

Judicial Independence: The Judge as a Third Party to the Dispute

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Abstract:

In this thesis, the author sets out a conceptual framework for judicial independence. From the starting point of adjudication as the basic function of the judiciary, the author embarks on an historical inquiry to shed light on the judicial determination of disputes. This inquiry reveals an ancient tradition of adjudicative impartiality stretching back to ancient Egypt. This tradition of impartiality is the unifying theme in Hobbes' theory of law. In the state of nature, each person possesses complete liberty. In order to enter into a peaceful society, persons must give up the right to decide their own disputes. Since persons can no longer act as their own judges, a third party must resolve legal conflict. Given this understanding, the author proposes the perception of impartiality as the fundamental rationale of judicial independence. Judicial independence creates the necessary space between judges and potential sources of undue influence to preserve the status of the judge as an impartial third party to the dispute. Finally, the author critiques the doctrine of judicial independence in Canadian law from the perspective of this conceptual framework.

Abstrait:

Dans cette thèse, l'auteur établit un cadre conceptuel pour l'indépendance judiciaire. Du point de départ de la résolution des disputes comme la fonction de base du système judiciaire, l'auteur se lance dans une enquête historique afin d'illuminer le processus de la détermination juridique des disputes. Cette enquête révèle une ancienne tradition d'impartialité judiciaire qui remonte à l'Égypte antique. Cette tradition de l'impartialité est le thème unificateur dans la théorie du droit de Hobbes. Dans l'état de la nature, chaque personne possède une liberté totale. Afin de créer une société pacifique, les personnes doivent renoncer au droit de juger leurs propres disputes. Du fait que les personnes ne puissent plus agir comme leur propres juges, il faut une tierce partie pour résoudre les conflits. L'auteur propose que c'est la nécessité que cet "autre" soit perçu comme impartial par les parties au dispute qui est le fondement de l'indépendance judiciaire. L'indépendance de la justice crée un espace entre les juges et les sources d'influence afin de préserver le statut du juge comme une tierce partie au dispute. Enfin, l'auteur critique la doctrine de l'indépendance judiciaire dans le droit canadien dans la perspective de ce cadre conceptuel.

Rezumat:

În această lucrare, autorul stabilește un cadru pentru noțiunea de independența a justiției. Plecând de la ideea că soluționare a litigiilor ar fi funcția de bază a sistemului

judiciar, autorul pornește într-o anchetă istorică pentru a clarifica procesul de soluționare a diferendelor juridice. Cercetarea indică o tradiție veche a imparțialității judecătorești datând încă din Egiptul antic. Această tradiție a imparțialității este tema unificatoare în teoria juridică a lui Hobbes. În starea sa naturală, fiecare persoană are libertate totală. Pentru a crea o societate pașnică, persoanele fizice trebuie să renunțe la dreptul de a-și face singure dreptate. Deoarece oamenii nu mai pot acționa în calitate de judecători proprii, avem nevoie de o terță parte pentru a rezolva conflictele. Autorul arată că necesitatea ca acest terț să fie perceput ca imparțial de părțile în litigiu este fundamentul independenței judecătorești. Independența sistemului judiciar creează un spațiu între judecători și potențialele surse de influență cu scopul de a păstra statutul de judecător, ca terț imparțial în litigiu. În cele din urmă, autorul critică doctrina independenței judecătorești în sistemul canadian din perspectiva acestui cadru conceptual.

Keywords: *judicial independence, magistracy, impartiality, Canadian law*

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[I]t is certain that when public judicatories are swayed, either by avarice or partial affections, there must follow a dissolution of justice, the chief sinew of society.



Sir Thomas More, *Utopia* (1516)

INTRODUCTION

Judicial independence has many friends and defenders. Judges claim to possess and jealously guard it, states from a wide range of legal traditions guarantee it in their fundamental laws and political scientists exalt it as the hallmark of liberal democracy. Support for judicial independence extends far beyond the borders of individual states as well; it has become an international obsession. Observers evaluate and comparatively rank state judiciaries on an "independence index", used by a variety of organizations to target independence-enhancing reform projects.²⁴

²⁴ See, *i.e.* Transparency International: The Global Coalition Against Corruption, online: <[http://](http://www.transparency.org/publications/gcr)

www.transparency.org/publications/gcr>.

Perhaps the most telling example of the deeply rooted reverence for judicial independence was the international community's reaction to the suspension of Pakistani judges by the state's executive in late 2007.²⁵

Yet, despite its popular support, the concept of judicial independence remains elusive. Little has been written on what an independent judiciary actually means or why one is so desirable. Commentators have become increasingly vocal in lamenting this lack of clarity: one describes judicial independence as under-theorized in a theory-drenched age while another portrays the world of liberal democracy eagerly anticipating a general theory.²⁶ But what would a theoretical understanding of judicial independence accomplish? A satisfactory theory would provide a basic structure from within which further research and discussion could take place. It would identify the rationale of an independent judiciary and unearth its key elements. Although a general theory is unlikely to solve concrete problems, it would demonstrate the degree of independence that is desirable and provide a yardstick to measure the effectiveness of actions taken to enhance judicial independence.

The present theoretical state of judicial independence is hardly satisfactory when

assessed by these ambitions. Judicial independence remains hopelessly entangled with other ideas, locked in an awkward embrace with concepts that provide scant clarification of its essential character: justice, fairness, impartiality, corruption, bias, separation of powers and the rule of law, to name but a few. Scholarship on judicial independence is almost entirely parochial, steeped in doctrine gleaned from specific cases in particular legal traditions. On the rare occasion where judicial independence is considered more broadly, the role of the judge becomes a chimera. The United Nations? Basic Principles on the Independence of the Judiciary illustrates this approach by establishing the general principle that judges must be free from "any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."²⁷ While setting out a starting point for the concept of judicial independence, this view fails to define the practical requirements of an independent judiciary.

Chapter 1 addresses this confused theoretical state by setting out a conceptual framework for judicial independence. The search for the theoretical underpinnings of independence begins with an often-neglected

²⁵ President Musharraf's suspension of judges in late 2007 sparked protests by lawyer associations both inside and outside of Pakistan, in addition to condemnation by numerous states. See, *i.e.* Jane Perlez & David Rohde, "Pakistan Attempts to Crush Protests by Lawyers" *The New York Times* (6 November 2007), online: New York Times <<http://www.nytimes.com/2007/11/06/world/asia/06pakistan.html>>.

²⁶ Graham Gee, "The Politics of Judicial Independence in a British-style Constitution" (Lecture to the Looking Back, Looking Forward: Judicial Independence in Canada and the World Conference, 30 November 2007), online: University of Toronto <http://www.law-lib.utoronto.ca/conferences/judicial_independence/index.htm> and

Peter H. Russell, "Toward a General Theory of Judicial Independence" in Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives From Around the World* (Charlottesville, Virginia: University Press of Virginia, 2000) at 1, respectively. See Russell at 1-6 for an overview of the expectations of a general theory of judicial independence.

²⁷ *Basic Principles on the Independence of the Judiciary*, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan in 1985, endorsed by General Assembly resolutions 40/32 and 40/146 (New York: United Nations Department of Public Information, 1988) art. 2.

historical inquiry into the adjudication of disputes. Early history reveals the dawn of a tradition of impartiality in ancient Egypt, now a core principle of western legal traditions. Understanding the development of impartiality in ancient Egypt helps to explain impartiality as the foundation of judicial independence. Hobbesian social contract theory further confirms the importance of impartiality to adjudication. In order to escape the state of nature, men enter into an agreement to maintain peaceful relations. This social contract requires them to give up certain liberties that they previously enjoyed. One liberty that must be divested is the right for a man to judge his own disputes. Third party adjudication to resolve conflicts over rights and entitlements becomes necessary when parties can no longer decide their own cases.²⁸ Decision-makers showing partiality lose their legitimacy since they no longer act as third parties to the dispute. As a state of mind, impartiality provides a legitimizing force for third party adjudication. However, given the difficulty of finding an adjudicator with a “view from nowhere”²⁹ and the impossibility of assessing impartiality in a human mind, a perception of impartiality supplies the necessary legitimacy. As the best human institutions can achieve, the perception of impartiality promotes confidence in third party adjudication when held by the litigants and the community.

While considering the concept of judicial independence, the international community adopts an unqualified view

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that sets out a general principle that judges are to possess complete freedom from all sources of influence in deciding cases.³⁰ This view neglects to answer several key questions about judicial independence and the practical meaning of independence remains unclear. If interpreted as a norm requiring absolute independence, unqualified independence would require an isolated judiciary. Even if seen as a principle that must be weighed against other principles, questions arise concerning the balance necessary to ensure sufficient judicial independence. In addition, unqualified independence leaves its rationale unstated, resulting in a lack of interpretive guidance. In order to maintain the perception of impartiality, the judiciary must be seen as independent from sources of undue influence. The perception of impartiality develops the contours of judicial independence by determining the extent to which measures of independence are necessary. The minimum degree of judicial independence is satisfied when litigants and the

²⁸ Included in the phrase “rights and entitlements” is the right of persons to ascertain whether rules created by the society have been violated, thus encompassing both private and public law.

