreement, include the use of judges in public inquiries,²² political favouritism in the appointment of judges,²³ contact by ministers with judges during a case,²⁴ assignment of judges to less favourable or preferable judicial districts,²⁵ mandatory judicial education,²⁶ retroactive repealing of legislation,²⁷ enacting

²⁰ Beauregard, *supra* note 3, paras. 21-22 (citation omitted).

²¹ M.A. Mutaheb, "Bangladesh" in Shetreet and Deschênes, eds., *supra* note 1, 39 and E. Vescovi, "Uruguay," in Shetreet and Deschênes, eds., *ibid.*, 374.

²² W.H. McConnell, "The Sacrifice of Judicial Independence in Saskatchewan: The Case of Mr. Mitchell and the Provincial Court," (1994) 58 Sask. L. Rev. 63, 66.

²³ As revealed by The Canadian Bar Association Special Committee on the Method of Appointment of Judges, *The Appointment of Judges in Canada* (Ottawa: The Canadian Bar Foundation, 1985), as cited in *ibid.*, 76.

²⁴ Friedland, *supra* note 13, 29-30.

²⁵ McConnell, *supra* note 22, 79.

²⁶ This was the view of former Chief Justice Lamer with respect to social context education and education on sentencing. The sentencing education was to have been carried out by the Attorney General: *ibid.*, 73. With respect to social context education, the Chief Justice said that "its goal, like that of other forms of judicial education, is to make us all better judges," but that suggestions it should be mandatory and "designed by institutions other than the judiciary" "must be vigorously resisted" as "counterproductive" and threatening to judicial independence "in a fundamental way." Lamer, *supra* note 2, 17.

²⁷ In Saskatchewan, for example, after enacting legislation establishing a commission to address the salaries of provincially appointed judges, the government repealed it when it did not like the Commission's recommendations: McConnell, *supra* note 22.

legislation to overcome a judicial decision retroactively,²⁸ permitting part-time judges to act as lawyers,²⁹ requiring judges to testify about their deliberations in a subsequent inquiry,³⁰ invasion of the core jurisdiction of the superior courts,³¹ inadequate resources to ensure security in the courtroom, inadequate resources to permit judges to order the sentence he or she thinks is appropriate, selective reporting by the media³² and personal attacks on individual judges.³³ Indeed, the role of judges in interpreting a constitutionally entrenched bill of rights has been called a "possible source of threat to judicial independence."³⁴

As with bias, the appearance of judicial independence must be upheld, even if there is not an actual interference. It has also been thought that public speaking by judges poses a problem for their perceived

²⁸ But see Lamer: among a number of ways in which judges are held accountable, he lists "the fact that the law as articulated by the courts can, as a general rule, be overridden by legislation duly enacted by the elected branches of government:" *supra* note 2, 13. Section 33 of the Charter, of course, contemplates that the legislature may override the application of certain sections of the Charter to legislation, both before and after judicial determination. "[A] respectable and consistent judicial appointments and elevations process . . . [and] [c]ontinuing judicial education" have also been identified as ways to ensure accountability: R.J. Scott, "Accountability and Independence," (1996) 45 UNB L.J. 27, 28. Richard Scott is Chief Justice of Manitoba.

²⁹ Lippé, *supra* note 19.

³⁰ Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to subsection 63(1) of the *Judges Act* at the Request of the Attorney General of Nova Scotia [The Donald Marshall Jr. Inquiry]. The Report can be found in (1991) 40 UNB L.J. 210.

³¹ *Provincial Judges Reference*, *supra* note 18, para. 9; also see *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725, para. 15.

³² P.L. Cumming, "Governing Judicial Conduct," (1996) 45 UNB L.J. 23, 25. On the media, also see the Hon. John Doyle, "The Well-Tuned Cymbal," in H. Cunningham, ed., *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Sydney: Judicial Commission of New South Wales, n.d. [1997]) 39.

³³ J. Tibbetts, "Attacks might blunt rulings: judge," *The Gazette* (Montreal) (August 22, 2000) A13.

³⁴ The Rt. Hon. Sir Ninian M. Stephen, "Judicial Independence - A Fragile Bastion," in Shétreet and Deschênes, *supra* note 1, eds., 529, 540. Stephen had held the position of Justice of the High Court of Australia and was Governor-General of Australia at the time of publication in 1985. Recently, the Chief Justice of Western Australia has expressed a rather different view, after discussing the "pros and cons" of an entrenched bill of rights: "I hope that the approaching millennium will see a rational and detailed national debate on the desirability, scope and content of a Bill of Rights. While much has been achieved through the development of the common law, the courts have had to pay a price for this in terms of criticisms that they have taken too much power to themselves. The guidance provided by a Bill of Rights would be one way of both assisting the courts as well as re-asserting the supremacy of Parliament. At the same time it will need to be acknowledged by Parliament that the courts will become more involved in the weighing of competing considerations, including those of a policy nature in the interpretation and application of a Bill of Rights, whether entrenched or unentrenched. This is what has occurred in Canada. While some decisions have been controversial, the status of the Supreme Court of Canada has been enhanced by its work in this area." The Hon Mr Justice David Malcolm AC, Presentation to Amnesty International, July 26 1998: <http://www.murdoch.edu.au/elaw/issues/v5n3/malcolm53nf.html>.

independence.³⁵ In *Tobiass*, the Supreme Court concluded that while a meeting between the Chief Justice of the Federal Court and the Assistant Deputy Attorney General in charge of civil litigation did not actually interfere with the independence of the judiciary, "the appearance of judicial independence suffered significantly as a result of [the meeting]."³⁶

In Canada, we have not been confronted by the dramatic attacks on judicial independence which have occurred elsewhere: threats to the physical safety or even the murder of judges³⁷ and the executive's blatant disregard for the principle.³⁸ The importance of judicial independence in a liberal democracy is

³⁵ Judges do speak more often in public than was customary in the past, but there is a general sense even among those in favour of "judicial speech" that some topics are off-limits, such as clearly political matters. For different views, contexts and issues to be considered with respect to judicial speech, see the opinions in "Forum: Judicial Free Speech," (1996) UNB L.J. 77. Also see K. Benyekhlef, "L'indépendance institutionnelle du pouvoir judiciaire: légitimité et participation au débat public," (1996) 45 UNB L.J. 37.

³⁶ *Tobiass*, *supra* note 2. In *Tobiass*, the trial judge was conducting the trial rather slowly. The Assistant Deputy Attorney General responsible for civil litigation at the federal Department of Justice met with the Chief Justice and expressed concerns, including the possibility that the government might be forced to take a Reference to the Supreme Court; following the meeting, the Chief Justice spoke to the trial judge. The Supreme Court concluded that "there is ample evidence that might lead a reasonable observer to conclude that the Associate Chief Justice [the trial judge] was not able to conduct the appellants' cases free from the interference of the federal Department of Justice and of the Chief Justice of his court:" *ibid.*, para. 76.

