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The role of the press as critic must be viewed in the context of the various mechanisms for effecting judicial accountability.

These mechanisms are neatly set out by Mauro Cappelletti in a paper entitled, "Who Watches the Watchmen?" published in "Judicial Independence" by Shetreet and Deschenes.

Cappelletti propounds a "topology" which consists of the following four main types of accountability:

A) Political accountability of either the individual judge or the judiciary as a group, of which I would recognize two principle sub-types: (1) accountability vis-a-vis the political branches, and (2) constitutional accountability.

B) Legal (vicarious) accountability of the State, which can be either (1) exclusive, or (2) concurrent with the personal accountability of the judge.

C) Legal (personal) accountability of the judge which can be (1) criminal, (2) civil, or (3) disciplinary. A further sub-type of personal accountability is the "recovery" accountability of the judge vis-a-vis the state, if the latter has been held personally accountable vis-a-vis the aggrieved person.

D) Societal or public accountability, i.e., accountability vis-a-vis the general public; societal accountability also can be of the individual judge, or of the judiciary as a whole.

Cappelletti believes that societal accountability can be obtained by exposure of the judiciary to public criticism through the mass media, and that this "tool" is of the greatest potential in

countries, like Canada, which are blessed with freedom of speech. Implicitly, he also refers to openness of judicial proceedings and publicity of court decisions, noting, "an important element of which, often missing in civil law countries, is publicity of dissenting opinion - for such openness and publicity are important pre-requisites for public criticism." The press is said to be potentially, "the most effective of all informal disciplinary mechanisms...".

Cappelletti believes that in order to provide the requisite degree of accountability dictated by judicial power, a "responsive" model is required which, "combines a reasonable degree of political and social responsibility, without, however, either subordinating the judges to the political branches, to political parties, and to other societal organizations, or exposing them to the vexatious suits of irritated litigants."

Says Cappelletti, "It is a model, moreover, which reflects the central ideal of a democratic system of government, an ideal which frequently goes under the name of checks and balances - that power should never go uncontrolled and that even the controlling power should not be irresponsible, that is, itself uncontrolled. It is, in other terms, the modern answer to Juvenal's famous question-who watches the watchmen?"

The important task of watching the watchers has largely fallen to the media, as no other institution outside of government has the capacity to observe the judiciary in action and relay its observations to the public in a manner which will enable the public to make its own appraisal. The question must now be asked,

how well does the media perform this important critical role.

A serious doubt as to the ability of the media to fulfil this important task in a liberal democracy like Canada, is expressed by Rajeev Dhavan in "Judges and the Judicial Power".

Dhavan argues that because it is steeped in the ideology of the "rule of law", the Western liberal tradition seems to have great faith in judges, the judicial process and the judiciary.

He suggests that the media share this faith in judges which extends from a general faith in the judicial process to a personal faith in the judges themselves - a faith which "seems almost to have the status of an ideology."

He recognizes that the judiciary is an extremely powerful institution, pointing out that: "It makes extremely important decisions which affect the lives of the people as much as legislative enactments. Everyday appellate courts make decisions which have the force of law. In some constitutional systems, judges can formally set aside and invalidate legislative enactments. (Canadians take note). In other systems, judges frustrate the intentions of the legislature informally by a use of their extremely versatile juristic teachings. There is no doubt that the power of the judiciary - and here I am concerned primarily with appellate courts is quite considerable."

In spite of this immense power over peoples lives, Dhavan points out that a media which is so aggressive when it comes to criticizing other institutions of government, stays relatively tame when it comes to the judiciary.

He concludes that, "The real point in all this is: we do not

hesitate to raise analogous skeptical questions about any other institution of government. Yet we happily have an "others-abide-our-question-thou-art-free-" attitude to the judiciary."

Some of these questions which Dhavan claims we often refuse to ask openly about judges are these: "What kind of people are the judges? How do they operate amongst themselves? To what extent are judges a law amongst themselves? To what extent are they restrained by their self-declared mythology? What is the network of social, political and economic relationships within which the judges operate? What is the effect of the politics of patronage on the appointment of judges? What are the financial arrangements within which judges operate? To what do judges owe their social and political status? Is the continuing political viability of the judiciary dependant on the acceptability of an ideology of which they are an important constituent? Can judges really strike an intuitive consensus about when they should interfere in a matter and when they should feign a guarded consensus? What is the pathological use of the judiciary as an institution? Who uses it and why?"

Dhavan mourns the lack of critical analysis of the judiciary's work. He says that: Critical analysis of the judiciary's work is limited to its jurisprudence, and for the most part lies hidden in legal discussions located in esoteric legal journals - surfacing into popular journalism and public controversy only in rare instances in the aftermath of acute controversy."

He also mourns the lack of real probing journalism when it comes to the subject of the judiciary, stating, "Even in countries where

the decisions of the judiciary are critically analyzed by social scientists, investigative journalism about the judges as people and the judiciary as an institution inspires public interest without too overt a public support.