²⁹ This phrase is borrowed from Thomas Nagel, *The View From Nowhere* (New York: Oxford University Press Inc., 1986), and in this context means an adjudicator devoid of any predetermined opinion or perspective. While modern social

contractarians, particularly John Rawls’ highly abstract veil of ignorance, share the Kantian view that persons are capable of assessing principles from an impartial and objective viewpoint, the proposition that individual judges, working within a particular legal tradition and applying sources of law to specific facts, can maintain an objective view stretches impartiality far beyond its breaking point.

³⁰ See *i.e.*, the absolutist perspective of the United Nations, *supra* note 4.

community perceive adjudicative institutions as impartial. In other words, the judiciary possesses the requisite independence when a reasonable observer from the community would, as a potential litigant in a legal dispute, presume adjudicative impartiality. This presumption of impartiality is context-dependent. Judiciaries enjoying long-established traditions of the community's confidence, arising from a history of just decisions, require less formal protection than those in emerging democracies or those whose members are known to be corrupt. Presumptions of impartiality vary in strength, but can be easily destroyed by information that suggests bias in a specific case. Where a reasonable observer fails to hold a presumption of impartiality, increased measures of judicial independence become necessary to maintain confidence in the judiciary.

Measures directed at enhancing judicial independence limit opportunities for undue influence by defining the appropriate relationships between judges, both individually and collectively, and others. However, these measures cannot eliminate all possible sources of influence. Judges enjoying robust guarantees of their independence, such as tenure and non-diminutive salaries, can still be influenced or hold personal biases resulting in decisions based on improper considerations. This prospect is simply unavoidable; it exists even under the view of judicial independence as unqualified.³¹ Instead of attempting to remove all sources of influence, measures of judicial independence regulate the relationships

between judges and others where undue influence is most likely to arise. Defining the boundaries of these relationships provides grounds for litigants and the general community to presume impartiality, fostering confidence in judges as third party adjudicators.

The growth of judicial power in many liberal democracies has raised important new questions about judicial independence and the extent to which it may undermine democratic principles. There is no easy resolution to this tension. On one hand, it is argued that judiciaries reviewing the actions of the other branches of government require increased independence to maintain the perception of impartiality. Without a clear separation of the judiciary and the legislative and executive branches, litigants may perceive the judiciary as being in the pocket of the other branches. The separation of the judiciary from other constitutional actors is also necessary in federal states where judges resolve disputes between the various levels of governments. On the other hand, advocates of accountability claim that institutions deciding between competing interests in matters of public policy require a democratic mandate in order to preserve their legitimacy. The compromise struck in states facing this conflict represents the relative values assigned to the liberal concept of judicial independence and the democratic principle of accountability. Chapter 2 takes the conceptual framework established in Chapter 1 and applies it to the doctrine of judicial independence in Canadian law.

³¹ Given that there is no judicial "view from nowhere", *supra* note 6, a judge enjoying freedom from any potential source of influence would still possess internal views. While judges may be able to challenge their personal biases sufficiently to keep an open mind, the risk of bias tainting the decision-making process cannot be overcome by complete judicial freedom. Whether actual bias

exists depends upon the character of the individual judge and his or her capacity to set aside personal biases that arose from life experiences. Because setting aside such biases is based on one's character, there does not appear to be any necessary connection between complete independence and the ability to fairly consider other perspectives.

The enactment of a constitutionally entrenched bill of rights in 1982 through the *Charter of Rights and Freedoms* significantly expanded the power of the Canadian court. Specific measures providing for the separation of the judiciary from the influence of the legislative and executive branches appear in the text of the Constitution Acts, but a general principle of judicial independence has become a deeply rooted tradition.

In the 1997 landmark case of *Provincial Judges Reference*³², the Supreme Court of Canada recognized judicial independence as an unwritten constitutional principle. The case arose when the governments of three provinces reduced the salaries of provincial judges as part of economic measures to limit budget expenditures. In one of these provinces, the executive negotiated judicial remuneration with the judges association. The Court found that the unwritten principle of judicial independence prevented any direct salary negotiations between the judiciary and the other branches of government. Instead, the Constitution demanded the creation of "independent, objective and effective" compensation commissions to depoliticize judicial remuneration.³³ According to the Court, governments must first consult with non-binding compensation commissions before tinkering with judicial salaries. Since the provincial governments did not consult these commissions, the Court struck down the judicial salary reductions as a violation of judicial independence.

The *Provincial Judges Reference* case is extraordinary in Canadian law for several reasons. First, the Supreme Court

of Canada's characterization of judicial independence as an unwritten constitutional principle, extending to all judges and capable of invalidating deliberative political action, unleashed an unprecedented storm of academic criticism. This criticism attacked the justiciability of an unwritten constitution, the interpretation of constitutional texts as subordinate to unwritten principles and the Court's so-called activism. Second, the Court muddied the doctrinal waters of judicial independence by invoking the principle in a case where the perception of impartiality was not impaired by an across-the-board public service salary cut. The provincial judges never argued that their reduced salaries fell below a threshold where they would consider taking bribes from litigants. Since all public sector workers faced the same salary reductions as the judges, it is doubtful that the action by the provincial governments would prevent a reasonable observer from presuming adjudicative impartiality. Faced with the difficulty of articulating how impartiality was threatened, the Court made desperate attempts to explain the necessity of the independent compensation commission process. The Court held that the absence of a salary recommendation from an independent commission would cause litigants to perceive judicial bias in favour of the government. This could have the effect of reducing the community's confidence in the judiciary. However, it seems implausible that a reasonable observer would expect provincial judges to start convicting innocent persons in order to obtain trivial and speculative benefits at the bargaining table.³⁴ In

³² *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 [*Provincial Judges Reference* cited to S.C.R.].

³³ *Ibid.* at para. 169.

³⁴ This argument is advanced forcefully by Professor Hogg. See Peter Hogg, "The Bad Idea of

Unwritten Constitutional Principles" (Lecture to the Looking Back, Looking Forward: Judicial Independence in Canada and the World Conference, 30 November 2007), online: University of Toronto <http://www.law-lib.utoronto.ca/conferences/judicial_independence/index.htm>.

addition to these problems presented by the *Provincial Judges Reference* case, the result of the decision may paradoxically result in diminished judicial independence. Possessed with jurisdiction only when petitioned by litigants, judicial institutions are incapable of issuing timely responses to acute attacks on their independence. The judiciary necessarily relies on others, notably the legislative and executive branches, to protect its interests. Moreover, these non-judicial branches of government are responsible to enact specific guarantees of judicial independence, such as tenure and non-diminutive salaries. The Court's failure to acknowledge the essential role of the legislative and executive branches in initiating and preserving measures of judicial independence sends the message that the courts are fully capable of looking after themselves. After the *Provincial Judges Reference* case, the legislative and executive branches of government may be wary of taking action touching upon the judiciary, particularly since such action is liable to be held unconstitutional even when it poses no threat to the perception of impartiality.

Compounding the prospect of a retreat by the legislative and executive branches from their legitimate role in judicial affairs is the lack of predictive certainty in Canadian law. The unwritten constitutional principle of judicial independence is slippery and amorphous; the case law reveals no coherent standard by which to assess conduct beforehand. While predictability is a long-established principle of the rule of law, the stakes are considerably higher given the vital interaction between the primary organs of the state. These interactions lose their dynamic character when patrolled by a

judiciary that defines the limits of its own supervisory power. The prospect of *ex post facto* legal review of this interaction is especially ill suited in the Canadian context, where informal conventions regulate the relations between constitutional actors. The legislative and executive branches now face the unenviable task of ascertaining their proper role *vis-à-vis* the judiciary under an uncertain constitutional scheme. A chilling effect on deliberative action necessary to protect and enhance judicial independence is likely to result.

However, the most troubling aspect of the *Provincial Judges Reference* case is the lasting damage it inflicted on the perception of impartiality. Within a short period of time after the implementation of the compensation commission process, the salaries of many provincial judges increased significantly.³⁵ Most observers characterized the Court's decision as greedy and self-serving. These accusations stem from the perceived conflict of interest between the Court's role as a third party adjudicator and the judicial branch appearing as a litigant. The resolution of a dispute by a decision-maker substantially aligned in perspective and interest with one of the parties erodes even the most strongly held presumption of impartiality. How could the opposing parties, in this case the legislative and executive branches, have confidence in the impartiality of judges hearing a case about the financial compensation of judges? Even operating under the presumption that the judges were impartial in fact, the obvious conflict of interest and the substantial legal obligations imposed on the legislative and executive branches in the *Provincial Judges Reference* case diminished confidence in adjudicative impartiality.

