

Democracy, Judicial Independence and Accountability

Ian GREENE*

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* Professor, Department of Political Science, York University, North York, Ontario.

The purpose of this paper is to investigate some of the assumptions behind judicial independence, judicial accountability, and democracy in Canada. Some of these assumptions may be put as follows :

- Because Canada is a democracy, the law-making and law-refinement function is the responsibility of the legislative and executive branches of government, and so judges are democratic to the extent that they limit the use of their discretion as much as practically possible when interpreting the law;
- The increased policy-making function assigned to judges by the Charter of Rights has increased the opportunity for judicial discretion, and has therefore led to increased pressure for judicial accountability; and
- Some of these demands for increased accountability threaten judicial independence.

However, some of the thinking behind these assumptions has sometimes been unfocused, unrealistic or inaccurate. By examining these points more closely, the result may be a better understanding of both judicial independence and accountability.

My analysis will refer to two studies I have participated in during the past few years. The first, the *Canadian Appeal Courts Project*, involved interviews with about 100 of Canada's appellate court judges, including eight Supreme Court of Canada judges, between 1991 and 1995.¹ The second was a study of leave to appeal decisions by judges in the Federal Court of Appeal that I conducted for a Toronto lawyer in the early 1990's.²

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1. My collaborators in this project were Carl Baar (Brock University), Peter McCormick (University of Lethbridge), George Szablowski and Martin Thomas (both of York University). Part of the analysis below is from a draft *Final Appeal* (Toronto : Lorimer), the book resulting from this study which is scheduled to be published in November, 1998. I conducted about 50 of these interviews myself, and the other interviews were conducted by my colleagues.
 2. A. Dekany has kindly given me permission to refer to the results of this study. The study was conducted on behalf of a client who was pursuing a constitutional claim that Canada's refugee-determination procedures violated the rights to equality and fundamental justice in the Charter of Rights.

I. JUDICIAL POLICY-MAKING IN A DEMOCRATIC CONTEXT

Judicial policy-making is not necessarily anti-democratic. Judicial discretion is unavoidable and plays a greater role in judicial decision-making than is generally believed. However, judicial discretion can be viewed as a healthy part of a vibrant democracy if that discretion is exercised with the fundamental principles of democracy in mind.

It is useful to review the strands of thought concerning the relation between judicial activism and democracy in Canada because underlying this intellectual activity there is a great divergence of views about the nature of democracy, as well as some just plain fuzzy thinking.

In the nineteenth century, following the example of the Austinian positivists, it was generally thought in common law countries that good legal reasoning had reached such a state of perfection that intelligent, experienced judges who followed the correct procedures would nearly always arrive at the "correct" legal answers to their cases. Thus, there was no conflict between the judicial role and democracy as judges merely applied the law as enacted by elected legislatures.

This school of thought, which had been adopted, among others, by A.V. Dicey, was attacked in the 20th century by "legal realists" who argued that legal rules can never be that clear, and that therefore the individual predisposition of judges must necessarily affect their decisions — the more so when interpreting constitutions because constitutions are written in general language to cover a broad range of issues. But even legal realists considered that judges acted with discretion only in a small minority of cases; discretion was a factor only in so-called "hard" cases. These are cases where the law is unclear because potentially conflicting laws govern a specific situation, or no law clearly applies, or a law is poorly drafted, or because the law is worded very generally. But even in these hard cases, there are "better" and "worse" outcomes according to most legal practitioners, depending on whether the judge follows the commentator's preferred reasoning process.

The problem for democracy, from the realist perspective, was a small number of cases in which judges exercised discretion. But the era of the Charter of Rights has led to a great deal of *angst* among Canadian academics about the role that judges ought to play in democratic institutions, and the post-1982 literature on the Charter and the judicial role could easily fill a book case. The Charter has made judicial discretion more visible, and therefore, for the first time to any significant extent, troubling.

Peter Russell, now professor emeritus at the University of Toronto, has done more than anyone to encourage the analysis of the Canadian justice system from a political science perspective. From the 1960's to the present time, Russell has produced a steady stream of influential books and articles that have provided deep insights into the nature of judicial discretion that results in "judicial power."³ From his perspective, judicial power

3. For example, the introductions to the cases in P.H. Russell, *Leading Constitutional Decisions*, 4th ed. (Ottawa : Carleton University Press, 1987), and later P.H. Russell, R. Knopff & T. Morton, *Federalism and the Charter : Leading Constitutional Decisions — A New Edition*

is manifest primarily, but not exclusively, in hard cases and at higher levels of court. The Charter of Rights changed the degree, but not the nature of judicial power. Because judges do sometimes have a profound influence on public policy,⁴ and because such influence is unavoidable, Russell advocated more democratic approaches to the selection of judges (he was the first chair of Ontario's Judicial Appointments Advisory Committee), more effective judicial training programs, and better mechanisms for ensuring judicial accountability.