³⁷ Following are examples of news reports about attacks on the personal and institutional independence of the judiciary. The International Commission of Jurists has reported that between January 1999 and February 2000 "412 jurists suffered reprisals in 49 countries for carrying out their professional duties," and "16 jurists were killed, 12 disappeared, and 79 were arrested, prosecuted, or even tortured:" "Judges intimidated and attacked worldwide: report," Agence France-Presse (August 11, 2000) (this despite the fact that some totalitarian countries were not included in the survey). In Russia, judges have been murdered and have been permitted to carry guns to protect themselves: Alan Philips, "Russian judges given guns for self-defence," *The Daily Telegraph London* (January 15, 1998) 16 (the judges must pass eyesight and psychological tests). In Argentina, a federal judge and members of her staff investigating cases involving "disappeared" children were threatened: "Those searching for truth and justice must be protected," M2 Presswire (May 24, 2000). Judges in Israel hearing a case against a politician charged with corruption received death threats prior to rendering the verdict: "Death threats against judges hearing Deri trial," Agence France-Press (March 17, 1999).

³⁸ The government of Hong Kong has sought a "reinterpretation" of "politically sensitive" decisions of the Hong Kong Court of Final Appeal by the national legislature in Beijing: Canadian Press, January 26, 2000; also see Law Yuk Kai and P. Hwang, "Cause to Worry About the Rule of Law in Hong Kong," *International Herald Tribune* (June 24, 1999) 10. The constitution permits the legislature to provide a binding decision of the Basic Law in cases before the courts when requested by a court prior to final judgement in the case. In the particular case at issue, the request came not from a court but from the executive after a court had made its decision. In Trinidad, the Prime Minister named the Chief Justice as one of the people who were enemies of the governing party, following the Chief Justice's criticism that the executive was attempting to assume control of financial and administrative functions of the judiciary: "Derek Jones lambasts Panday," *The Gleaner* (April 4, 2000). Also see E. Olson, "Outside Experts Indict Malaysian Judiciary," *International Herald Tribune* (April 7, 2000) 4. (All reports found on Westlaw.)

well-established and, as a principle, is not challenged. We simply do not expect the government to close the doors of the court;³⁹ we do not expect even criminal organizations to threaten judges with death.⁴⁰ Our challenges are more sedate, more in keeping with defining the parameters of the rule of law than in disregarding it. Rather more controversial are the extent of the independence and its corollary, how judges may be made accountable while still retaining the independence necessary to allow them to fulfil their constitutional role.

The impact on the ability of judges to decide questions without fear of retribution by an executive prepared to ignore the rule of law or more subtly affect the careers of judges is not difficult to understand. Public commentary, however, is clothed in the protection of our commitment to freedom of speech and criticism of heated responses to judicial decision-making is harder to justify; and one may well query how the mere observations of private citizens can threaten the independence of the judiciary. Now, one might argue that it should be easy enough for judges to ignore the public outcry about their decisions if they wish to do so. In Canada, after all, they do not have to be elected.⁴¹ Nor, of course, can we restrict the right of those who want to condemn a particular decision or a tendency in the courts. More importantly, we should not want to do so. Yet we cannot ignore public commentary directed at the courts' legitimacy. These observations do not take place in a vacuum but must be understood in context. These commentaries, ostensibly about "judicial activism," are intended to exert indirect pressure on the Court; more importantly, however, they are intended to exert pressure on elected representatives to rein in the Court or to discredit its decisions. These criticisms are bolstered by the involvement of elected representatives themselves, including members of governing parties. In claiming to speak for "the people," these critics seek to undermine the foundational legitimacy of the judicial function. Executive or legislative interference with judicial independence and concerted public commentary designed to undermine the legitimacy of the Court in the eyes of the public share a similar concern: each is about undermining the capacity of the judiciary to perform its function as an intermediary for citizens, for enforcing status as a "citizen." Concerns about threats to judicial independence are, on this view, concerns about the treatment of citizens in a democratic state.

The current concerted challenge to the legitimacy of the Supreme Court in particular has arisen at a time of significant constitutional change which has given citizens another way to acquire civic entitlements when legislatures have

³⁹ By which I mean with guns, metaphorically or literally. At least one Canadian government has not been averse to "closing the doors" in order to save money: *Provincial Judges Reference*, *supra* note 18, para. 276.

⁴⁰ I do not believe that we are at that stage in Canada, but there is, I understand, an increasing concern about the physical integrity of judges: see Friedland, *supra* note 13, 27. Daphne Dumont, now President of the Canadian Bar Association, spoke about threats to the physical safety of judges in Vancouver in November 1999 at a conference entitled *Transforming Women's Future: Equality Rights in the New Century*.

⁴¹ The election of local judges in a number of American was inherited from the era of Jacksonian democracy, a rather more radical notion than our own version.

failed to address their concerns. This is the sub-text underlying the cry of “judicial activism” and attempts to undermine judicial decision-making. I suggest that there is a parallel with the original emergence of the principle of judicial independence. In the discussion which follows, I will call the changes in England roughly concomitant with the original development of the principle of judicial independence “the first constitutional transformation” and those occurring since 1982 in Canada “the contemporary constitutional transformation.”

III. *Judicial Independence and Constitutional Transformations*

Evolving recognitions of “individual rights” or “individual autonomy” and “citizen” or “citizenship” have been significant macro constitutional developments in England from roughly the 1200s forward, particularly during the seventeenth and eighteenth centuries, imported into Canada at its inception and subject to dramatic new developments in 1982. The gradual emergence of judicial independence, arising from the struggle for dominance between the monarchy and the Parliament, was coincident with the rise of the concept of the individual as an autonomous legal being meriting protection from the state by an institution independent from other state institutions. Similarly, our contemporary understanding of judicial independence must be informed by more recent shifts in the concept of citizen and the citizen’s place in the constitutional order. As legal categories become blurred (that of marriage springs to mind), social status gains in importance. Thus “citizenship” – defined as recognition of entitlement to the goods and benefits of society, by access to what “matters” – is as important a sociological or political category today as it is a legal category. As our courts, and the Supreme Court of Canada, in particular, have been responsible for protecting the citizen against the abuses of government, so they now have some responsibility for determining the “appropriate” extension of full “citizenship” to those who have been marginalized as citizens (broadly defined) and in various ways excluded from the civic society. Judicial independence is thus necessary to both the citizen seeking protection from an arbitrary state and the citizen claiming a civic entitlement in accordance with constitutionally mandated standards.

A. *The “First” Constitutional Transformation*

I do not intend to rehearse in any detail the developments which culminated in the establishment of the principle of judicial independence. Nevertheless, it is important to appreciate that the conditions underlying judicial independence are not arbitrary or abstract, but are rooted in a history of actual interference in the judicial function. While arising out of the tumultuous struggle for supremacy between the monarch and the Parliament and the evolution of a democratic political regime to replace an autocratic one, the development of judicial independence also accompanied the development of another equally significant principle: recognition of the liberties upon which citizens could base claims against government. The meaning of individual rights – and of the identification of citizenship (in the broad sense) – during this formative period was admittedly a far cry from our understanding

today. The important point is the relationship between the growth of the autonomous citizen and the development of the concept of judicial independence.