³⁵ See Sylvia LeRoy, "Judicial Independence and the Integrity of the Judiciary", August 2004 Fraser Forum 3.

Maintaining the link between judicial independence and the perception of impartiality provides the means to overcome these problems. The Supreme Court of Canada provided a brief glimmer of hope in the *Provincial Judges Reference* case by noting that one of the goals of judicial independence “is the maintenance of public confidence in the impartiality of the judiciary”.³⁶ However, the Court quickly forgot about this connection by getting lost in the creation of elaborate metaphors to articulate its vision of judicial independence as part of the unwritten constitution.³⁷ The effect of the decision in *Provincial Judges Reference* is a decoupling of judicial independence with the perception of impartiality by treating judicial independence as the means to its own end.

Even if the Court maintains the link between judicial independence and the perception of impartiality, it still faces an unavoidable conflict of interest in cases where the judicial branch appears as a litigant. While there does not appear to be an ideal solution to this problem, courts can temper a perception of bias in such cases by creating a distinction between constitutional rules. Specifically, the adoption of prophylactic rules in cases presenting obvious and unavoidable conflicts of interest, such as *Provincial Judges Reference*, would go a long way in shielding the judiciary from attacks on its legitimacy.³⁸ Prophylactic rules are judicially crafted directives to prevent violations of the constitution. Unlike ordinary constitutional rules, prophylactic directives are not mandatory where the

state devises an alternative method of fulfilling its constitutional obligations. Prophylactic rules are just one of several possible strategies to achieve a constitutional end, thus providing a role for non-judicial actors to fashion ways of protecting substantive constitutional requirements.³⁹ Prophylactic rules are well suited to the Canadian context as they encourage dialogue and promote informal conventions to regulate interaction between the branches of government.

For example, in *Provincial Judges Reference*, the Supreme Court of Canada found that a compensation commission was the only constitutionally acceptable solution to protect judicial independence.⁴⁰ Had the Court treated the compensation commission process as a prophylactic directive, it would have initiated a dialogue with the legislative and executive branches. These branches of government would then have to decide whether to follow the Court’s directive or come up with a different way of setting judicial salaries that protected judicial independence. By involving non-judicial constitutional actors in the decision-making process, the perception of bias generated from the unavoidable conflict of interest would have been significantly reduced. Furthermore, treating the compensation commission process as a prophylactic directive would have respected the role of the Court as the interpreter of the Constitution, while ensuring space for creative compliance by the other branches of government.

³⁶ *Provincial Judges Reference*, *supra* note 9 at para. 10.

³⁷ *Ibid.* at para. 109 where the Court writes that judicial independence flows through the “preamble, which serves as the grand entrance hall to the castle of the Constitution”.

³⁸ See Michael Plaxton, “In Search of Prophylactic Rules” (2005) 50 McGill L.J. 127.

³⁹ *Ibid.* at 130.

⁴⁰ *Provincial Judges Reference*, *supra* note 9 at para. 133 where a majority of the Court held that “[g]overnments are constitutionally bound to go through the commission process”.

CHAPTER 1: DEVELOPING A THEORY OF JUDICIAL INDEPENDENCE

I. PRELIMINARY MATTERS

This chapter sets out a framework for the concept of judicial independence founded on the core principle of adjudication; however, it is important at this preliminary stage to identify the scope and limitations of this endeavour. Most importantly, this chapter does not advance a full theory of judicial independence. Instead, as the name of the chapter implies, the framework advances toward an understanding of judicial independence by considering issues and answering questions that any satisfactory theory must address. Given that the framework does not present a complete theoretical foundation, it will not be able to answer all questions that may arise in relation to judicial independence; however, such questions will presumably prove more answerable in light of it.⁴¹

The goal of this chapter is to arrive at a framework that provides the key to unlocking the most significant problems of judicial independence. Even if this goal is accomplished, one may find instances where the framework does not work as expected. For example, it may not hold true in states which place limited emphasis on third party adjudication to resolve legal disputes. In addition, it is possible that the framework will not adequately address problems arising from its export to legal traditions considerably different from those in western liberal

democracies, although there appears to be no automatic reason for why this would be the case. It is important to emphasize that the framework should not be rejected simply because scenarios can be envisioned where it would not work; this result is expected. Instead, the framework is valuable for the light it sheds on the concept of judicial independence.⁴²

It is useful at this stage to define several keywords and reveal the assumptions necessary to understand the framework set out in this chapter. It is a fundamental premise of this chapter that a peaceful society is a good that should be strived for. A peaceful society refers to an association of persons who recognize rules established by the society as binding on themselves in their relations with others, and generally comply with such rules.⁴³ This chapter assumes that persons tend to act rationally and in their self-interest, and that the pursuit of self-interest inevitably leads to conflict with others doing the same. Many kinds of conflicts are bound to arise; however, this chapter is especially concerned with disputes containing a legal element. Legal disputes involve persons who cannot agree on their conflicting rights and entitlements. This broad definition includes the determination of whether an individual has violated societal rules, thus encapsulating both private and public law. Since persons are not always capable of resolving their conflicts in ways that promote harmonious social relations, a peaceful society must maintain a mechanism to decide disputes.⁴⁴ The judiciary, established by the state as an

⁴¹ Professor Russell acknowledges that a theory of judicial independence will not provide concrete answers to questions that arise in specific cases because of complex normative issues and the lack of knowledge in how measures of independence will affect its underlying motivation. See Russell, "Toward a General Theory of Judicial Independence", *supra* note 3 at 4-5.

⁴² See *ibid.* at 5-6.

⁴³ This definition inspired by John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 2005) at 4.

⁴⁴ Arbitration and mediation play a significant role in helping persons overcome disagreements, however for the purposes of this paper, the adjudication of legal disputes refers to conflicts that cannot be settled by any other peaceful means.

institution to adjudicate legal disputes, fulfills this essential role.⁴⁵

II. IMPARTIALITY AT THE HEART OF ADJUDICATION

An inquiry into the concept of judicial independence begins with the idea of adjudication as the basic function of the judiciary.⁴⁶ Given that judges decide legal disputes, what lies at the heart of their decision-making and what does it reveal about judicial independence? First, this section considers adjudication in its historical context by examining the often-neglected ancient origins of decision-making with the aim of shedding light on the concept of judicial independence. Second, the application of the Hobbesian social contract to the process of adjudication discloses the status of a judge as a third party to the dispute.

The early history of judging demonstrates the development of a tradition of impartiality in ancient Egypt, now a core principle of western legal traditions. Although legal scholars often overlook a detailed examination of the origins of adjudication, the context of nascent ideas has the potential to illuminate contemporary understandings. Comparing the development of historical traditions to present conceptions provides a starting point to discover the rationale of legal principles. Numerous primary sources describe the importance of impartiality to ancient Egyptian judges. These judges boasted about their fairness, while those accepting bribes or favouring certain interests were liable to harsh punishment for betraying confidence in the judicial

system. Ancient Egyptians fostered this tradition of impartiality over thousands of years to the extent that it became a fixture of contemporary conceptions of adjudication. Understanding the birth of impartiality in ancient Egypt helps to explain impartiality as the object of judicial independence today. Hobbesian social contract theory confirms the importance of impartiality to the adjudicative process. In a hypothetical state of nature, men enter into a social contract with the aim of establishing a peaceful society. This agreement requires men to give up certain liberties in the interest of peace, including the right to judge their controversies. Since men can no longer decide their own disputes, a third party must resolve conflict. In order to maintain legitimacy, these decision-makers must uphold their status as true third parties. Adjudicators with an interest in the outcome of the case lack legitimacy to decide the case since they are no longer third parties to the dispute.

A. THE DAWN OF IMPARTIALITY

Primary sources, many recently accessible because of advancements in linguistics and archeology, disclose the development of a tradition of adjudicative impartiality in ancient Egypt. The importance attached to judicial fairness by the ancient Egyptians gave rise to impartiality as a core principle of western legal traditions. This origin of impartiality provides a valuable foundation for the consideration of impartiality as the rationale of judicial independence.

In the first chapter of *Legal Traditions of the World*, Professor Glenn sets out a

⁴⁵ Of course, judiciaries in most states tend to perform many more functions than adjudication, but for the purposes of this chapter adjudication is explored as the basic function of judicial institutions. Furthermore, Professor Russell's theory that the judiciary refers to any officials who perform adjudication must be considered in order to prevent

the state from transferring adjudicative functions to others who do not receive the same protections as member of the formal judiciary. See Russell, *supra* note 3 at 8-9.