Prior to 1982, Russell was sceptical about whether the Charter of Rights would result in the enhanced protection of human rights for Canadians because he did not consider that judges were any better equipped than elected legislators to make policy decisions about how to protect human rights (with the possible exception of legal rights issues like procedural safeguards in criminal prosecutions). Moreover, Russell pointed out that the legal-judicial system is not nearly as well designed to make good public policy in the area of human rights as the ministerial-legislative system is. Russell's post-1982 analysis of how the judges have handled Charter jurisprudence is that they haven't done as badly as feared by Charter sceptics like himself, but neither have they done as well as the Charter enthusiasts had predicted. For Russell, the Charter is here to stay, and what political scientists can usefully do is to encourage the development of a more representative, socially sensitive, and democratically accountable judiciary.

Michael Mandel, in his controversial book *The Charter of Rights and the Legalization of Politics in Canada*,⁵ argued that the Charter had resulted in the "legalization" of politics. What he meant was that some of the most important public policy decisions had been taken out of the realm of democratic debate, and placed into the hands of an elite class of unelected, unaccountable, and socially privileged individuals. Mandel claimed that nearly every important Charter decision has resulted in enhancing the status of social elites in Canada — of which judges and lawyers are an important segment — thus further diminishing the lot of the underprivileged. From Mandel's perspective, the legal-judicial process itself is biased to favour the rich and powerful. Litigation is expensive, and lawyers with the highest tariffs tend to win the most cases. The rules of evidence filter out factors that are important to the underprivileged, factors that would have had a greater chance of being heard in the democratic legislative process. Politics has become more "legalized," more the preserve of the advantaged classes. Mandel's advice to those with a progressive social policy agenda is to ignore the Charter

(Ottawa : Carleton University Press, 1989); P.H. Russell, "Judicial Power in Canada's Political Culture" in M.L. Friedland, ed., *Courts and Trials — A Multidisciplinary Approach* (Toronto : University of Toronto Press, 1975); P.H. Russell, *The Judiciary in Canada — The Third Branch of Government* (Toronto : McGraw-Hill Ryerson, 1987) and *The Clash of Rights* (1996).

4. P.H. Russell, "The Supreme Court Decision : Bold Statescraft Based on Questionable Jurisprudence," in P.H. Russell, R. Décary, W. Lederman et al., *The Court and the Constitution* (Kingston : Institute of Intergovernmental Relations - Queen's University, 1982), article on the anti-inflation case.
5. M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto : Wall & Thompson, 1989) 2nd ed., (Toronto : Thompson Educational Publishing, 1994).

and avoid the courts, and concentrate on effecting policy changes through the democratic process of elections and legislatures.

Rainer Knopff and Ted Morton, whose book *Charter Politics*⁶ was published in 1992, are the best-known critics of the Charter from the centre-right of the political spectrum. Like Mandel, they lament that the Charter has transferred power from democratically-elected legislatures to judges, but from their perspective this development is unfortunate because judges may become the unwitting pawns of either left-wing or right-wing social activists. They argue that the Charter is a two-edged sword — it can be used to slash either to the right or to the left — and the history of the *U.S. Bill of Rights* has shown that the pendulum tends to swing back and forth in response both to historical trends and the impact of particular personalities on the courts. Knopff and Morton are considered to be on the right because of their scepticism about the value of social policy intervention by government. They argue that policy activists have no moral right to impose their designs on society, and hence they advocate less government intervention, whether decreed by legislative or executive branches, or by the courts.

Knopff and Morton articulate the danger inherent in judges over-stepping what ought to be the legal bounds of their authority and becoming "oracles" of social policy. When oracular judges consider that they ought not to be limited by the intent of the framers of the constitution, a dangerous combination is struck. These judges are giving themselves a *carte-blanche* to re-write the Constitution from the perspective of their own limited wisdom, something that is not only foolhardy but undemocratic.

Christopher Manfredi's 1993 contribution to this debate, *Judicial Power and the Charter*, argues that all branches of government — the judiciary, the legislature, and the executive (cabinet and public service) — have responsibility for interpreting the Constitution, including the Charter. The Charter recognizes this joint responsibility in large measure because of the infamous Section 33, the "notwithstanding" clause. This is the clause that gives Parliament or a provincial legislature the power to enact a law so that it can operate "notwithstanding" the sections of the Charter dealing with fundamental freedoms, legal rights and equality rights, for five-year renewable periods. Thus, Section 33 is a signal that cabinets need not role over and play dead in the face of important judicial interpretations of the Charter. Rather, cabinets ought to be encouraged to review these decisions and to challenge them, if necessary, through the introduction of a Section 33 override into the appropriate legislation.