The first regular "judicial" body was established by Henry II in 1178.⁴² With the judges reliant on the monarch for their positions and driven into corruption by low and irregular salaries (as were other civil servants of the king), "by the eve of the Revolution of 1688, the courts had been brought very low indeed in public and professional esteem."⁴³ Caught in the conflict between the monarchy and Parliament over which of them would be sovereign, judges could find themselves impeached or worse from deciding in favour of one or the other.⁴⁴

The preconditions of an independent judiciary were clearly established by the Act of Settlement in 1701. It provided that judges (of the common law courts) would serve subject to good behaviour and could be removed upon address to both houses of Parliament; salaries were to be fixed. Even so, until 1760, judges (along with other royal appointees) resigned on the death of the monarch. With statutory rejection of *this* requirement, we come to "the modern position in England on security of judicial tenure."⁴⁵ Judicial independence has since become so embedded within the British constitutional framework that Professor Lederman concluded that while Parliament was supreme, its privilege "though it goes very far, [did] not extend to the point that Parliament could constitutionally overthrow the independent judicature as a co-ordinate institution of first importance in maintaining the rule of law."⁴⁶

⁴² Professor Lederman's 1956 article remains the definitive work on the development of the separate judiciary and of the principle of judicial independence in England: W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev 769 and 1139. The judicial entity of 1178 became the Court of Common Bench or Common Pleas which "[w]ithin a century . . . was clearly established as a separate body sitting apart from the king under its own chief justice" with a specialized jurisdiction in private law matters: *ibid.*, 772-73.

⁴³ *Ibid.*, 781. By the fourteenth century, judges (except for members of the Court of Exchequer) were chosen from the ranks of the new profession which had arisen to argue in the courts and thus were trained in the discipline of law: *ibid.*, 775-76. By this period, too, although the monarch was no longer able to make judgements in place of the judges or to give direction to the judges, it was still within the royal power to appoint and dismiss judges, a power exercised by the Stuart kings and then again with the restoration of the monarchy after the Commonwealth.

⁴⁴ The Rt. Hon. Lord Justice Brooke, "Judicial Independence - Its History in England and Wales" in Cunningham, ed., *supra* note 32, 93, 96-98; J. Miller, "Crown, Parliament, and People" in J.R. Jones, ed., *Liberty Secured? Britain Before and After 1688* (Stanford: Stanford University Press, 1992) 53, 64.

⁴⁵ Lederman, *supra* note 42, 785. It should be noted that until 1799 the monarch could decide who would receive a pension: Friedland, *supra* note 13, 3-4.

⁴⁶ Lederman, *ibid.*, 808-809. That understandings of the conditions necessary to judicial independence may differ is indicated by the position of the British Lord Chancellor who serves as minister of justice as a senior member of Cabinet and is Speaker of the House of Lords at the same time as being President of the Supreme Court of England and Wales and who in that capacity has no security of tenure at all. As a member of government, the Lord Chancellor may lose his or her position by removal by the Prime Minister in a cabinet shuffle or in loss of position through a general election. This arrangement runs counter to our modern Canadian understanding of the judiciary as constitutionally and practically distant from the executive and the legislature.

In British North America, the pace by which the principle was established differed from colony to colony.⁴⁷ But the judicature provisions of the *British North America Act, 1867*, now *Constitution Act, 1867*, reveal "the intention to reproduce superior courts in the image of the English central royal courts." The basic provisions underlying judicial independence with respect to the superior courts therefore have characterized Canada since its inception.⁴⁸ These are: that judges hold office during good behaviour and are removable only by joint address to the Governor-General by both houses of Parliament⁴⁹ and that Parliament shall fix salaries and pensions.⁵⁰ These guarantees, then, are a response to a very real problem: the control of judges by the executive and the temptations facing poorly or erratically paid judges. The issues raised today about appointment, tenure and salaries and benefits are more subtle, perhaps, than those in the early and mid-parts

⁴⁷ For example, according to Professor Lederman, the development of judicial independence had begun in Nova Scotia with a 1789 statute "remarkable for the extent to which, at this early date, it approached the contemporary English guarantees of judicial independence." *ibid.*, 1153. Elsewhere, however, judges were "pawns" in the game of dominance fought by the governor who appointed them and the local elected assemblies who paid them: *ibid.*, 1143. By 1849, the modern trappings of judicial independence in the Canadas and in Nova Scotia were in place: *ibid.*, 1151-57. On the early system in British North America, also see McConnell, *supra* note 22, 67-72.

⁴⁸ Professor Lederman questioned the constitutionality of the provisions for removal of judges because the *Judges Act* provided that a judge who, as the result of an inquiry, was found to be unable to carry out the duties of the office, would cease to be paid: *ibid.*, 1162-1163. This is no longer the case, however. Section 66 of the *Judges Act* now provides for a leave of absence with salary. Professor Lederman also questioned whether the procedure contemplated by the *Judges Act* would constitute an alternative to removal of judges by Parliament, concluding that it seemed to contemplate removal by the federal executive. Professor Friedland concludes that most likely the only way in which a judge would be removed today is by address to Parliament: Friedland, *supra* note 13, 77.

⁴⁹ It is not clear whether judges can be removed for reasons other than unacceptable behaviour or what constitutes unacceptable behaviour, however: Friedland, *ibid.*, 78-80.

⁵⁰ In Canada, many rights claims are raised before the inferior courts, particularly in the criminal law area, and many civic entitlements are determined by administrative tribunals (by persons needing social benefits, for example). In a modern state, the independence of members of tribunals is a not insignificant question, but not one I am able to address here: see most recently, see *Hewat v. Ontario* (1998), 37 O.R. (3d) 161(C.A.). The independence (or alleged dependence) of inferior courts has, of course, been the subject of a number of decisions of the Supreme Court and of other courts in recent years. The conditions of appointment and removal and the setting of salaries in the inferior courts are quite different from those applying to superior court judges, being for the most part under the ultimate control of the executive. The Supreme Court has held that sections 99 and 100 of the *Constitution Act, 1867* (security of tenure and salary) "are generally regarded as representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension," but that they may not be appropriate for provincially appointed judges: *Valente*, *supra* note 10, para. 26. Under the *Provincial Judges Reference* the provinces are to establish salary commissions which are independent, effective and objective; they are intended to "depoliticize" the remuneration process; the government is not bound by the recommendations, but could be required to justify any significant deviation from the recommendations: *supra* note 18. In short, the conditions underlying judicial independence may be different for different tribunals. On the history of the use of commissions, see McConnell, *supra* note 22, n.43.

of the previous eight hundred years, but they nevertheless have their roots in the same sources of control or pressure over the judiciary.

But what did it matter that judges and the judiciary were independent? One reason was certainly the mutual desire of the monarch and Parliament to obtain "vindication" from the courts, since "[i]n such circumstances . . . a forum that was subservient to the royal will could not be accepted by Parliament or by subjects seeking legal redress before an impartial and authoritative resolver of legal disputes."⁵¹ In broad terms, this struggle was about the locus of political supremacy and whether Britain would be subject to autocratic or democratic government.