⁴⁶ See Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Limited, 1987) at 5-10.

theory of tradition.⁴⁷ Glenn's starting point is one presumably familiar to most of his readers: a description of the western world's concept of tradition. The western world sees tradition as an outdated way of doing things; tradition is a way for the past to control the present, best avoided by rational thinking.⁴⁸ Instead of thinking for themselves, adherents to tradition allow the past to make decisions for them. Glenn argues that the western perspective on tradition is problematic since it fails to take into account that thinking rationally about tradition is itself a tradition.⁴⁹

Glenn writes that the evaluation of one tradition through the logic of another is liable to produce biased results, and expresses a general uneasiness with theories of tradition.⁵⁰ In a world of competing traditions, Glenn points out that there is "no initial justification for granting primacy of one [tradition] over others".⁵¹ With this relativist perspective in mind, Glenn fleshes out the contours of tradition to provide a way to think about and compare multiple traditions. According to Glenn, thinking theoretically about tradition is a valuable exercise because it expands knowledge and understanding about others.⁵² Contemplating tradition requires one to suspend conviction in a tradition to learn from another in a "middle ground".⁵³

Tradition is defined by Glenn as the presence of past information that

underwent the process of traditio.⁵⁴ First, the presence of past information is necessary to use and further transmit tradition. If information about the past is not accessible, a tradition is unknown. Presence of the past refers to the capture of information in a way that makes it accessible to others, occurring through a variety of means such as objects, speech and writing. In considering various physical means, Glenn notes that objects contain implicit information about how they were made. The mere existence of an object discloses an understanding of the physical world necessary to its creation.⁵⁵ For example, a clay pot demonstrates the creator's knowledge of how to mould soft earth into a useful shape, and the process of hardening clay by extreme heat. Like other physical objects, written texts are durable but remain vulnerable to human destruction, natural decay and the loss of meaning from collective human memory.⁵⁶ Even if decipherable, texts are liable to the interpretation of the reader since different individuals at different times will likely draw different meanings from the same text.⁵⁷ Furthermore, texts cannot answer a reader's challenge or criticism. The text must be able to, on its own terms, convince whomever it happens to meet.⁵⁸

Second, traditio describes a process of transmission which brings past information to the present. Glenn's use of the word traditio originates in the 15th

⁴⁷ H. Patrick Glenn, *Legal Traditions of the World*, 3rd ed. (New York: Oxford University Press, 2007).

⁴⁸ *Ibid.* at 2-3.

⁴⁹ *Ibid.* Certainly, rational thinking has an extensive presence in western philosophy, stretching back to ancient civilizations.

⁵⁰ *Ibid.* at 4.

⁵¹ *Ibid.*

⁵² *Ibid.* However, the value Glenn places on the knowledge and understanding of others is itself a tradition. Glenn may acknowledge this implicitly where he expresses uneasiness with the evaluation

of one tradition through the logic of another, see *supra* note 27.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 4-15.

⁵⁵ *Ibid.* at 8.

⁵⁶ For example, if the language of the text was no longer understood or decipherable, its meaning would be lost from the collective human memory. *Ibid.* at 9.

⁵⁷ Presumably, this is why many great texts take the form of dialectic reasoning.

⁵⁸ *Supra* note 24 at 10.

century Latin root of tradition meaning “delivery, surrender, handing down, a saying handed down, instruction or doctrine delivered”.⁵⁹ The continuous transmission of past information within a particular social context is necessary to ensure its present relevance.⁶⁰ In other words, the process of traditio is necessary to provide cultural familiarity with past information. Where the process of traditio fails, traditions appear strange and their adherents come across as different.⁶¹

Glenn’s theory of tradition provides a useful structure by which to consider legal traditions of ancient Egypt. Our historical knowledge derives from physical objects and written texts which survived the destructive tendencies of time. The availability of ancient information in the present has increased dramatically because of recent advances in the understanding of ancient languages and archeological techniques. This information reveals well-defined legal traditions in the ancient world, and particularly ancient Egypt.⁶² As expected, many of these traditions appear strange, indicating a breakdown in the continuity of their

transmission. While centuries of subsequent intellectual development may discredit ancient ideas, an unbridgeable dichotomy between the ancient world and the present is not beyond question. Descriptions of ancient Egyptian legal traditions that appear surprisingly unsurprising in the western legal context reveal links between the ancient and the present. While gaps in the historical record prevent the tracing of these traditions through the passage of time, their comparison with contemporary understandings leaves no doubt of their transmission, speaking to their considerable venerability.

Considered one of the most influential civilizations, the ancient Egyptians created a progressive society and developed legal traditions still felt in the present.⁶³

Although large quantities of physical objects and written texts from the Fertile Crescent remain well preserved, the meaning of their inscriptions remained a mystery for more than a millennium.⁶⁴ A significant breakthrough occurred with the discovery of the Rosetta Stone stele on

⁵⁹ *The Oxford English Dictionary*, 2d ed., s.v. “tradition”.

⁶⁰ *Supra* note 24 at 12.

⁶¹ *Ibid.*

⁶² Information must be received from physical objects and written texts with great care and cultural sensitivity. With respect to physical objects, Professor Glenn notes that they “do not speak or communicate in a human language, so a particular receptivity is called for...” *Ibid.* at 7. The reading of written texts presents significant interpretation challenges. Glenn writes that “[a]gainst non-traditional interpretations, the text cannot answer back. It simply *is* the canon, forever such and as such, forever vulnerable. ... Absent demonstrable adherence to custom, or revelation, the text may be seen more as a point of departure than as a means of continuance.” *Ibid.* at 10.

⁶³ For example, the scales of justice as a symbol of justice first appeared in ancient Egypt c. 2000 BCE. See James Henry Breasted, *The Dawn of Conscience* (New York: Charles Scribner’s Sons, 1933) at 189-90, the title of which inspired the name

of this section. See also Russ VerSteege, *Law in the Ancient World* (Durham, NC: Carolina Academic Press, 2002) at 108. The scales of justice are discussed further in this section. In addition to legal traditions, ancient Egyptians contributions to art, architecture, astronomy, literature and medicine are felt in the present. The progressiveness of ancient Egyptian society is detailed by Breasted.

⁶⁴ Although many ancient records have been lost or destroyed, the ancient Egyptians meticulously recorded their affairs, producing huge quantities of written sources, a fraction of which are preserved. See R.O. Faulkner, “The Kingdom Under Ramesses III” in *The Cambridge Ancient History: The Middle East and the Aegean Region c. 1380-1000 B.C.*, 3rd ed. (Cambridge: Cambridge University Press, 1975) 244 at 245 and John Van Seters, *In Search of History: Historiography in the Ancient World and the Origins of Biblical History* (New Haven: Yale, 1983) at 129 who writes that “no Near Eastern society was more meticulous in its record keeping”.

Egypt's Mediterranean coast in 1799. The Stone contained an inscription in two forms of hieroglyphs and classical Greek. This discovery became a catalyst for the eventual decipherment of hieroglyphs, a momentous achievement occurring several decades later. This accomplishment brought the presence of ancient Egyptian information to the present.⁶⁵ As a result, the texts of numerous ancient sources, some dating back more than 5,000 years, are now available in contemporary languages.

Ancient Egyptian texts reveal a remarkably organized and sophisticated legal system.⁶⁶ Although no legal code remains, texts from as early as the Middle Kingdom refer to one.⁶⁷ In the ancient Egyptian state, officials acted as decision-makers in both civil and criminal cases. Since there was no professional judiciary, governors adjudicated disputes in a federation of regional courts. Six courts comprised the kingdom's judicial system, each with a chief judge. Litigants brought disputes for adjudication through formal written applications. It appears that the ancient Egyptians were a litigious lot; court scribes meticulously recorded numerous private and public cases.⁶⁸ These records read like case reports, each briefly describing the facts and the judge's decision. In terms of governmental structure, an important official known as the vizier acted as the kingdom's prime minister. In addition to carrying out a range of executive functions, the vizier served as the chief justice of the regional courts and

administered the judicial system. Ancient Egyptians considered the vizier to speak on behalf of Ma'at, the goddess of truth and justice.⁶⁹ In his role as head of the judicial system, the vizier both investigated and heard serious cases, such as murder.

One of the earliest references to the adjudicative process appears more than 4,000 years ago in the tombs of two state officials. These officials acted as judges during the lengthy reign of the Sixth Dynasty pharaoh, Pepi II. The inscriptions read, "Never did I judge two brothers in such a way that a son was deprived of his paternal possession."⁷⁰ These early inscriptions illustrate the most ancient Egyptian adjudicators taking the interests of persons, other than the parties to the litigation, into account. Not only do these inscriptions demonstrate the consideration of broader societal interests in decision-making, their inclusion in the tombs of two state officials indicates the officials' concern with their reputation for fairness in the community. These two inscriptions provide the first reference to an increasingly important theme of adjudicative fairness in the ancient Egyptian kingdom. During the subsequent First Intermediate Period, a Heracleopolitan king wrote eloquent passages of wisdom to his young son, known as the Instruction Addressed to Merikere. With respect to the appointment of state officials, the king advised his son to select wealthy judges. Judges lacking material resources were liable to corruption by wealthy litigants:

⁶⁵ See generally, E.A. Wallis Budge, *The Rosetta Stone* (New York: Dover Publications, 1989).