Manfredi argues that the wording of the Charter gets the democratic balancing act about right, giving appropriate powers to each branch of government. However, as a result of an historical accident, Section 33 has lost, at least temporarily, its legitimacy. As it has turned out, the first time that Section 33 was used in a politically significant way was by the Quebec government of Robert Bourassa in 1989. Bourassa spearheaded Bill 178, which used the Section 33 override to maintain the application of the provisions in Quebec's Charter of the French Language that forbade the use of English on outdoor commercial signs, in spite of an explicit decision of the Supreme Court of Canada that Bill

6. R. Knopff and T. Morton, *Charter Politics* (Toronto : Nelson, 1992).

178 violates the Charter.⁷ The reaction of anglophone Canada to this maneuver was so negative that Section 33 was roundly condemned — unfairly, from Manfredi’s perspective — and this dynamic became a major factor explaining the eventual failure of both the Meech Lake and Charlottetown Accords.

If it had not been for the Bill 178 fiasco, Manfredi argues that Section 33 would likely have been used by the Government of Canada to counteract what many consider to have been two bad decisions of the Supreme Court of Canada : the *Askov*⁸ decision of 1990, and the *Seaboyer*⁹ decision of 1991. Prior to these decisions, most of the Supreme Court of Canada’s decisions on the Charter had met with general approval. Even the *Morgentaler* decision¹⁰ — that struck down the sections of the Criminal Code dealing with abortion — did not preclude the Parliament from introducing another abortion law that would have respected the procedural rights of women more effectively.

It is important to note that in 1997 the Parti Quebecois government of Lucien Bouchard decided not to re-enact the Section 33 override to protect the French-only outdoor sign provisions. Over the years since the controversy over Bill 178, public opinion in francophone Quebec had come to the conclusion that Bill 178 had been too draconian, and that the Supreme Court of Canada’s recommendation for protecting the French language — French could be predominant on outdoor signs but other languages need not be prohibited — was acceptable. The use of the Section 33 override had resulted in a democratic public debate about the appropriateness of the override in this circumstance — something that Section 33 was intended to do through its built-in five year expiry period. It may be that public opinion in anglophone Canada may yet come to accept that Section 33 can be useful both to provide a counterbalance to judicial decisions in a democratic context, and to promote democratic debate about its use.

Patrick Monahan has argued that in order to resolve the dilemma of the possibility of judicial fiat in a democratic setting, the courts ought to make decisions that wherever possible reinforce the democratic process.¹¹ If judges are faced with two alternate ways of resolving an issue, both of which could be considered legally correct, then they ought to choose the route that results in the greatest public input into the issue. For example, if the issue before a court is whether a particular municipal zoning by-law is within the jurisdiction of a municipality to enact, and if there are sound legal arguments on both sides of the issue, then the courts ought to consider whether the by-law promotes democracy through broad and fair public participation, or whether it restricts democracy. If it turns out that the by-law promotes democracy, then this factor ought to be considered as a point in favour of upholding the by-law. Appealing as this approach sounds, however,

7. *Ford v. A.-G. Quebec*, [1988] 2 S.C.R. 712, and *Devine v. A.-G. Quebec*, [1988] 2 S.C.R. 790.

8. *R. v. Askov*, [1990] 2 S.C.R. 1199.

9. *Seaboyer v. The Queen*, [1991] 2 S.C.R. 577.

10. *Morgentaler, Smoling and Scott v. The Queen*, [1988] 1 S.C.R. 30.

11. P. Monahan, *Politics and the Constitution : The Charter, Federalism and the Supreme Court of Canada* (Toronto : Carswell, 1987).

the problem remains that there may not be many cases where considerations about democratic participation are relevant to the outcome of a judicial decision.

David Beattie's contribution to the democracy-vs-the courts debate is to argue that in the current complex political environment, issues of individual fairness are liable not to get the attention they deserve from elected politicians. Therefore, a transfer of some decision-making power to the courts is not a bad thing in order to prevent the legitimate rights claims of individuals — claims legitimized by laws enacted by democratically-elected legislatures — from falling through the cracks.¹² Judicial participation in policy-making is therefore essential to preserve fundamental democratic norms. But judges ought to approach constitutional adjudication in a way that reinforces the logic of the Constitution. They do so by ensuring that legislatures have chosen the best-available policy alternatives, and by ensuring that legislative advances are not outweighed by cuts to personal rights and freedoms. Beattie argues that as long as there is an improvement in the process of selecting Supreme Court judges that is more accountable and responsible, there will be no inherent contradiction between judicial review and the democratic process.