At the same time, the status of the "subjects" was evolving. The fight to preserve and enhance Parliament was also a fight to (re)instate rights for the small group who could claim them.⁵² Rights were unequally distributed, particularly on the basis of class and sex, and "[a]lmost without exception those who acted consciously in the defense of constitutional liberties and the rule of law also showed themselves to be oppressors of the Catholic minority."⁵³ Nevertheless, the changes in the status of the individual and the recognition of civil liberties,⁵⁴ hinted at in 1215 for a very few, gradually extended to others; within the context of the decline of feudalism, emergence of a central political authority and a mercantile or cash economy permitting enhanced mobility and individual identity, these liberties demanded an institution which could serve as intermediary between the exercise of individual rights and abuse of power by the executive (monarch) and Parliament, both of which were capable of arbitrary actions, including the death of opponents and acts of attainder. Thus "[b]y 1688–89 individuals' liberty had become their property, inherited from their English ancestors and safeguarded by their English law. . . . By 1689 a disposition of mind had become fixed in which the security of the subjects' liberty, law, and property was to be a condition of the monarch's right to rule, the yardstick of the government's right to exist."⁵⁵ People could be deprived of their rights only by process of law; the conditions for a judiciary sufficiently independent to ensure that the process of law was followed were in place within a few years following the Glorious Revolution.

⁵¹ McConnell, *ibid.*, 67.

⁵² J.R. Jones, "Introduction," in Jones, ed., *supra* note 44, 1, 3.

⁵³ J.R. Jones, "The Revolution in Context," in Jones, ed., *ibid.*, 11, 17.

⁵⁴ One theory was that the liberties were "restored" rather than newly acquired or confirmed and that they derived from the "ancient constitution" rather than being conceded by kings. Under the ancient constitution, the people and the rulers ("legal kings" since their authority relied on the consent of the people) were subject to reciprocal obligations in an agreement "framed with the people's participation and consent." J. Phillip Reid, "The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries," in E. Sandoz, ed., *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Columbia and London: University of Missouri Press, 1993) 147, 150 (references omitted).

⁵⁵ H. Nenner, "Liberty, Law, and Property: The Constitution in Retrospect from 1689," in Jones, ed., *supra* note 44, 88, 88.

The tools of democracy and individualism have evolved to an extent that we are reluctant to speak of the triumph of "the people" when Parliament finally won the struggle with the monarchy. Still, by 1688, shortly before the statutory codification of the conditions of judicial independence, the liberties of citizens – or at least some liberties of some citizens – had taken hold sufficiently to ground far more extensive and important developments later.⁵⁶ Despite an unforgivable gloss on a very complex history, this deceptively simple point emerges: that the maturing of the principle of judicial independence was linked with the decline of one institution and the rise of another, the triumph of democratic ideology and a new understanding of citizenship under which citizens could make legal claims against arbitrary government action. No longer "merely" moral rights or one side of a political compact, the liberties had legal status, whether common law or based in statute.⁵⁷ Thus, rather than petitioning the very institution which had denied rights, the autonomous citizen had a claim which courts, a separate and independent institution, could enforce.

The contemporary constitutional transformation – the changes to the Canadian Constitution in 1982 – resulting in constitutionalized civic entitlement has been so far more "civil" and far less tumultuous than the first constitutional transformation to which I have just referred. Yet the enactment of the *Canadian Charter of Rights and Freedoms* and the inclusion of Aboriginal rights in section 35 and the codification of judicial review in section 52 of the *Constitution Act, 1982*, mark a change in the relation between citizen and government and of the status of claims to entitlements reflective of, even if not equivalent to, that arising from the momentous struggle between the monarch and Parliament. The existence of an independent judiciary is as crucial in its own way to the contemporary transformation as it was to the first.

B. *The Contemporary Constitutional Transformation*

In Canada, the judicial role under federalism, coupled with the judicial appointment process, has always given rise to challenges to both the impartiality and independence of the federally appointed judiciary; these challenges are often from provincial governments or regional interests, but they may also be from disaffected groups who consider that their lives – lived away from the country's geographical, political or sociological centre (or, at least, perceived to be so lived) – are not taken into account by the courts. The existence of a Supreme Court intended to develop a national system of law has inevitably been a source of discontent given the bifurcated notion of nationhood in the geographical landmass called Canada. Add to that the dissatisfaction engendered

⁵⁶ Thus it has been said that the Glorious Revolution "took on the mythic, populist stature . . . providing a bridge between seventeenth-century struggles against tyranny and the democratic struggles that had just begun." K. Wilson, "A Dissident Legacy: Eighteenth Century Popular Politics and the Glorious Revolution," in Jones, ed., *ibid.*, 298, 334.

⁵⁷ J.C. Holt, "The Ancient Constitution in Medieval England," in Sandoz, ed., *supra* note 54, 22.

by the fact that decisions about pre-1982 Aboriginal claims were made by courts schooled in western legal principles and norms and there is, without the Charter and section 35 of the *Constitution Act, 1982*, significant potential for dissatisfaction with the Supreme Court in particular as an institution. The Charter jurisprudence, of the Supreme Court of Canada in particular, has not elicited totally new criticism, therefore, but has merely provided new fodder for denunciation of the Court.⁵⁸ At the same time, the *Constitution Act, 1982* has imposed a distinctively new function on the judiciary which has loomed large in challenges to the judiciary both at the institutional and individual levels.

The criticism of judicial decision-making is couched in terms of institutional integrity. While hardly of the tenor of the monarchy-Parliament conflict out of which judicial independence emerged, contemporary public commentary claims to be about the constitutional relationship between the judiciary and elected representatives. Or, as the argument goes, it is about how the judiciary are usurping the function of the democratically elected representatives. It is not surprising, therefore, that the Court has been described as a monarchy.⁵⁹ Today, however, the ideological dispute is not about democracy or autocratic government, but about the *nature* of democracy and the institutions which are active participants in the democratic process. Against the notion of democracy as "majoritarian" rule, a populist understanding of the role of legislatures, has arisen a conception of democracy which permits access to the determination of civic entitlement at different points in the process and which is designed to balance the limits of so-called majority rule. As the emergence of judicial independence was related to the grounding in law of citizen claims against arbitrary government action, so our contemporary constitutional transformation has been about the redefinition of citizenship and the means by which citizenship as civic entitlement can be enforced.⁶⁰

It has been argued that the constitution is now one of citizens, rather than of governments,⁶¹ and that certain groups of citizens can claim "constitutional

⁵⁸ "Criticism" is the polite word; in some cases, at least, "attacks" or "disparagement" is a more appropriate term to describe the kinds of commentary with which I am concerned here.

⁵⁹ T. Byfield, "As Australia votes on ousting the monarchy, we in Canada are zealously creating a new one" (1999) 26 *Report Newsmagazine* 60; M. Harris, "Royal Waste of Time: Louise Arbour's Appointment to the Supreme Court Shows that Our Judiciary is our Royalty," *The Edmonton Sun* (June 27, 1999) C21.

⁶⁰ I have explored this notion in greater detail in "Recognizing Substantive Equality as a Foundational Principle," (1999) 22 *Dal. L.J.* 5. An understanding of this notion of citizenship for aboriginal peoples can be found in J. Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court," *supra* 15. Also see R. Johnson, "Justice La Forest, Sexual Orientation and Citizenship" in R. Johnson and J.P. McEvoy, *et al*, *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Supreme Court of Canada Historical Society, 2000) 289 for a slightly different but related notion of citizenship.