⁶⁶ See Raymond Westbrook, "What is the Covenant Code?" in Bernard M. Levinson, ed. *Theory and Method in Biblical and Cuneiform Law* (Sheffield: Sheffield Academic Press, 1994) 13.

⁶⁷ *Ibid.*

⁶⁸ See P.G. Monateri, "Black Gaius: A Quest

for the Multicultural Origins of the „Western Legal Tradition?“ (2000) 51 *Hastings L.J.* 479 at 521.

⁶⁹ For a critical examination of Ma'at in modern moral language, see Maulana Karenga, *Maat, The Moral Ideal in Ancient Egypt: A Study in Classical African Ethics* (New York: Routledge, 2004).

⁷⁰ James Henry Breasted, *Ancient Records of Egypt*, vol. 1 (Irvine, California: Michael S. Sanders, 1988) at 325-31, 355-57.

Make great thy nobles, that they may execute thy laws. He who is wealthy in his house does not show partiality, for he is a possessor of property and is without need. But the poor man (in office) does not speak according to his righteousness, for he who says „Would I had?, is not impartial; he shows partiality to the one who holds his reward.⁷¹ The Heracleopolitan king's advice to his eventual successor demonstrates the importance of adjudicative impartiality in the ancient Egyptian state. A corrupt judiciary would undermine public confidence in the judicial system, and ultimately the king's authority. In order to maintain adjudicative impartiality, the king wisely separated the interests of his judicial officials from those of powerful litigants by ensuring that judges were sufficiently wealthy to resist their influence.

An inscription from the conclusion of the First Intermediate Period and the reunification of the Egyptian kingdom evidences the entrenchment of the Heracleopolitan king's idea that sufficient resources would shield judicial officials from the influence of wealthy litigants. Mentuwoser, a prominent state official serving under the Twelfth Dynasty pharaoh Sesostri I, proudly proclaimed his impartiality on a well-preserved stone tablet found in a temple dedicated to the god Osiris. In the inscription, he boasts, "I was one who heard cases according to the facts without showing partiality to him who held the reward, for I was wealthy and goodly in luxury."⁷² Whether or not impartiality was a justification for Mentuwoser's extravagant lifestyle, this prominently displayed tablet reveals the judicial adjudicative impartiality embed-

ded among ancient Egyptian judges and the value of a reputation for fairness.⁷³ Deeply entrenched among Egyptian judges, the tradition of impartiality received its strongest endorsement from the pharaoh himself. Thutmose III appointed Rekhmire as vizier over the kingdom during the latter half of his Eighteenth Dynasty reign. During the lavish appointment ceremony, Thutmose III furnished Rekhmire with detailed instructions on how to carry out the duties of his office, known as the Installation of the Vizier. These instructions establish guidelines for the vizier's behaviour in the exercise of his executive, administrative and judicial responsibilities, and in his relations with others. An impressive inscription recounting these instructions appears in Rekhmire's tomb:

It is an abomination of the god to show partiality. This is the teaching: thou shalt do the like, shalt regard him who is known to thee like him who is unknown to thee, and him who is near... like him who is far... Do not avoid a petitioner, nor nod thy head when he speaks.⁷⁴

Thutmose III's instructions make a key contribution toward the development of the tradition of adjudicative impartiality by placing fairness at the heart of judicial decision-making. The Installation of the Vizier views impartiality as an indispensable feature of adjudication. By connecting judicial partiality to condemnation by the gods, the pharaoh rebuked corruption in the strongest terms possible. This denunciation of partiality is even more significant from the mouth of the pharaoh, given that ancient Egyptians considered the pharaoh a living god.⁷⁵ The instructions of Thutmose III also refer to

⁷¹ Breasted, *supra* note 40 at 154-57.

⁷² *Ibid.* at 161.

⁷³ *Ibid.*

⁷⁴ James Henry Breasted, *Ancient Records of Egypt*, vol. 2 (Irvine, California: Michael S. Sanders,

1988) at 665-68.

⁷⁵ John A. Wilson, "Authority and Law in Ancient Egypt" in *Authority and Law in the Ancient Orient* (Baltimore: American Oriental Society, 1954) at 6.

impartiality as a state of mind: adjudicators are to see the parties as equals. A litigant who knows the judge must not receive a juridical advantage. The king's decree to treat those who are near like those who are far requires officials to abandon their prejudices and affections in deciding disputes. Furthermore, Thutmose III's caution against a judge nodding his head while parties argue the case reveals an awareness of how a perception of partiality could result in a loss of confidence in the judicial system. Interestingly, this admonition shows the pharaoh taking the perspective of an ordinary litigant by considering that a perception of unfairness could result where a litigant views the judge's body language as receptive to the opposing party. Thutmose III also provided Rekhmire with an example of what fairness means. The pharaoh recounts the story of vizier Kheti, who heard a case involving one of his relatives:

Beware of that which is said of the vizier Kheti. It is said that he discriminated against some of the people of his own kin in favor of strangers, for fear lest it should be said of him that he favored his kin dishonestly. When one of them appealed against the judgment which he thought to make him, he persisted in his discrimination. Now that is more than justice.⁷⁶

This story shows how far a judge would go to avoid having his reputation tainted by accusations of partiality. In Kheti's case, the vizier denied justice to his relatives in order to insulate himself from charges of bias. According to the pharaoh, this went too far. While Thutmose III clearly valued the perception of impartiality, his instructions make clear

that decisions must always be made on the merits of the case.⁷⁷ Further in Rekhmire's tomb, the vizier describes his approach to decision-making as the chief justice of Egypt:

I judged both [the insignificant] and the influential; I rescued the weak man from the strong man; I deflected the fury of the evil man and subdued the greedy man in his hour... I was not at all deaf to the indigent. Indeed I never took a bribe from anyone...⁷⁸

This inscription demonstrates how Rekhmire decided cases in accordance with Thutmose III's instructions. Rekhmire highlights cases where a significant power imbalance existed between litigants, proclaiming that powerful parties could not intimidate him. Not only does Rekhmire assert that he decided cases in favour of the weaker party when demanded by justice, he appears to relish in his reputation of protecting the weak from oppression. Like Thutmose III, Rekhmire considers the appearance of his impartiality by pointing out that he always heard both parties, without regard to their status, before rendering a decision. Listening attentively to each side prevented disappointed litigants from claiming that Rekhmire ignored their arguments because of their lowly status. Lastly, the inscription emphasizes that Rekhmire decided cases exclusively on the requirements of justice, never succumbing to influence from wealthy litigants offering bribes.

In addition to inscriptions describing the tradition of adjudicative impartiality, institutional arrangements developed over time to separate ancient Egyptian judges from sources of influence. While both the Heracleopolitan king and Mentuwoher

⁷⁶ James Henry Breasted, *Development of Religion and Thought in Ancient Egypt* (Philadelphia: University of Philadelphia Press,

1972) at 241-42.

⁷⁷ See Breasted, *supra* note 40 at 127.

⁷⁸ VerSteeg, *supra* note 40 at 111.

advocated the appointment of judges with the resources to resist bribes, the judiciary's reputation in the kingdom eventually suffered. By the time Eighteenth Dynasty pharaoh Horemheb ascended the throne, the judiciary was rife with corruption.⁷⁹ To restore confidence in state institutions and curb further abuses, Horemheb issued an edict to insulate judges from sources of influence. On a prominently displayed stele, Horemheb decreed the establishment of judicial salaries to make judges less dependant on bribes as a source of income.⁸⁰ In addition, Horemheb further strengthened the financial independence of judges by exempting them from taxes.⁸¹ Given these new protections, Horemheb extended little sympathy to judges accepting bribes or otherwise demonstrating partiality, increasing the penalty for corruption to the severing of an offender's nose, or even death.⁸² Ancient Egyptian literature reflects a variety of writing styles and techniques, providing a glimpse into the kingdom's culture. Translated texts include religious books, proverbs, biographical works and scientific manuscripts. Several of these sources look at the ancient Egyptian legal system and reflect popular attitudes toward adjudication. For example, the Nineteenth Dynasty era proverbs known as the Wisdom of Amenemopet cautions both litigants and judicial officials against abuses of justice:

Do not force a man to go into court,
Neither shalt thou bend righteousness (or justice),
While thy face is inclined towards showy clothing (of a litigant),
And thou drivest away him who is shabby.
Take not gifts from the strong,
Neither shalt thou

oppress for him the weak. Justice is a great gift of god, He giveth it to whom he will.⁸³ The theme of adjudicative impartiality in this passage echoes the instructions of Thutmose III. The proverb openly acknowledges judicial vulnerability; it is inevitable that the appearance of wealthy litigants will impress decision-makers. Instead of giving into their weaknesses, judges must remain vigilant to avoid allowing the appearance of a litigant to affect the decision-making process. Judges are warned against accepting bribes from litigants, and are encouraged to treat all parties equally. As seen in the instructions of Thutmose III, justice flows from the supernatural; judges must uphold their impartiality by receiving the gift of justice from god.