While many of the courts-vs-democracy studies have tended to focus on judges, Alan Cairns has pointed out that a major impact of the Charter has been to fortify the political power of groups previously marginalized by the political process. These "Charter Canadians" include women, seniors, the disabled, visible minorities and to some extent aboriginal peoples. All of these groups had an impact on the wording of the Charter in the early 1980's; the Trudeau government formed alliances with them to get the Charter past the barriers being erected by a coalition of anti-Charter provincial premiers. Because of their involvement in this process, members of these groups have come to see the Charter as an entrée to political influence — through the possibility of judges supporting their claims — that they could not have achieved as easily through the elected legislative process.¹³

One thing this review of the courts-vs-democracy debate indicates is that the nature of democracy itself is often taken for granted as having something to do with policy-making through elected legislatures (the fact that the executive branch almost completely dominates the legislative branch is rarely considered). More thought needs to be given the nature of democracy itself in order to produce a clearer analysis of what role courts ought to and do play in the democratic process.

12. D. Beattie, *Constitutional Law in Theory and Practice* (Toronto : University of Toronto Press, 1995).

13. A.C. Cairns, *Charter versus Federalism : The Dilemmas of Constitutional Reform* (McGill-Queen's, 1992).

II. DEMOCRACY AND JUDICIAL DECISION-MAKING

The approval of laws by elected legislatures and the selection of political leaders through elections do not in themselves define democracy. These are merely two of the visible manifestations of an underlying principle. I argue that the basic principle from which the notion of democratic government arises is the principle of mutual respect. Democracy can therefore be thought of as government based on the principle of mutual respect.¹⁴

Mutual respect is the notion that every human being in a society is important and equally deserving of respect. Every person is an end in himself or herself, not to be seen merely as a means to achieve someone else's goals. Everyone's life is important. The right of all persons to develop their potential and to make choices about their lives without interfering with the similar right of others is fundamental, along with the responsibility to contribute to the political conditions that make the application mutual respect possible. Among contemporary political philosophers, John Rawls comes closest to describing what I mean by mutual respect because he emphasizes consideration for the needs of the least advantaged in society when democratic institutions must choose among competing notions of social equality.¹⁵

Definitions of democracy often begin with the principle of majority rule through fair and open elections, but the selection of governments through election is only one among several sub-principles of the basic axiom of democracy : mutual respect. The other important sub-principles include :

- decision-making through consensus where possible and practical, and if not according to majority-rule;
- respect for the principle of social equality, which means (in Ronald Dworkin's words) that "individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them;"¹⁶
- respect for minority rights, meaning that minorities are owed the same concern and respect as majorities;
- respect for fairness, meaning both sides in a dispute about the application of law have a right to a fair hearing before an impartial tribunal;
- respect for the rule of law;

14. This argument was developed in I. Greene and D. Shugarman, *Honest Politics : Seeking Integrity in Canadian Public Life* (Toronto : Lorimer, 1997). This approach differs from that of Monahan in that democracy is not thought of merely as participatory democracy, and from that of Beattie in that there is no particular interpretive method held out as being superior to others.

15. J. Rawls, *A Theory of Justice* (Cambridge : Harvard Univ. Press, 1971).

16. R. Dworkin, *Taking Rights Seriously* (Cambridge : Harvard Univ. Press, 1977) at 180-183.

- respect for the value of freedom, or the right of citizens to determine their own priorities and to develop their human potential except in a way that interferes with the equal right of others to do so (including freedom of expression and of the media, which were described in the 1938 *Alberta Press* case as "the breath of life for parliamentary institutions");¹⁷ and
- respect for integrity, which I take to mean honesty implemented through compassion.

From this perspective, the alleged tension between democracy and judicial decision-making is less of a conundrum. One of the purposes of courts in a democratic context is to resolve disputes about the application of the law such that when there is judicial discretion, it acts so as to promote important sub-principles of democracy such as procedural fairness and the impartial application of the law, and through these the democratic principles in the Constitution such as social equality, protection of minority rights, and freedom of expression.

What becomes important, then, is how well the courts perform functions involving discretion, rather than whether the law-making aspects of judicial decision-making can be considered as representing the views of the public at any particular point in time. As long as the judicial process is organized to make the promotion of mutual respect as much of a reality as possible, then there is no necessary contradiction between the law-making role of courts, and democracy. There will always be legitimate debates about whether the existing rules and practices controlling the interplay between the legal-judicial system, the legislative-executive system and the public results in the optimization of democratic norms, but the question about whether judicial law-making is democratic becomes much less important.

III. JUDICIAL DISCRETION

My position is that in the realm of hard decisions where an appeal court is split, it is frequently the case that neither the majority nor the minority decision can be held up as the "one right decision" according to an objective analysis of the law. From a legal perspective, the majority decision is the "right" one. However, minority judges and judges writing separate concurring opinions also believe that their opinions are legally sustainable, and in most cases this is correct. Academics will argue over which interpretation of the law is the most persuasive to them, but this academic discussion rarely demonstrates that there is clearly "one right answer" to a particular issue of interpretation.