⁶¹ A.C. Cairns, "The Constitutional World We Have Lost," in D.E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change. Selected Essays by Alan C. Cairns* (Toronto: McClelland & Stewart, 1995) 97.

ownership.”⁶² These groups include (simplistically) women (increasingly diversified), First Nations, racialized communities, gays and lesbians, persons with disabilities and “official-language minorities” (to use Alan Cairns’ term), all of whom have made claims both for greater inclusion and for a reconfiguration of the norm, including the perception of difference and recognition of intersectionality. As Cairns has said, these “minorities”, “especially their elites, now see themselves as part of the constitution. They see their fate as affected by the evolving meaning attached to particular constitutional clauses. They monitor the developing judicial interpretation of their clauses.”⁶³

There is some dispute about the extent to which the 1982 changes have changed the Canadian constitutional dynamic and whether the role of the judiciary has changed dramatically. There is no question that the Supreme Court and courts in general affected policy-making prior to 1982⁶⁴ and certainly the parameters of federalism were influenced by the decisions of the Judicial Committee of the Privy Council and the Supreme Court of Canada. Nor are cases under the *Charter* or section 35 of the *Constitution Act, 1982* the only cases in which the Court’s decisions may have an effect on notions of citizenship in the sense to which I am referring here. Shauna Van Praag’s contribution to this volume indicates how multicultural citizenship has been advanced in non-constitutional areas of law, as well as by means other than law.⁶⁵ Similarly, a case such as *Dobson v. Dobson*⁶⁶ can be read as helping to define the status of “the reproducing woman” as citizen. The implications of holding a mother liable for injuries suffered by her child while *in utero* through her actions would have had repercussions for many other areas of a pregnant woman’s life, as the majority clearly appreciated. Put tersely, her claims as “woman” to civic entitlements would have been curtailed by her status as a “reproducing woman.”

Even so, I tend to the view that there has been a fundamental shift in the grounding of claims. Rights claims can be more broadly understood as claims to greater civic entitlement; they are claims to full inclusion in the civic society and yes, sometimes, to change the existing shape of that society. For example,

⁶² R. Gibbins, “The Impact of the American Constitution on Contemporary Canadian Constitutional Politics,” in M.C. McKenna, *The Canadian and American Constitutions in Comparative Perspective* (Calgary: University of Calgary Press, 1993) 131, 141.

⁶³ A.C. Cairns, “Constitutional Minoritarianism in Canada,” in Williams, ed., *supra* note 61, 119, 120.

⁶⁴ See, for example, R. Silberman Abella, “The Judicial Role in the Development of Law: The Impact of the Charter,” in J.F. Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 268. For instance, as Justice Abella notes at 271, “In Canada . . . the family property laws confirmed by the Supreme Court of Canada in 1973 in *Murdoch v. Murdoch* were completely revised in 1978 by the same court, without benefit of legislative reform – or of the Charter – in *Rathwell v. Rathwell*.”

⁶⁵ S. Van Praag, “Identity’s Importance: Reflections of – and on – Diversity,” *infra* 605.

⁶⁶ *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753. A child sued his mother for injuries incurred as a foetus when a car driven by his mother was in an accident.

claims by women around reproductive freedom must untangle the complex interrelationship between the ideology of biological determinism which has been so important in depriving women of full citizenship and women's claims that society recognize the reality women's reproductive capacity. The current debate over the definition of marriage is really about inclusion and exclusion in a ceremony and public representation which has been determined to "matter" in Canadian society. There is in some ways nothing new about these claims and many of them could have been made before 1982; certainly most of them could have been sought through lobbying the legislature. What has changed is that there is a new grounding for the claims, just as when the liberties of the first constitutional transformation became legally enforceable rights. Furthermore, "Charter values" and Charter cases have infused notions of entitlement outside the strict parameters of Charter rights.

Contemporary citizenship depends not only on the right to speak freely, to be free from arbitrary treatment by the state and other civil liberties (to be what I have termed a legally autonomous citizen), but on the right to make claims to those things which the society has decided matter and which define full membership in the society. Just as the first constitutional transformation did not arise fully formed from any one event, our Canadian version follows decades of demographic change, increased economic mobility and extension of political rights, particularly over the past century or century and a half. It is quite true to say that the extension of civic entitlement was until recently achieved primarily through the "government by discussion" which is the genius of representative government.⁶⁷ Quite simply, this is no longer the case. Suffice it to say here, that with respect to the great debate about the appropriate relationship between courts and legislatures, my view is that they are complementary and have long been complementary, something which I can see as being only to the good. In my view, neither legislatures nor courts have always been reliable in recognizing the needs of the marginalized and disadvantaged, and it has always seemed to me that it is healthier to have two institutions which at least sometimes counteract each other than relying solely on one. My views derive not from a particular affection for the courts, but from what I believe to be a healthy cynicism about both institutions. That said, the *Constitution Act, 1982* has accorded legitimacy to a more equal partnership between the legislatures and the courts to address a range of claims that do indeed have ramifications for the shape of civic society.

⁶⁷ R. Knopff and F.L. Morton, "Does the Charter Hinder Canadians from Becoming a Sovereign People?" in Fletcher, ed., *supra* note 64, 277. Also see F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 149: "Our primary objection to the Charter Revolution is that it is deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy . . . the willingness to engage those with whom one disagrees in the ongoing attempt to combine diverse interests into temporarily viable government majorities."

These ramifications underlie the virulent objections to the judiciary's role today. The protagonists in constitutional claims are usually governments and the citizen claimants, just as was the case with respect to the liberties of an earlier time. But while there were no doubt occasions on which third parties were in some way involved in those earlier claims, claims arising under the *Charter* or section 35 of the *Constitution Act, 1982* bring third parties into the fray. There are different reasons for this. Aboriginal land title claims, for example, are complex and far-reaching, and certain aboriginal rights which give priority to (for instance) First Nations fishing may well affect the actual fishing practices and expectations of other groups. The integration of newly recognized aboriginal claims and understandings of citizenship with existing expectations reliant on older notions of civic entitlement requires negotiation and mediation through a filter which acknowledges both. In other cases, however, the impact is not direct, since the consequence of a successful claim is merely an extension of recognition to similar civic entitlements. To return to the marriage example, the extension of capacity to marry to people who currently cannot be legally married does not deprive those who are married of *their* capacity to marry; but it does deprive them of the right to say that they are the only ones who can make a claim to something society has said is very important: the status of being married. Where the judiciary are involved in remapping the social topography, it is those whose own social location seems to be threatened – not by a loss of position, but rather by a loss of an *exclusive* right to be in that position – who have the most to gain from a judiciary reluctant to carry out its mandate. This is, I suggest, the very important sub-text lurking beneath much of the concerted attempt to undermine the legitimacy of the judicial institution, that is the contemporary challenges to judicial independence.