Written in c. 1800 BCE, *The Tale of the Eloquent Peasant* remains as one of the most remarkable works of ancient fictional literature. The Tale tells the story of a poor litigant's firsthand experience with the ancient Egyptian legal system. The story begins with a peasant named Khunanup traveling to the market with his donkeys laden with goods. On the way, he encounters Nemtinakht, the superintendent of a wealthy noble's lands. Nemtinakht schemes to steal the peasant's goods, diverting Khunanup's caravan over his fields. While passing over the field, one of the peasant's donkeys eats a mouthful of grain. Nemtinakht uses the "theft" of his grain as a pretense to beat the peasant and seize his goods. Given this injustice, Khunanup petitions a judge traveling through the region for relief. The judge listens to the peasant deliver an extraordinary speech about truth and

⁷⁹ Cyril Aldred, "The Reign of Horemheb" in *The Cambridge Ancient History: The Middle East and the Aegean Region c. 1380-1000 B.C.*, *supra* note 41, 71 at 76 who writes that there was "widespread corruption" at the time Horemheb assumed office.

⁸⁰ Wilson, *supra* note 52 at 120-23.

⁸¹ *Ibid.*

⁸² *Ibid.* See also Aldred, *supra* note 56 at 76.

⁸³ Breasted, *supra* note 40 at 324.

justice. After the speech, the judge is so impressed with Khunanup's oratory skills that he invites another official to listen to the story. This scenario repeats itself, and Khunanup ends up reciting nine speeches before finally receiving justice from the pharaoh himself. The pharaoh listens to Khunanup's final treatise on justice and orders the return of his goods and the forfeiture of Neminakht's property to the peasant for additional compensation.⁸⁴

The nine speeches describe the role and philosophy of ancient Egyptian judges. Khunanup's anxiety increases each time he is forced to repeat his pleas; with each additional repetition, the story becomes increasingly desperate, reaching new heights of elaboration. In his first address, the peasant compares the role of the judge to a navigator of a ship on the sea of truth, who must steer around the dangers of injustice. In his second address, Khunanup appeals to the judge's sense of impartiality and fairness: Helm of heaven! Beam of earth! Plumline bearing the weight! Helm, drift not! Beam, tilt not!

Plumline, go not wrong!⁸⁵ Through these analogies, Khunanup suggests that judges can drift from justice, and appeals for adjudicative impartiality. Becoming exasperated when delivering his third speech, the peasant warns of bias creeping into the adjudicative process, admonishing the judge to avoid it:

Look, you yourself are the very scales: if they tilt, then you can tilt. Drift not, but steer!⁸⁶ Khunanup sees the judge as the personification of the scales of justice, an

analogy surprisingly familiar to contemporary legal traditions. Biased scales tilt to one side instead of maintaining a true and equal balance. Like the scales, the judge must avoid prejudices that result in the parties having less than a true and equal opportunity to present their case. Khunanup laments a partial judge, describing him as: ... blind to what he sees, and deaf to what he hears, his heart straying from what is recalled to him.

A partial judge does not listen to the arguments of the parties, and in making his decision, fails to consider the merits of the case. Khunanup spares no words for such a judge: Look, you are a town without a mayor, like a generation without a great man, like a boat with no controller, a gang without a leader.

Look, you are a stealing officer, a bribed mayor, a district-overseer who should beat off the plunderer who has become an archetype for the evildoer.⁸⁷ In his sixth speech, Khunanup persists in his criticism of partial judges, again invoking the analogy of the scales:

You were appointed to hear cases, to judge contenders, to punish the thief. Look, your way is to weigh for the robber. You are trusted — and are become a misleader.⁸⁸ In this passage, Khunanup reiterates adjudication as the basic function of the judiciary. Judges are necessary to decide disputes and dispense justice. By virtue of their office, judges possess great power and public trust. Litigants call upon judges to decide their conflicts with the understanding that the judge will hear both sides before

⁸⁴ Story paraphrased from the translations in R.B. Parkinson, *The Tale of Sinuhe and Other Ancient Egyptian Poems* (New York: Oxford University Press, 1997) at 54-88 and George A. Barton, *Archeology and The Bible*, 7th ed. (Philadelphia: American Sunday School, 1937) at 525-28.

⁸⁵ R.B. Parkinson, *ibid.* at 63.

⁸⁶ *Ibid.* at 66.

⁸⁷ *Ibid.* at 67.

⁸⁸ *Ibid.* at 69. The text "weigh for the robber" is taken to mean that a biased just places more emphasis on the scales of justice in favour of the morally blameworthy party

punishing the morally blameworthy party. A corrupt judge, who Khunanup compares to the scales of justice weighed in favour of a thief, betrays their office and threatens the process of adjudication.

The Tale of the Eloquent Peasant reveals the enormous value placed on adjudicative impartiality in ancient Egypt. Khunanup's impressive speeches on justice provide a detailed look at the ancient Egyptian legal system from the perspective of a poor litigant, one who possessed nothing more than an extraordinary way with words. The analogies of justice and impartiality invoked by Khunanup still resonate in legal discourse today. Khunanup's appeal to his judge's sense of justice indicates that judges took great pride in their reputations for fairness and impartiality; the mere accusation of adjudicative bias or corruption was shocking and scandalous. Indeed, after Khunanup questioned the motivations of his judge in the third speech, the court attendants responded by beating him on "all his limbs".⁸⁹

Primary sources considered in this section, many accessible only in the past two centuries, reveal the dawn of adjudicative impartiality in the ancient Egyptian kingdom. This tradition appears familiar as a core principle of western legal traditions; does this indicate a bridge between the ancient world and the present time? Historians and legal scholars have explored a connection between ancient Egypt and western civilization. Professor Monateri, for example, has researched the possibility of an African-Semitic link to western legal traditions.⁹⁰ Monateri concludes that "[w]estern law is derived not only from Roman Law, but from other ancient laws as well", pointing to examples in contract

law, the state, the adjudication of disputes and the role of professional elites in shaping legal culture.⁹¹

As the starting point of this connection, sources indicate extensive diffusion of traditions among ancient civilizations. For example, an old Babylonian hymn to the judge-god Shamash describes a tradition of adjudicative impartiality: The unjust judge thou makest behold shackles. As for him who takes a bribe and bends the right, Him dost thou burden with punishment. He who does not take a bribe, who espouses the cause of the weak,

Is well pleasing to Shamash: he will live long. The careful judge, who renders a just judgment, Prepares himself a palace, a princely residence is his dwelling...⁹² The language of this hymn appears strikingly similar to ancient Egyptian sources. A corrupt Babylonian judge accepting bribes bends the "right", an analogy like Khunanup's tilted scales in the Tale of the Eloquent Peasant. Impartiality is considered pleasing to the god Shamash, linking justice and the supernatural as seen in both Thutmose III's instructions to the vizier and the proverbs of Amenemopet. It is also notable that the hymn praises judges protecting weaker litigants, reminiscent of the boastful inscriptions in Rekhmire's tomb.

This diffusion of information in the ancient world, coupled with historical events, evidences linkages between the traditions of ancient Egypt and western civilization. These linkages appear like a matryoshka doll: inspecting the traditions of one civilization reveals the traditions of another inside. In chronological order, the ancient Egyptians and Greeks represent the first such connection.

⁸⁹ *Ibid.* at 67.

⁹⁰ Monateri, *supra* note 45.

⁹¹ *Ibid.* at 516.

⁹² Breasted, *supra* note 40 at 341.