In holding that it is often the situation regarding hard cases that there can be a number of competing decisions that could all be considered theoretically "correct" according to law, I am not adopting a relativist perspective that holds that no particular philosophical stance is better than any other. Nor am I assuming the view of legal

17. *Reference re Alberta Statutes*, [1938] S.C.R. 100.

positivism, which claims that standards of right and wrong are determined solely by elected legislatures, and the only role of judges is to interpret accurately the legislature's intent. My position is that judicial decisions in hard cases can be placed on a continuum from excellent to poor, with the best decisions most in accord with the principle mutual respect and the sub-principles associated with it.

In order to give due regard to the principle of deference to the majority, judges need to do their best to give effect to the intent of elected legislatures in their decisions, except when to do so would violate the principles of social equality, the protection of minority rights, and fundamental freedoms as outlined in the *Canadian Charter of Rights and Freedoms* and the common law. They also need to act with integrity, which includes attempting to be and to appear as impartial as humanly possible.

From this perspective, judicial decisions are "right" to the extent that they pursue the principles of mutual respect behind democracy. But there may be several right answers — answers that all attempt to implement mutual respect but that are different from each other, perhaps because of different weights given to each of the principles of democracy derived from mutual respect. Keep in mind that there is probably an infinite number of "wrong" answers, but that the potential number of "right" answers is much more limited.

What determines the precise nature of a particular set of right answers developed by different judges is the fact that their personalities, backgrounds and legal educations are different, and especially those aspects of their personal histories that affect how they reason and write about the nature of justice and democracy. Therefore, good judges may disagree about what constitutes the correct legal interpretation of a particular set of laws as applied to a specific fact situation, without this disagreement implying that any of them are necessarily acting incompetently or in bad faith.

I suspect that most Canadian judges, lawyers and legal academics may not be as open as I am to the idea that there are often several possible solutions to legal dilemmas in hard cases that could all be considered potentially "correct."¹⁸ It may be that many jurists have been more heavily influenced by the legacy of the Diceyan notion of the rule of law than they might be willing to admit in casual conversation. Dicey's writings on the nature of the rule of law provided the most thoroughgoing analysis of this important concept up to that time.¹⁹ The basic idea of the rule of law — that public officials in democracies may act only according to laws authorized by elected legislatures, and that the law applies equally to everyone unless inequalities are built into the law itself — is fundamental to any democracy because it reflects the principles of deference to the majority, equality, minority rights and freedom. However, Dicey developed a more

18. For example, my interviews with appellate court judges in the provinces and the Federal Court of Appeal indicated that most of these judges were frustrated by the number separate concurring decisions released in recent years by the Supreme Court of Canada. My interviews with Supreme Court of Canada judges indicated that most of them were aware of this desire for "one right answer," but most thought that it would be intellectually dishonest to move in that direction because in most cases there were, in fact, several competing "correct" answers.

19. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London : MacMillan, 1960).

specific version of the rule of law that claimed first that there was only ever one "correct" interpretation of the law, and second that in countries that had adopted the British parliamentary system of government, the judges of the superior courts ought to have the final say as to the interpretation of the law, subject, of course, to amendment through legislation. He had no time for separate administrative courts because they would allow several "right answers" to legal issues to coexist in the separate court systems.

So, thanks to the Diceyan tradition, voices in appellate courts that will not sing in unison are usually regarded either as exploratory attempts to find the "right answer" at the frontiers of legal reasoning, or as necessary experimentation on the road to the "right answer" that eventually materializes. Diversity is tolerated because it helps to "develop" the law to a higher state of correctness and justice. But there is little tolerance for the notion that several potentially different "right answers" can co-exist.

Therefore, in the Canadian debate about judicial discretion, the focus is on the extent to which judges — as opposed to elected politicians — ought to be involved in deciding important public policy issues, rather than the nature of discretion itself. My view is that because the nature of judicial discretion has not received enough careful analysis, the quality of the debate about the extent to which judges ought to exercise discretion over public policy issues has been impoverished. Another point I want to make is that judicial discretion plays a more significant role in the judicial process than is generally thought.

IV. THE EXTENT OF JUDICIAL DISCRETION

Discretion is unavoidable in judicial decision-making in the following instances :

- When the law is unclear, that is in "hard" cases, where judges must "legislate."

This first aspect of judicial discretion is now universally recognized. As noted above, the debate centres around whether in a democratic setting judges ought to pull in their horns so as to legislate as little as necessary, or whether they ought to play a more activist role in order to deal with issues that legislatures are either too busy or to uninterested in to handle.

- Even when judges agree on the result, they have their own ways of getting to that result. No two judges, after hearing the same case, if locked in separate rooms would write opinions using exactly the same words.²⁰

20. See P. McCormick & I. Greene, *Judges and Judging* (Toronto : Lorimer 1990) c. 5. In this study of judicial decision-making, the authors found that trial court judges had four basic approaches to decision-making. We described the judges as being "improvisers," "strict formalists," "pragmatic formalists," and "intuitivists." The "improvisers" (10 per cent of judges interviewed) reported that they had no standard approach to decision-making because all cases are different. The "strict formalists" (22 per cent) reported formalistic methods of decision-making that they felt led different judges to the same conclusions. The "pragmatic formalists" (44 per cent) compared the decision-making process to creating a check-list of items, assessing the shifting balance between the two sides, or to water rising to a level of probability. The

- Even in cases not considered "hard," different judges can give different weights both to factual and legal matters, and in some kinds of cases this different weighting can result in deciding the same kinds of issues in quite divergent ways.