IV. *Public Commentary as a Challenge to Judicial Independence*

Concern about the judicial role, whether under a rights-oriented constitutional regime or not, is one shared by persons from all political persuasions.⁶⁸ Some commentary, including much of the feminist critique, has been directed at what is perceived to be the particular biases of judges arising from their until quite recently fairly homogeneous backgrounds. The predominant condemnation today, in contrast, tends to bewail the usurping by the judiciary of the legislative function.⁶⁹ And certainly one must recognize that "judicial activism" cuts both

⁶⁸ This criticism preceded the enactment of the *Charter* and continues today. E. McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Dordrecht: Martinus Nijhoff, 1986) 293; C. Baar, "Judicial Activism in Canada" in K.M. Holland, ed., *Judicial Activism in Comparative Perspective* (London: Macmillan, 1991) 53, 58; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (rev. ed.) (Toronto: Thompson Educational Publishing, 1994). K. Roach refers to sources of criticism in "The Continuing Dialogue Between the Supreme Court and Canadian Legislatures," *infra* 481.

⁶⁹ One assessment suggests that the attacks on the judiciary are merely another way for "the right wing" to advance an economic agenda: C. Thompson, "Courting the Free Market" (1998) 32 *This Magazine* 6.

ways: it can be both progressive and reactionary.⁷⁰ Furthermore, criticism of judicial decision-making and of judges themselves comes from all quarters: "ordinary" citizens, political or media commentators,⁷¹ judges,⁷² legal academics⁷³ and politicians.⁷⁴ Some of this criticism is pointed and vigorous,

⁷⁰ K.M. Holland, "Judicial Activism in the United States," in Holland, ed., *supra* note 68, 12. See also F.L. Morton, "The Politics of Rights: What Canadians Should Know About the American Bill of Rights" in McKenna, *supra* note 62, 107.

⁷¹ For examples of comments in the popular press, see C. Yu, "See no evil: moral taboos tumble as a judge uses the charter to legalize child porn," (1999) 10 *British Columbia Report* 38; P. Jackson, "Supreme Court's Been Hijacked Right Here: Interest Groups and Slick Lawyers are Swaying the Course of Justice," *The Calgary Sun* (May 4, 2000) 15 ("Chiefly, the problem – and one which will one day diminish respect for the court to the point it will have to be brought to heel and revamped – is justices have taken over the role of politicians."); "Supreme self-restraint," *National Post* (April 7, 2000) A19 ("Canadians have been outraged as the courts have used the Charter to tweak or abolish dozens of laws, including the abortion law, the Lord's Day Act, restrictions on pornography and voluntary school prayer, and laws that kept incompetents from fighting fires (as in the case of British Columbia firefighter Tawney Meiorin [not in fact a Charter case]); Ian Hunter, "Judge-bashing is here to stay," *National Post* (March 30, 2000) A19; "Decision set Canadians against one another," *The Daily Gleaner* (February 18, 2000) ("Judges are complaining about the growing criticism they face and challenges to their judicial independence. It is little wonder when a decision of the highest court in the land [the *Marshall* decision holding that Marshall had a treaty right to earn a moderate livelihood eel fishing] encourages a breakdown of law and order resulting in violence in society."); R. Leishman, "Out-of-control judges threaten rule of law," *London Free Press* (May 12, 2000) A14 ("Instead of upholding the law as defined by precedents and legislative enactments, judges now routinely change the rules of law to accord with their own personal political preferences."); all found on <http://www.newscan.com>.

⁷² For possibly the most notorious example, see the comments of McClung J.A. in *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (Alta. C.A.), paras. 23-63. At para. 56, McClung J.A. suggested that the judicial approach to constitutional issues was a threat to judicial independence: "Only judicial independence will suffer if we continue to push the constitutional envelope as we have over the past 20 years. An overridden public will in time, demand, and will earn, direct input into the selection of their judges as they do with their legislative representatives. There will be renewed calls for a supplementary process wherein their judges' performance, even the continuance of their employment (as it will be characterized) can be periodically reviewed. Those forces are already gathering." McClung J.A. also personally attacked Justice L'Heureux-Dubé for her comments in the Supreme Court's decision in *Ewanchuk* about his decision at the Court of Appeal: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, rev'g (1998) 212 A.R. 81. With respect to the public condemnation of L'Heureux-Dubé J. by McClung J.A. following *Ewanchuk*, see "Women's Council to file complaint about judge McClung" *Canadian Press Newswire* (March 1, 1999). McClung J.A. subsequently apologized.

⁷³ The most comprehensive analysis is found in Morton and Knopff, *supra* note 67.

⁷⁴ For example, the Saskatchewan Justice Minister in 1987 "told the Progressive Conservative annual convention in Regina that lenient judges 'in ivory towers' had better start paying attention to the will of the people: McConnell, *supra* note 22, 79. McConnell continues, "[a]lthough [the Minister] continued that there was little recourse, he was not in fact, without informal sanctions. Non-concurring judges could be reassigned to remote areas of the province as punishment for themselves and an example for others or increases in salary levels could be withheld for the whole corps of judges. Newspapers reported that judges were apprehensive that the Minister with executive responsibility for their court was interfering with their essential freedom to decide cases.""

but constructive; some of it is best described as mean-spirited and lacking civility; but some of it reaches a level or comes from a source which is more troublesome because it questions the legitimacy of judicial decision-making and for this and other reasons raises the spectre of inappropriate interference or pressure on the judiciary.

The critics condemn particular decisions, including the positions taken by particular judges. They also more generally argue that the judges do not have the right to overturn legislative enactments. From time to time they attack individual judges at a personal level. Taken individually, these comments may seem merely to make a contribution to the debate about judicial decision-making and the role of the courts, a debate which in itself should not threaten judicial independence. Seen, however, as a comprehensive challenge to the judiciary, a certain type of public commentary is meant to influence legislatures and fuel demands for more control over judges. In short, it has the potential to lead us back to the more traditional threats to judicial independence emanating from the executive and legislature. They are also designed to undermine public confidence in the judiciary, although this does not appear to have yet occurred.⁷⁵

One commentator expressed concern over fifteen years ago about the impact of public attacks on the judiciary, saying that “[t]he increasing popular pressure on judges creates continuous tension between judicial independence and impartiality and public accountability of judges in a democracy.” Indeed, he went on, “[e]xcessive popular pressure on judges, like too facile procedures and too malleable standards for judicial removal and discipline, might have a chilling effect on judicial independence.”⁷⁶ Although speaking specifically of undue controversy around “isolated” examples of inappropriate judicial statement or conduct, Shimon Shetreet suggests that we must be careful about public criticism of judges because

[e]xcessive popular pressure and irresponsible journalism, hungry for sensational pieces, might put the judges in an unbearable position and is likely to threaten the

⁷⁵ See J.F. Fletcher and P. Howe, *Public Opinion and the Courts* (Institute for Research on Public Policy, May 2000). Some of the results of this study can be found in T.G. Heintzman, “The Top Threats to the Canadian Judicial System: The Press Isn’t One of them” presented at the Canadian Bar Association Meetings in Halifax in August 2000. One newspaper report about the study suggested that this support was lagging behind reality: “The mud may not have stuck to the Teflon court in Prof. Fletcher’s polls so far, but the criticism in the media, and from the opposition Reform Party and provincial governments – especially in Alberta and Ontario – is a relatively new phenomenon.” P. Brunner, “McLachlin’s choice: aristocrat or democrat. The new chief justice takes office on the cusp of war between the legislatures and the judiciary,” (1999) 26 *Report Newsmagazine* 18. Also see Morton and Knopff, *supra* note 67, 17.