Dhavan recognizes that there is an "establishment" and management interest in the judiciary being seen to operate as a fair and efficient institution, and concedes that many of these questions are asked from time to time - particularly at times of social crises and controversy. But he reaches the pessimistic overall conclusion that, "debate on the judiciary is usually muffled - and often rhetorical and imprecise."

There are some signs that the Canadian media are developing a better understanding of the fact that the independence of the judiciary is not just a cloak behind which the judiciary is shielded from criticism - but that it is a shield intended to permit the judiciary to remain impartial and able to dispense justice in an equal way. And there are also some positive signs that the Canadian massed media are willing to devote more of their resources to judicial issues. The Constitution debate and litigation were a marvelous spur to more thorough, sensitive and accurate coverage of judicial and constitutional matters - and the stream of constitutional rulings at every level of the courts as a result of proclamation of the Charter of Rights and freedoms has triggered a new era of media responsiveness to these issues. But it still remains to be seen whether this new recognition is strong enough to help meet three major challenges to the independence of Canada's judiciary.

As a prelude to a discussion of the first challenge, it is useful to examine some of the comments made by Justice Jules Deschenes in a paper entitled, "Toward an independent judiciary: Canadian and International perspectives" published in "Judicial Independence".

Deschenes asserts that, "The independence of the judiciary might appear, in some quarters, to be a worn-out object. Yet it must constantly be affirmed and defended and bolstered, since independent courts constitute the last bulwark of the citizenry against the arbitrary encroachments of the state."

He warns that, "Let the independent power of review of the courts over administrative actions, or their checking power over ultra vires legislation, or their overriding power over criminal law be abolished, let those powers simply dwindle away: liberty will then have run its course and those people who clamour their surprise loudest who, through their guilty indifference or selfish passivity, will have most contributed to its suppression."

The concern voiced over diminution of the independent power of the courts over administrative actions applies directly to the so-called "emergency" refugee legislation which has already passed through the House of Commons and is now being studied in the Senate.

A first concern is that section 38(1) provides that members of the Immigration Appeal Board and the Refugee Status advisory Committee are said "to cease to hold office" on the commencement day. The Canadian Bar Association has pointed out that: "This unique provision appears to dismiss all members of the Immigration Appeal

Board and Refugee Status Advisory Committee without compensation. It is tantamount to an interference with the independence of these bodies, particularly in the case of the Immigration Appeal Board which has been held to be a Court by the Federal Court of Appeal as well as the Supreme Court of Canada."

The Association concludes: "The Board and the Committee have developed a high degree of experience and proficiency among their members. There are existing position in the new Committees to be struck and it seems eminently sensible to appoint current members of these bodies to the new committees rather than dismissing them statutorily. To permit the dismissal of such experienced officials without compensation is a shocking example of rank interference with judicial officers and is unprecedented...".

Secondly, under the proposed bill, leave will be required before an action can be commenced in the Federal Court. Moreover, applications based on the prerogative writs such as habeus corpus, mandamus and certiorari, will no longer be permitted to be brought without leave.

These changes, under the guise of emergency legislation, will impede the ability of the Federal Court to continue to provide judicial supervision of the actual workings of the Immigration Act and Regulations - and they will diminish the Court's ability to act as a safeguard to Canadian citizens and permanent residents to ensure that their lawful rights are fulfilled by the Immigration Commission.

The Canadian Bar Association argues that "untold "numbers of errors in lawful procedures have been rectified by access to the

courts.

The Association submitted to the Committee that: "The introduction of the leave requirement on judicial review may signal a new trend towards restricting the rights of individuals to seek judicial redress from decisions made by the federal government. It may represent an effort by the federal government to minimize, in particular, the impact that the courts have had on their decision making powers under the Immigration Act. There can be no doubt that decisions of the Federal Court have affected the decision making process within the immigration Commission. The trend has been to impose on Commission and External Affairs officials a duty to comply with principles of fairness. There also is little doubt that the Commission has been reluctant to comply with some of its legal obligations as interpreted by the Courts. There does not appear to be a justifiable ground to restrict access to the Federal Court by persons affected by the immigration process..."

And third, The bill not only restricts access to the Courts with the leave requirement, it prevents any further review by a higher court of the refusal to grant leave.

The Association notes that, "Canada would stand alone among common law democratic jurisdictions in imposing such absolute jurisdictions on review by a higher court,"

As a prelude to the second major challenge to an independent judiciary in Canada, it is useful to examine some of the comments of Justice Irving R. Kaufman, in "Chilling Judicial Independence".

Justice Kaufman affirms: We begin with a postulate I consider



self-evident: the fundamental role played in our government by the federal courts demands that the judge be independent. As Felix Frankfurter explained, "courts are not representative bodies. They are not designed to be a good reflex of a democratic society." They exist, rather, to give force to the noble precept, "Equal justice under law." Equal justice requires impartiality, and impartiality demands freedom from pressure...".