This third aspect of discretion is illustrated by a study of the "leave" decisions of Federal Court of Appeal judges that I conducted in 1990. At that time, part of the workload of the Federal Court of Appeal consisted of considering about two thousand annual applications for leave to appeal from refugee applicants whose claims had been rejected by the Immigration and Refugee Board. The judges reviewed these claims singly, in their chambers. Each judge would consider one to two hundred of these applications a year, usually in batches of about 50 every few months.

If the judges exercised little personal discretion, then we would expect that each judge would approve about the same proportion of leave applications, as long as there were no significant differences in the kinds of cases assigned to each judge. But this was not what I found. As the following table shows, the average approval rate of the judges was 27%. However, the "strictest" judge (who made 203 decisions) approved only 14% of the applications, while the most "liberal" judge (who made 188 decisions) approved 48%.

Judge	LEAVE GRANTED?			
	YES		NO	
Pratte	29	14%	174	86%
Linden	20	16%	101	84%
Iacobucci	20	18%	92	82%
Stone	33	21%	125	79%
Décary	57	22%	200	78%
MacGuigan	69	23%	228	77%
Hugessen	59	27%	157	73%
Urie	16	28%	157	73%
Heald	43	30%	98	70%
Mahoney	60	36%	105	64%
Marceau	73	44%	92	56%
Desjardins	90	48%	98	52%
Total	569	27%	1512	73%
Grand Total :		2081 *	100%	
* Applications which were withdrawn by the applicant (44), dismissed for non-perfection (171) or were pending (1) were not included in this table. In addition, there were 7 files in which it was not clear which judge made the leave decision.				
Significance of association = Less Than .000005			Cramer's V = .23	

"intuitivists" (24 per cent) relied more on a "gut feeling" or a "key moment" in a hearing. Most judges were unaware of the extent of the differences in their styles of decision-making.

When I tested for factors which might explain the differences in the approval rates among the judges, such as the country of origin of the refugee applicants or the time of the year in 1990 when the decisions were made, the differences among the judges remained. A statistical test indicated that there are less than five chances in a million that the differences among the judges were due to chance. Therefore, I concluded that although the merit of the refugee applications was the major determinant of the majority of decisions, with regard to the "hard" decisions — in which good judges could come to different conclusions — the factor that was responsible for the widely different approval rates of the judges was the relative "strictness" of the judges.

In addition, I helped to arrange for an independent expert to conduct a "blind"²¹ review on a random sample of 390 of the files. He would have "approved" about 35 per cent of the leave applications overall, as well as about 35% of the cases from the dockets of each of the judges.²² This is not to say that the independent expert's decisions were "right" and those of the judges were "wrong," but rather that when the same standard of "strictness" is applied to all cases, it appears that all the judges received about the same proportion of meritorious applications. There is no escaping the conclusion that given the same law and the same kinds of factual issues, some judges took a "strict" approach to these leave applications, while others took a more "liberal" approach.²³

I also tested to find out whether the cases which received leave from the "liberal" judges fared worse at the substantive appeal (i.e. the actual appeal which was considered by three judges of the Federal Court of Appeal for the cases granted leave) than the cases which received leave from the "strict" judges. There was no statistically significant difference in rates of success in the substantive appeal between the cases granted leave by the "strict" and "liberal" judges. This is an indication that the "strict" judges did not have a better record of "screening out" weak cases regarding the leave decisions. Therefore, refugee applicants who were unfortunate enough to have their leave applications come before a "strict" judge were less likely to have access to justice than those who were lucky enough to have their applications come before a more "liberal" judge.²⁴

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21. A "blind" review refers to the fact that the independent expert had no knowledge of which judge had actually made the decision on the Federal Court of Appeal, or what that decision was.
 22. There was no statistical difference between the proportion of cases "approved" by the independent expert on each judge's docket.
 23. There were 2341 applications for leave filed in the Federal Court of Appeal in 1990, and I was able to collect relevant data on the outcome of 2,08 applications. The Court granted leave to 572 (25%), and refused leave in 1513 (66%). Forty-four applications (2%) were withdrawn by the applicant, 171 (7%) were dismissed for non-perfection, and one case was granted a stay pending decisions in other proceedings about the applicant's immediate family. There was no clear record of disposition for 3 applications. The data collection took place between November 3 and November 13, 1992 by Ms. Karen Atkin, a Ph.D. student at York University, who acted according to instructions from me.
 24. One remedy is to ensure that applications for leave that are rejected are reviewed by a second judge, who would have the power to reverse the negative decision.