⁷⁶ Shetreet, “Judicial Independence,” *supra* note 9, 657. LeDain J. quotes Shetreet in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976) as saying that “[i]n modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured.” *Valente*, *supra* note 10, para. 17.

independence of the judges who very often have to act against popular wishes and to protect dissenters and members of minority groups.⁷⁷

In the area of criminal law, one provincial court judge has suggested that public pressure has increased for "more severe sentences and harsher treatment of offenders."⁷⁸ Judges must be able to take into account "the social climate in order to make judgments and impose sentences which are relevant to the public and which reflect current realities," while nevertheless being "free from and immune to public pressure if they are to perform their tasks properly."⁷⁹

Because the current challenges to the judiciary are often, if not primarily, related to the debate about the appropriate role of the judiciary, it is important to consider how recommendations for clarifying or balancing the relationship between the courts and the legislatures may themselves threaten judicial independence. I refer to only two here, the increased use of section 33 of the *Charter* to insulate (in the short term) legislative determinations from judicial review and the call for public hearings as part of the judicial appointment process. Kent Roach, for example, proposes that legislative recourse to section 33 would, under certain circumstances, be more candid than rewriting legislation and would from a certain perspective leave the court's decision intact and effective when the override has elapsed.⁸⁰ He is, I believe, seeking a principled way of ensuring that both the legislatures and the courts are recognized as interpreters of the constitution. Of course, it is beyond debate that section 33 is part of our constitutional framework. Indeed, judges themselves have reminded legislatures of this option.⁸¹ The potential of section 33 to undermine constitutional guarantees is enormous and this potential is kept in check only by the force of public opinion.⁸² Yet the more section 33 is used, the less its use would raise concerns. The threat of invocation of the override as a more regular part of the constitutional regime, would, I believe, have a chilling effect, even if unconsciously, on the courts' willingness to recognize constitutional claims or on how extensively they would recognize claims. Extensive use of the override in the face of, for example, determinations by the Supreme Court of Canada of civic entitlements would undermine the authority of the Court and in

⁷⁷ Shetreet, *ibid.*, 656-57.

⁷⁸ Cumming, *supra* note 32, 23. Cumming's fear was realized in the "trail balloon" of "report cards" on sentencing by provincial court judges floated in the guise of a private member's bill by a Tory backbencher in Ontario: *supra* note 9.

⁷⁹ *Ibid.*, 23. Acknowledgement of this has been controversial: Chief Justice Lamer (as he then was) was strongly criticized for saying that he concurred in the decision to strike down the abortion provisions in the Criminal Code in 1988 because the majority of people in Canada did not consider abortion reprehensible: "S. Parker, 'A politician on the bench: Canada's chief justice explains his novel theory of constitutional law-making by judges,'" (1998) 25 *Alberta Report* 6-7.

⁸⁰ Roach, *supra* note 68.

⁸¹ For example, with respect to a specific circumstance, see the comments of Major J. in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 197.

⁸² P. Hughes, "Section 33 of the Charter: What's the Problem Anyway? (Or, Why a Feminist Thinks Section 33 does Matter)," (2000) 49 UNB L.J. 169.

doing so, help satisfy the objectives of the kind of public commentary about which I have expressed concern in this article.

The call for public hearings as part of the judicial appointment process has been longstanding because it seems to be a way to deal with perceived federal government biases, as well as the more recent concern about perceived judicial activism.⁸³ Similarly, the provinces have argued for a role in the appointment of Supreme Court justices.⁸⁴ The public hearings might explore not only candidates' "qualifications" narrowly defined, but also their "judicial philosophy."⁸⁵ Recognizing that the appointments process might well be improved, in my view the qualifications for competent judging are far more complex than could be established at a public hearing. Furthermore, while we would all hope that candidates for judgeships would not tailor their responses to the mood of the inquiry committee, human nature might exercise its subtle influence and candidates might either give a false impression of their "judicial philosophy" or, once appointed, might feel constrained in dealing with concrete cases in front of them. Less cynically, one would hope that the more thoughtful candidates would find that abstract discussions of their "philosophy" would be wholly inadequate to convey how they would address particular cases before them. To the extent that the current appointments process is political, one suspects that public hearings could only make it more so. It may seem odd that those who complain that judges are too political seek to render the appointment process more political, but this reflects the difference between characterization of unwanted decisions and imposing greater political control – and a populist veneer – over the appointment process.

To return to my main point, it is first of all important to understand the sub-text behind these contemporary challenges to judicial independence. They are in reality a challenge to the new constitutional regime implemented in 1982 and to the implications for the changed social landscape. So what to do? I begin with the premise that any approach which would actually stifle such commentary is unacceptable and in its own way, dangerous. The offences of contempt and of "scandalizing the court" have been available to address inappropriate remarks or conduct in or outside the courtroom or disobedience of judicial directions.⁸⁶

⁸³ For a review, see Friedland, *supra* note 13, 233ff. His own recommendation was for a committee/hearing hybrid which was designed to minimize the likelihood of a hearing: *ibid.*, 256.

⁸⁴ "Ontario wants say in top court picks," *The Daily Gleaner* (October 25, 1999) A5.

⁸⁵ See, for example, P. Manning, "Parliament, not judges, must make laws of the land," *The Globe and Mail* (June 1, 1998) A 21. Another politician of similar persuasion put the point more bluntly: during the campaign for leader of the Canadian Alliance, Tom Long "criticized judges for trying to write law instead of interpret it. He said as prime minister he would appoint Supreme Court judges who understood those limits, as opposed to 'activists.'" W. Walker, "Long takes aim at crime and punishment," *The Hamilton Spectator* (May 27, 2000) D05.

⁸⁶ Lederman, *supra* note 42, 799-800. Friedland briefly reviews the use of these powers and concludes that "the scope of scandalizing the court has been substantially cut down:" *supra* note 13, 31-32.

Whatever the merits otherwise, I hope – and believe – courts would be reluctant to apply these remedies to public discourse of the type I am referring to here. Similarly, while the courts have taken the route of limited bans on discussion of certain cases or aspects of cases in the media, many of these have been controversial and would be even more so if they were directed at stifling criticism of judges.⁸⁷ There is also nothing to be gained in this context (if there is in any context) by explicit constitutional entrenchment of the principle of judicial independence, since many of the comments are made by private individuals.⁸⁸

Vituperative or disparaging public commentary is thus not as easily addressed as, for example, legislative restrictions on the judiciary. Solutions to the threat to judicial independence must be found in a political culture which includes recognition of the importance of judicial independence to our democratic process as it has evolved, and in the response of the courts themselves, particularly that of our highest court.