Monateri points to Ptolemaic Egypt, starting in c. 332 BCE, as a period of information transfer between the legal traditions of the ancient Egyptians and the Greeks.⁹³ This crosspollination of traditions may have occurred even earlier, with the visit of Greek lawmaker Solon c. 6th century BCE who studied in ancient Egypt before returning home to reform Athens' draconian laws.⁹⁴

Octavian's conquest of Greek-controlled Egypt c. 30 BCE, following the death of Ptolemaic Queen Cleopatra VII, brought surviving ancient Egyptian legal traditions into the Roman world. Egyptian national law and legal institutions continued to operate after the Roman conquest, even enduring after the Antoninian Constitution of 212.⁹⁵ Whether from the Egyptians under Greek control, or borrowed from Greek civilization influenced by ancient Egypt, the Romans were aware of and influenced by ancient Egyptian legal traditions. In turn, Rome's exalted laws exerted great influence on western legal traditions.⁹⁶

An alternative route by which ancient legal traditions may have found their way to the western world is through the ancient Hebrews, especially considering the tremendous influence of the Old Testament.⁹⁷ The ancient Egyptian and

Babylonian civilizations indirectly influenced Hebrew literature and religious texts through the Canaanites. At the time of the Hebrew settlement in Palestine, ancient Egyptian and Babylonian traditions saturated the resident Canaanite civilization.⁹⁸ The Canaanites were under Egyptian rule, and had developed an extensive trade relationship with the Babylonians. Therefore, it seems likely that the Hebrews were indirectly exposed to ancient Egyptian traditions through their interaction with the Canaanites.⁹⁹

The Torah records direct evidence of ancient Egyptian influence on the Hebrew civilization through the prophet Moses. According to the narrative in the book of Exodus, the pharaoh's family adopted Moses as an infant.¹⁰⁰ Raised by Egyptian nobility, Moses spoke Egyptian, learned Egyptian traditions and became familiar with Egyptian culture. The first biblical reference to a tradition of adjudicative impartiality appears shortly after the story of Moses leading the Hebrews out of Egypt. Exodus 18:21 describes Moses' father-in-law, a Midianite priest, advising Moses on the appointment of judges:

[T]hou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands,

⁹³ Monateri, *supra* note 45 at 519, 522.

⁹⁴ See Yaacov Shavit, *History in Black: African-Americans in Search of an Ancient Past* (London: Frank Cass, 2001) at 114. Greek laws at the time were literally draconian, having been written by Draco, and consisted of almost entirely capital offences.

⁹⁵ Monateri, *supra* note 45 at 527.

⁹⁶ At its height, the Roman Empire included most of continental Europe, and even reached into Great Britain. For the consideration of Roman influence on the civil law tradition see John Henry Merryman & Rogelio Pérez-Perdomo *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. (Palo Alto, California: Stanford University Press, 2007) at 13. Although Roman legal traditions had less influence on the development of the common law, its influence

is still felt. See Arthur P. Monahan, *Consent, Coercion and Limit: The Medieval Origins of Parliamentary Democracy* (Montreal: McGill-Queen's University Press, 1987) at 76 and George Mousourakis, *The Historical and Institutional Context of Roman Law* (Burlington, Vermont: Ashgate Publishing, 2003) at 434.

⁹⁷ See Breasted, *supra* note 40 at 338. For consideration of the influence of the Old Testament on western civilization see "The Old Testament" in John L. Beatty & Oliver A. Johnson, *Heritage of Western Civilization*, vol. 1, 8th ed. (Eaglewood Cliffs, New Jersey: Prentice Hall, 1995) 21.

⁹⁸ Breasted, *supra* note 40 at 347.

⁹⁹ Hebrew interaction with the Semitic Canaanite civilization is recorded in the Old Testament books of Joshua and Judges.

¹⁰⁰ Exodus 2:10.

and rulers of hundreds, rulers of fifties, and rulers of tens.¹⁰¹ Deuteronomy 1:16-17 repeats the story of Moses appointing judges:

And I charged your judges at that time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's: and the cause that is too hard for you, bring it unto me, and I will hear it.¹⁰²

Like the ancient Egyptian tradition, the supernatural plays an important role in the ancient Hebrew conception of justice. Most noteworthy are the similarities between the Hebrew God and the Egyptian goddess Ma'at.¹⁰³ Both represent a fountain of justice; the function of the judge is to listen to both sides of the dispute and then decide the case in accordance with divine judgment. The biblical text also reflects the ancient Egyptian tradition of adjudicative impartiality.¹⁰⁴ Reminiscent of Rekhmire's boast of saving weaker parties from those who would oppress them, Moses instructs judges to treat both parties the same, and not to fear intimidation by powerful litigants.

From these historical linkages, it appears that the ancient Egyptian tradition of impartiality has become a core principle of western legal traditions. Although gaps in the historical record prevent precise tracing, a prominent symbol of impartiality confirms the transmission of a tradition of adjudicative impartiality from ancient Egypt to the present. Originating in the Old Kingdom of ancient Egypt, the scales of justice adorn modern courthouses, representing impartiality.¹⁰⁵ Our contemporary familiarity with the scales of justice demonstrates our familiarity with an ancient symbol and a tradition developed over thousands of years in the ancient Egyptian kingdom. The scales represent the existence of a bridge to the past; a proposition that thousands of years of subsequent intellectual development has upheld: judges, in carrying out their function of deciding disputes, must act impartiality and listen to both sides, something argued by an eloquent peasant nearly 4,000 years ago.¹⁰⁶

B. IMPARTIALITY UNDER THE HOBBSIAN SOCIAL CONTRACT

Hobbesian social contract theory confirms the importance of impartiality to a peaceful society. In his political science masterpiece, *Leviathan*¹⁰⁷, Thomas

¹⁰¹ King James Version.

¹⁰² King James Version.

¹⁰³ The two tablets delivered by Moses on Mount Sinai may represent the Ma'atian concepts of law and justice. See Gerald Massey, *Ancient Egypt: The Light of the World*, vol. 1 (London: T. Fisher Unwin, 1907) at 537. See also J. Gwyn Griffiths, "The Legacy of Egypt in Judaism" in William Horbury, W.D. Davies & John Sturdy, *The Cambridge History of Judaism: The Early Roman Period*, vol. 3 (Cambridge: Cambridge University Press, 2000) 1025, notably the biblical references to the Egyptian scales of justice at 1045. In addition, the Wisdom of Amenemopet was translated into Hebrew, read by Hebrews and influenced the writing of the Old Testament: Breasted, *supra* note 40 at 322.

¹⁰⁴ According to Breasted, the pharaoh instructed the vizier that his duty was "not to show respect of persons", words nearly identical to Moses' instructions. *Ibid.* at 342-43.

¹⁰⁵ Wolfgang Boochs, *Altägyptisches Zivilrecht* (Sankt Augustin, Academia Verlag, 1999) at 13, cited in Glenn, *supra* note 24 at 93 n. 2, see also *supra* note 40 and Griffiths, *supra* note 80. The scales of justice also appear in the Tale of the Eloquent Peasant, considered earlier.

¹⁰⁶ In the Tale of the Eloquent Peasant, Khunanup analogies the judge to the scales of justice, and implores him to maintain a fair and true balance.

¹⁰⁷ Thomas Hobbes, *Leviathan* (Mineola, New York: Dover Publications Inc., 2006).

Hobbes propounds the first modern iteration of the social contract. Published in 1651, during the political turmoil following the execution of King Charles I, the text reveals Hobbes as a staunch royalist, intimately concerned with the outbreak of civil war in his native England.¹⁰⁸ Through his infamous analogy of the state as an artificial person, Hobbes approaches sedition as a political sickness leading to civil war, and ultimately the death of the state.¹⁰⁹ The cause of sedition is political unrest, but like a physical sickness, it can be treated and cured.¹¹⁰ Within this context, the *Leviathan* is as much of a work of scholarship as it is a prescription for healing England's political sickness by persuading citizens of the legitimacy and necessity of the state.

Hobbes paints a miserable picture of the hypothetical state of nature.¹¹¹ By nature, men enjoy complete liberty, defined by Hobbes as the absence of external impediments that take away power from a man to do what he wants.¹¹² While this may appear favourable at first glance, men with unrestricted liberty in the state of nature employ any means necessary to promote and protect their self-interest. Furthermore, it is a fundamental right of nature that each man can do anything in the name of self-defence.¹¹³ According to Hobbes, there is no state, law or even morality in nature, and thus no social organization, justice or injustice, right or wrong behaviour.¹¹⁴ Each man possesses a right to everything that exists, even another's body.¹¹⁵ Since

men evaluate actions from their self-interested point of view, there is no forum for resolving disputes that may arise; each man acts as his own judge in all matters.¹¹⁶ Violent conflict is liable to erupt when the self-interests of two or more men clash, for example if they desire something that cannot be enjoyed by them all. Given the limited availability of natural resources, men must either destroy or subdue others to survive.¹¹⁷

It is possible for men to escape this brutal state of nature if they enter into a contract to curtail their natural liberty. Men negotiate this social contract on equal terms, given that each man fears death and seeks the benefit of its protection from the violence of war.¹¹⁸ A man must be willing to give up his right to do what he wants in the pursuit of peace when others are also prepared to do so.¹¹⁹ The extent to which men must divest their liberty depends upon how much liberty each man would allow another to enjoy against himself. Hobbes characterizes the terms of the social contract as the laws of nature that, once recognized, can deliver men from the state of nature into a peaceful society.¹²⁰ Hobbes sums up the laws with a negation of the golden rule: do not do things to others which you do not want to have done to you.¹²¹ This rule provides a simplified way for men to weigh the actions of others against their own.

According to Hobbes, inequalities do not exist in the state of nature, but arise from the introduction of civil laws.¹²² Therefore, men must acknowledge

¹⁰⁸ Geoffrey M. Vaughan, *Behemoth Teaches Leviathan: Thomas Hobbes on Political Education* (Lanham, Maryland: Lexington Books, 2002) at 16.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ The usage of masculine references in this section are for the purposes of integration with the original text of the *Leviathan*, but should be read as including all persons.