The three discretionary factors I have described — that resulting from "hard" cases, that resulting from the decision-making and decision-justification process, and that resulting from giving different weights to relevant legal and factual matters — combine to make judging a very human process.²⁵

I have argued both that judicial law-making is not necessarily anti-democratic, and that judicial discretion is a more important factor in appellate court decision-making than generally recognized. This is not to say that I advocate that judges do or ought to depart from the law; on the contrary, I agree that the rule of law is an essential element of democratic government.

The law is an essential but imperfect instrument designed to promote the value of mutual respect. There is often an array of potential "right" answers to legal disputes, in addition to an infinite number of potential "wrong" answers. The challenge of appellate courts is to weed out wrong answers from the courts below, while explaining why the particular answer that the court adopted was chosen as the best "right" answer from among competing alternatives.

V. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

The interviews that my colleagues and I conducted of Canadian appellate court judges shed some light on the nature of the current tension between judicial independence and judicial accountability in this country.

Of sixty appellate court judges who responded to the open-ended question, "What does the principle of judicial independence mean to you?", thirty nine (65%) understood it to mean that no one may attempt to interfere with impartial adjudication, particularly members of the legislative and executive branches of government. Three other types of responses each received support from about one-eighth of the judges interviewed : no interference from other judges, impartiality, and complete freedom to decide. The idea of autonomy (including administrative autonomy) was mentioned by a tenth of the judges (multiple responses were recorded so that the totals to our open-ended questions sometimes exceed one hundred per cent).

The judges were also asked whether they perceived any threats to judicial independence at the present time, and if so, what constituted these threats. Of the eighty judges who responded, more than two-thirds (55) listed one or more threats. This proportion was surprising, especially in comparison to the results of interviews with 91 trial court and appellate judges in Alberta and Ontario conducted by Peter McCormick and myself in the early 1980's. Asked if they could think of any instances when their judicial independence had been tampered with, not a single judge in the earlier study could give any examples of such tampering, although some referred to four well-publicized incidents not involving them personally where a federal cabinet minister had

25. J. Hogarth's book, *Sentencing as a Human Process* (Toronto : University of Toronto Press, 1971), illustrates the enormous impact of discretion on the sentencing behaviour of lower court judges.

telephoned a judge about a particular case.²⁶ Although the question in the current study is worded slightly differently, we do not think that the stark contrast between the results of the two studies is merely a result of the difference in wording of the question.

A fifth of the appellate judges who perceived threats to their independence — 12 out of 55 — were concerned that special interest groups seemed to be attempting to bring pressure to bear on the direction of judicial decisions. Five judges complained about pressure to make decisions which were perceived to be "politically correct," and five complained about the impact of media criticism that they could not respond to without themselves violating judicial independence. As well, a handful of judges were concerned that the inaccurate or sensationalist handling of judicial decisions by the media was in a sense putting pressure on them to make decisions which would result in a "good press." As a result of the *Charter of Rights and Freedoms*, Canadian appellate courts have made controversial decisions regarding subjects such as abortion, rape shield legislation, drunkenness as a defense in sexual assault cases, compulsory retirement, gay rights, Sunday shopping, the rights of refugee claimants, and the spending of union dues for political purposes. These decisions have resulted in an unprecedented level of commentary in the media about judicial decisions, much of it critical. There have even been demonstrations in front of court houses following controversial decisions — an absolute novelty for Canadians.

Some appellate judges were also concerned about what they considered to be unwarranted pressure from the executive branch of government. These pressures included criticism of judicial decisions by politicians (9 judges), lack of appropriate administrative support (8 judges), and inappropriate procedures for determining judicial salaries (6 judges). Some judges were particularly concerned about the propensity of some provincial Attorneys General publicly to criticize judges' sentencing practices or to take a judge to task for a particular decision which undercut government statements or ran counter to provincial policy priorities. More than one judge reported an impression that provincial governments had cut back on administrative support services to the appellate courts because they were unhappy about the direction of appellate court decisions. One example was the suggestion that judicial secretarial support was being reduced and the provision of personal computers refused in order to force the judges to write briefer decisions. Concerning judicial salaries, several judges were angry that the federal government rejected the advice of the independent commission established to review judicial salaries. Although the government cited the deficit and debt crisis as the reason, some judges were afraid that the real reason was that the appellate judges were making too many decisions which irritated the government.