The concern that courts are or appear to be compromised when they play or appear to play a representative role applies directly to the provision of the Meech Lake agreement which allows provincial premiers to select future Supreme Court of Canada Justices.

Under the agreement, the Prime Minister would be required to fill court vacancies from a list of candidates nominated by the provinces. But should Ottawa reject a provincial recommendation, there is a danger that there would be an unnecessary vacancy on the Court if the province then refuses to propose another candidate. The danger in Kaufman's context, is the actuality or appearance that the provincially appointed judge will be or appear to be representing the provinces local interests on the national court - and that the judges will feel, or be perceived to feel pressure to further the provinces particular interest when rendering legal decisions. Indeed, former Prime Minister Pierrre Elliot Trudeau has warned that Meech Lake accord provisions to allow the provinces to name senators and Supreme Court of Canada judges, would lead to a federal government "run by remote control by the provinces" because up to now, Ottawa has had sole control over both institutions.

The third challenge to the independence of Canada's judiciary lies in the recommendation of the Zuber Inquiry into Ontario's court system. Very little of the news coverage has been directed to the fact that the Inquiry contains a number of recommendations which run counter to the maintenance of an independent judiciary.

First and foremost, Zuber a status quo in Ontario in which the administration of the courts remains firmly under the control of the provinces attorney general. This is objectionable because the attorney general also exercises responsibility over the appointment and administration of the province's crown attorneys. The problem is exacerbated because the attorney general exercises no special status vis a vis the rest of the members of the cabinet, even though the office of the attorney general dictates a political neutrality. Zuber's failure to change the status quo in order to protect the independence of the provincially appointed judges, places an onus on the media to raise the issue, and ensure that its significance is clearly understood.

Zuber also introduces some strange mechanisms for judicial accountability. He suggests that the behaviour of judges should be formally reviewed on a confidential basis by lawyers and other members of the public. But the information to be evaluated by some undefined persons in the judicial hierarchy who presumably have some say in where the particular judge is to sit in court - and the type of cases that judge will be permitted to try. He proposes a system of computerized accountability in which judges can be overseen like workers in a factory - and if they do not reach the daily quota of trials and settlement, who knows what

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administrative sanctions will be imposed.

The common thread in all of these challenges is that the judges themselves are unable to take open, public initiatives which will help counter the threat to their independence. If they act behind the scenes, they are putting themselves in the fortunate position of pleading before the proverbial piper who is calling the tune. And if they take a public position they are casting themselves in a political mould and risk losing the faith that Canadians have in them because of the very fact that they are not considered to be part of the political arena. It therefore falls to the media to make sure that these and related issues are clearly brought to the attention of the public.

There are some steps which the media can take to improve the situation. Publishers should finance special legal education programs for journalists. News organizations should as much as possible try to develop news and editorial beats which permit journalists to concentrate their efforts on reporting not just the courts, but the legal system as well. More space should be given on "op-ed" pages for analytical articles on the administration of justice. More editorial comment should be made on key justice issues such as those relating to the independence of the courts. More efforts should be made to ask and answer the kind of questions which Dhavan claims are being deliberately avoided.

Judges too can improve the situation by the type of justice they provide in their courts. As Dhavan has noted, part of the solution lies in judges opening themselves up to close scrutiny by maintaining an open court process which is fully exposed to

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"publicity." They must avoid creating the pockets of secrecy identified by Quebec Superior Court Justice Goulard in a 1987 decision which are often made contrary to the letter and the spirit of the law in order to protect the identity of persons appearing in court on criminal charges. The issuing of unwarranted orders banning identification and closing courtroom doors creates suspicion that judges have motives other than the pursuit of justice, and sends out the message that they have something to hide. Judges must begin to demand of themselves the same degree of openness - or more - which they have begun to demand of administrative tribunals and the police search and wiretap warrant investigative process. Judges can also improve the situation by continuing to minimize use of the citation for contempt by scandalizing the court. Use of the contempt sanction in the Kopyto prosecution sent out the message that Canadian courts are thin-skinned, and not quite the bodies one would expect to be strongly independent of the government. Appeal Court judges might go the Supreme Court of Canada route and appoint an executive director who is charged with the task of educating the media about the operation of the court, and ensuring that reporters are aware of the significant decisions that are being released. The Supreme Court service is one of the factors that has led to an improvement in the covering of the Court. Lastly, judges could encourage more in-depth reporting of their decisions by including in their judgments more thorough explanations of the reasons underlying their decisions.

There will always be tension between the courts and the media.

Some of this tension reflects the distance which there should be between the media and any other institution of government - and natural because of the responsibility of the judiciary to protect the court process. But tension fueled by misunderstanding by both the media and the judiciary of the important role of the media in preserving and advancing the independence of the judiciary through the tool of criticism, is preventable - and must be avoided if our justice system is to fulfill its unique role in our society.

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