One wonders at times whether our critical institutions need to remind themselves of their own function in society. Commentary which threatens judicial independence is primarily communicated through the media, for example. The media have a crucial role to play in our society; at the same time, however, they have a great deal of power and with that comes an obligation to carry out their function in a responsible way. Too often one wonders whether “sound” and “visual” bites have a higher priority than considered analysis.⁸⁹

⁸⁷ For example, see the broad pre-trial ban made by Kovacs J. in *R. v. Bernardo*, [1993] O.J. No. 2047 (Q.L.). Also see the ban ordered in *R. v. Murray*, [1999] O.J. No. 4143 (Q.L.): Murray was ordered to stand trial on a charge of obstruction of justice, the reasons for which were the subject of a publication ban.

⁸⁸ Friedland discusses this possibility at *supra* note 13, 23-26, rejecting it as unnecessary (he comes to the opposite conclusion about entrenchment of the Supreme Court itself). Entrenchment is considered problematic because, among other consequences, it would involve the judges in determining “the boundaries of their own power.” P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 97, quoted in *ibid.*, 26. Friedland further quotes Russell: “Canadians might well be cautious about making changes in the Constitution which will give judges a more powerful role in defining their own power and shift power away from those who are politically accountable and represent other interests in society.” This may well be water under the bridge. The principle of judicial independence was acknowledged to be an unwritten constitutional principle by Dickson C.J. at para. 29 of *Beauregard* as one of the elements of a Constitution “similar in Principle to that of the United Kingdom.” In the *Provincial Court Judges Reference*, Lamer C.J. (as he then was) held that the unwritten principle applied to provincially appointed judges in civil cases, a position vigorously rejected by La Forest J. in part on the basis that it involved the courts in deciding their own powers.

⁸⁹ Section 33 of The International Bar Association Code of Minimum Standards of Judicial Independence, developed in 1982, reads as follows: “It should be recognized that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges:” Shetreet and Deschênes, eds., *supra* note 1, 391.

Similarly, legal and other academics have a particular responsibility to address societal concerns, to bring attention to wrongs, to make proposals for change and improvement; academics have a luxurious position in our society and ought in many ways, more than we usually do, act as society's conscience. Is it too much to expect that our critiques should be well-developed, well-formulated and based on sustained analysis?

The greatest responsibility to ensure that public commentary does not diminish judicial independence lies with the judiciary themselves. In this regard, it has been suggested elsewhere that the courts themselves have a responsibility to ensure that the public understands the meaning and importance of judicial independence.⁹⁰ It seems that members of the Supreme Court of Canada have been taking the opportunity to explain its role rather more often lately, perhaps motivated by a need to show the invalidity of the charges of "judicial activism." I see these as reassuring conversations with the public, both to allay concerns and to forestall measures to address perceived problems which might have a detrimental effect on the Court's independence. In my view, it would be inappropriate, however, for the Court to defend its individual decisions or to find itself engaged in a tug-of-war with its opponents. Equally, I say with the greatest respect, that members of the Court should be wary of conceding too much of the field in order to defray condemnation of their decisions; explanation of the judicial role is one thing, diminishing its constitutional mandate is another.

Most significantly, it is crucial that they, particularly the justices of the Supreme Court of Canada, not be deflected in carrying out their appropriate constitutional role. While it is appropriate for the Court to indicate that it recognizes the partnership between itself and the legislatures, it is also important that the Court not present itself as subservient to the legislatures. There is, with respect, a difference between arrogance and resiling from the Court's fundamental place in the constitutional structure. With respect, I believe that members of the Court must guard against the transformation of understandable individual sensitivity into institutional over-sensitivity.

The Court's part in maintaining its own independence requires clarity and openness; it may also require personal courage. But we all have an interest in judicial independence, whether we agree with particular decisions or not. Those of us in the legal community especially, as practitioners or academics, or as representative institutions, have an obligation to challenge threats to judicial independence whether they come from government or from individuals just as much as we have an obligation to engage in constructive criticism of judicial decisions and from time to time individual judges. This in fact happened in response to the private Ontario bill to implement "report cards" for provincial

⁹⁰ Doyle, *supra* note 32, 39. The judges of the Canadian Supreme Court have already begun this process to some extent. Benyekhlef argues that judicial independence relies on judges' participation "aux débats fondamentaux qui agitent la société démocratique:" *supra* note 35, 57.

court judges, and to a lesser extent with respect to some of the recent vilification of the judiciary and individual judges.

V. Conclusion

I reiterate that judicial independence does not belong to the judges, but to the crucial role that they play in a democracy where citizens are entitled to certain liberties and where they are guaranteed certain safeguards against an overzealous state. Citizens have looked to the judiciary for protection from the state and from other powerful interests for three hundred years. I must emphasise that in my view the traditional concerns underlying judicial independence, the supervision of the relationship between the individual and the state, in particular, remain as important as ever. It is a mistake to underestimate the capacity of government to take oppressive action or to gradually whittle away at the underpinnings of democracy. Generally speaking, Canada is characterized by a political culture in which governments respect the constitution and accept judicial decisions restraining their actions under that constitution. But whether invoking the War Measures Act or restraining free speech in order not to embarrass foreign dignitaries at international gatherings, the potential to forget the demands of democracy lies close to the surface.

But if we define "justice" – as I believe we do in Canada and under our constitutional regime – as the extension of citizenship, the recognition of full humanity as measured by access to goods and benefits of the society, then the implementation of justice requires the use of law in the extension of rights. Citizens now see in the judiciary an institution with a responsibility to contribute to redefining the contours of civil entitlement and "citizenship" in Canada. Judges can perform that role only if they themselves are not vulnerable to pressure. Judicial independence is not a means of avoiding scrutiny. It places on judges the obligation to keep the state in check, yes, but it imposes other duties, as well: to be impartial in a way which includes recognition of the partiality of law; and to recognize the need for accountability.

Criticism of judicial decision-making and at times of judicial behaviour is part of democracy. Those speaking in favour of judicial independence today may well be critical of a particular decision tomorrow. Truth to tell, it is not always easy to decide when criticism crosses the line from fair comment to become a threat to independence; or when apparently individual intemperate remarks are in fact part of a larger campaign with the goal of encouraging greater government control of the judiciary, perceived as increasingly "acceptable" if the public's confidence in the integrity of the judiciary is undermined. At the same time, we need to be aware that with greater public interest in judicial proceedings, at least in part because of high profile cases, debates about our judicial system are – appropriately – carried out in public. More significantly, the attacks on judges, their decisions and the *institution* of the judicial branch itself are part of a larger political debate and take on the trappings, including the language, of a political debate about the evolutionary nature of democracy and

constitutionally mandated civic entitlements. It is a debate about the pushing of the borders of citizenship, just as the emergence of judicial independence accompanied the emergence of the legally autonomous citizen.

While we cannot allow vigilance against more traditional threats to judicial independence to diminish, we also need to recognize that judicial independence in the future will be far more a tool of political engagement than it has been in the recent past. The potential threats to judicial independence should be understood as attacks not only on the judiciary themselves, but also on how we define citizenship and civic entitlement under the Canadian constitutional regime. Even so, concern about threats to judicial independence cannot be focussed on just one aspect of the judicial role; once undermined, the capacity of the judiciary to carry out all its tasks becomes subject to doubt.