Seven judges were worried that the Canadian Judicial Council had developed inappropriate procedures for disciplining judges. The seven judges who were critical of the Council's investigatory procedures felt that it was improper for Chief Justices to have disciplinary powers through the Council. A better approach, they felt, would be to have federally-appointed judges elect a judicial disciplinary tribunal. Their argument was that because the puisne judges know that their chief sits on the body which could investigate complaints against them and would likely be involved in deciding whether a complaint

26. P. McCormick & I. Greene, *Judges and Judging* (Toronto : Lorimer, 1990) at 248-249.

warranted a full investigation, the puisne judges would feel pressured to stay on their Chief's good side — for example by supporting his or her point of view in hard cases where the court was split. As well, the Chief Justices have the reputations of their respective courts to consider, creating an incentive in borderline situations either to exonerate judges who have been complained against, or to seize the opportunity to deal with a good but controversial judge. Disciplinary tribunals elected by the judges themselves would be less intimidating, less likely to have a "chilling effect" on the puisne judges. Mr. Justice David Marshall makes a similar point in his book on judicial independence, which suggests that these concerns may be even more wide-spread than our interviews indicated.²⁷

It is clear that the Charter of Rights has precipitated most of the concerns of the judges about threats to judicial independence. Pressure group activities toward the courts are frequently the result of a Charter decision. Critical remarks by Attorneys General and other cabinet ministers are sometimes prompted by Charter decisions, but in any case the Charter has exposed the judges' policy-making role and therefore has drawn judges into political controversy. And the increasing visibility of the judiciary has resulted in an unprecedented level of official complaints about judicial behavior. For example, the number of complaints received by the Canadian Judicial Council has increased from 47 in 1987-88 (the year of the Supreme Court's controversial Charter decision striking down Canada's abortion legislation), to 164 in 1993-94 and 174 in 1994-95.

VI. SOME THOUGHTS ABOUT JUDICIAL ACCOUNTABILITY

The concept of accountability in public administration refers to the capacity to demonstrate quality and to be answerable for questions about apparent breaches of it. It is part of the ethical structure of democratic societies that all government institutions must be accountable in appropriate ways. It is often forgotten that line accountability — reporting to a superior — is just one of many ways in which quality can be demonstrated. Line accountability cannot apply to the judiciary (except in the very limited sense that judges must appear for work, hear cases and write decisions) because of the principle of judicial independence.

But the near absence of line accountability does not mean that judges cannot be accountable. They are accountable in other formal and informal ways.²⁸ Formal mechanisms of accountability include the prerogatives and moral suasion exercised by chief judges and chief justices, the disciplinary, appointment and educational roles of judicial councils, experiments with management advisory committees that include judges, and educational opportunities provided by the National Judicial Institute and the CIAJ. Good appointment and promotion procedures can be thought of as a "front-end" accountability procedure. Informal or self-accountability mechanisms include the self-discipline learned from pre-judicial careers, the impact of sound commentary on judicial thinking in the academic press and in the media, and the impact of the opinions of other

27. D. Marshall, *Judicial Conduct and Accountability* (Toronto : Carswell, 1995).

28. See I. Greene, "Judicial Accountability in Canada," in P.C. Stenning, ed., *Accountability for Criminal Justice* (Toronto : Univ. of Toronto Press, 1995) at 355-375.

judges about the quality of a judge's work. In the future, systematic methods of evaluating judicial performance that are controlled by the judges and that do not interfere with judicial independence might represent a valuable addition to the somewhat limited arsenal of judicial accountability mechanisms.

But according to the interviews my colleagues and I conducted with Canadian appellate judges, the current state of public opinion about what judicial accountability ought to constitute is not healthy. What appears to have happened is that because the usual notion of democracy revolves around the powers of elected legislatures and legislative supremacy, the thinking about the proper nature of judicial accountability has become skewed. It is assumed that judges have encroached on the turf of the legislative branch, either by default or by design, and that because of this situation judges are fair game for the same kinds of political pressures that are applied to elected politicians. Elected politicians are held to account, in part, through demonstrations, threats, and editorials in the media, so why shouldn't judges be subjected to the same treatment now that their policy-making role has expanded a little?

If, rather, we think about democracy as a set of ever-evolving institutions whose goal is always the maximization of mutual respect, the picture changes. There is a legitimate role for judges to play in any rule of law regime to protect, preserve and enhance democratic principles based on mutual respect. Furthermore, discretion is a necessary element in judicial decision-making not only in hard constitutional cases, but also in deciding how to balance different aspects of the law, and in deciding how to phrase the decision. The important question is how to use discretion wisely in order to further democratic norms.

Judicial accountability — if thought of as ways and means to demonstrate quality, rather than line accountability or as judges being fair game for the pressure tactics applied to elected politicians — represents an opportunity. After conducting personal interviews with about 100 judges from the Provincial Courts to the Supreme Court of Canada, my sense is that judges generally work hard, think seriously about the meaning of justice and make every attempt to see that justice is done in each decision they participate in. Sometimes they may develop the feeling that their work is not appreciated because it is not understood. Creating better accountability mechanisms can represent an opportunity for judges to correct misapprehensions about the judicial role (and in so doing, they might be forgiven if they blow their own horns just a little).