¹¹² *Supra* note 84 at 72.

¹¹³ *Ibid.* at 72.

¹¹⁴ *Ibid.* at 71.

¹¹⁵ *Ibid.* at 72.

¹¹⁶ *Ibid.* at 78.

¹¹⁷ *Ibid.* at 69.

¹¹⁸ *Ibid.* at 86.

¹¹⁹ *Ibid.* at 73.

¹²⁰ *Ibid.* at 88.

¹²¹ *Ibid.*

¹²² *Ibid.* at 86.

equality amongst themselves.¹²³ Even if a man believes himself to be superior to others, he must accept natural equality among men given that they enter into the social contract on equal terms.¹²⁴ Furthermore, it is a premise that a man cannot reserve a right for himself under the social contract which he would not allow others to retain.¹²⁵ When men keep rights that they do not want others to enjoy, they act against the law of natural equality.¹²⁶ The laws of nature described by Hobbes demonstrate the importance of adjudicative impartiality to a peaceful society. Given men's self-interest, the peaceful resolution of conflict requires men to give up the natural right to decide their own disputes under the social contract:

And seeing every man is presumed to do all things in order to his own benefit, no man is a fit Arbitrator in his own cause: and if he were never so fit; yet Equity allowing to each party equall benefit, if one be admitted to be Judge, the other is to be admitted also; & so the controversie, that is, the cause of War, remains, against the Law of Nature.¹²⁷ Even though the laws of nature provide the means for men to avoid the state of nature, Hobbes acknowledges that conflict may arise after the formation of the social contract. In order to preserve peace, the parties to a controversy must submit their dispute to a judge for a decision:

And because, though men be never so willing to observe these Lawes, there may neverthesse arise questions concerning a mans action; First, whether it were done, or not done; Secondly (if done) whether against the Law, or not against the Law; the former whereof, is called a question Of Fact; the later a

question Of Right; therefore unlesse the parties to the question, Covenant mutually to stand to the sentence of another, they are as farre from Peace as ever. This other, to whose Sentence they submit, is called an Arbitrator. And therefore it is of the Law of Nature, That they that are at controversie, submit their Right to the judgement of an Arbitrator.¹²⁸ Given the central role of judges in maintaining a peaceful society, Hobbes emphasizes that judges must remain impartial between the parties:

Also if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them. For without that, the Controversies of men cannot be determined but by Warre. He therefore that is partiall in judgment, doth what in him lies, to deterre men from the use of Judges, and Arbitrators; and consequently, (against the fundamentall Lawe of Nature) is the cause of Warre.¹²⁹

Hobbes further writes that judges lose their impartiality when they possess an interest in the outcome of the case:

For the same reason no man in any Cause ought to be received for Arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other: for hee hath taken (though an unavoydabl bribe, yet) a bribe; and no man can be obliged to trust him. And thus also the controversie, and the condition of War remaineth, contrary to the Law of Nature.¹³⁰

The Hobbesian theory of the social contract demonstrates why third parties must be called upon to decide disputes in a peaceful society. In the state of nature, men can do anything to

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* at 87.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.* at 86.

¹³⁰ *Ibid.* at 87.

accomplish their desired ends. No action, no matter how distasteful or repugnant, is immoral or unjust; men are exclusively interested in their survival and maintaining self-defence. Men cannot trust one another in the condition of war to keep promises and are therefore unable to enter into agreements to resolve their conflicts.¹³¹ The peaceful determination of disputes is hardly possible in the scenario of every man for himself; instead, violence ends up resolving inevitable conflicts over limited natural resources. Eventually the need for self-defence motivates men to enter into a social contract for peace. Men must agree to set aside their natural right to do what they want in the interest of peace. The extent to which natural liberty must be divested under the social contract depends upon how much liberty men would allow others. In other words, the liberties retained in society are those which each man, negotiating the social contract from a position of natural equality, would permit every other man to enjoy against himself. Hobbes' equality of liberty among men provides the key to understanding the legitimacy of third party adjudication in a peaceful society.

In the state of nature, where men enjoy unrestricted liberty to do what they want, both parties to a conflict possess the right to judge their dispute,¹³² leading to an impasse that can only be resolved by conquest. In the words of Hobbes, "the Controversies of men cannot be determined but by Warre".¹³³ Conflicts between men do not disappear once a social contract for peace is established. Disputes are bound to arise from man's pursuit of self-interest in even the most harmonious of societies, thus a peaceful

society must hold a non-violent mechanism to end them. It is beyond obvious that no self-interested litigant would allow his opposing party to decide their disagreement, yet this simple proposition reveals what lies behind the legitimacy of arbiters. One would reject his opponent as a judge without hesitation, since there would be no confidence that the matter would be decided fairly by the very person whose interests are at stake. This proposition demonstrates impartiality as essential to the acceptance of a decision-maker. None of the contesting parties is acceptable to the others as the judge of the controversy since they are all partial; moreover, none possesses this right under the social contract. Given that a party to a dispute would deny his opponent's liberty of judging their controversy, Hobbes' equality of liberty principle requires him to divest the right to judge his conflicts under the social contract. Thus, in a peaceful society no man can judge his own case: "And seeing every man is presumed to do all things in order to his own benefit, no man is a fit Arbitrator in his own cause."¹³⁴

If the parties to a dispute lack the legitimacy to judge their conflict, who, then should decide? The only rational option to settle disagreements in a peaceful society is the judgment of a third party, someone unconnected to the dispute.¹³⁵ According to Hobbes, the law of nature commands men to submit their controversies to an arbiter for a decision: "[t]his *other*, to whose Sentence they submit, is called an Arbitrator... they that are at controversie, [must] submit their Right to the judgement of an Arbitrator."¹³⁶

¹³¹ This is why the Leviathan must be created to enforce the social contract between men in the state of nature: *ibid.* at 76.

¹³² *Ibid.* at 78.

¹³³ *Ibid.* at 86.

¹³⁴ *Ibid.* at 87.

¹³⁵ A third party in this context is broad enough to include multiple persons, for example a group of individuals such as a jury.

¹³⁶ *Supra* note 84 at 87. Emphasis added.

The use of the word “other” signifies the third party status of the decision-maker.¹³⁷ Because impartial arbiters are essential to a peaceful society, men must be able to access genuine third parties to adjudicate their conflicts. If an impartial arbiter cannot be found, men will withhold their disputes from third party adjudication.¹³⁸ The potential consequences of this failure may be severe, as the dispute is apt to end in a manner destructive of a peaceful society.¹³⁹ The peaceful adjudication of disputes depends not only upon men bringing their controversies before an arbiter, but also upon their willingness to abide by the arbiter’s decision. What makes the parties to a dispute willing to accept an adverse decision? The answer to this question illuminates the legitimacy of the adjudicative process, and is particularly important to the effectiveness of third party decision-making since one party is bound to be routinely disappointed with the outcome of the case. In the event the decision of a judge is rejected, the dispute’s impasse returns, carrying with it the potential for litigants to take the controversy into their own hands. Given that men are generally self-interested, they must have a stronger motivation to abide by an unfavourable judgment than to simply reject it after the fact.

As demonstrated earlier, only third party adjudicators can legitimately decide disputes brought before them under the social contract. For the same reason that no man would permit his opposing party to decide their case, he would not accept the judgment of a decision-maker who demonstrated partial affections or treated him unfairly. Hobbes writes that an arbiter who stands to gain “greater profit, or honour, or pleasure” from “the victory of one party, than of the other” has become partial to the outcome of the dispute. In this case, “no man can be obliged to trust him”.¹⁴⁰

For example, a judge accepting a bribe from one of the litigants appearing before him loses his impartiality vis-à-vis the parties; the absence of impartiality results in a loss of legitimacy. The acceptance of a bribe revokes the judge’s status as a third party to the dispute. In effect, he has become a party to the litigation since he develops a direct interest in the outcome of the case. Since he acts as a party to the dispute, he has no right to decide the controversy unless all the litigants possess the same right.¹⁴¹ The unsuccessful litigant is thus justified in rejecting the decision of a partial arbiter because such a judge has simply become a proxy for his opponent.

¹³⁷ See *ibid.*

¹³⁸ Hobbes recognizes as much when he writes that judges exhibiting partial affections dissuade men from bringing their controversies before an arbiter. Such judges are responsible for a return to the condition of war. *Ibid.* at 86. The decision-maker must be accepted by all parties to the dispute as a genuine third party, in the sense that he is unconnected to the subject matter or the parties involved. Considering that the ending of disputes is in the best interest of all members of society, the state creates and maintains judicial institutions to provide access to justice. It is likely that other barriers to third party adjudication, particularly complexity and cost, may further dissuade individuals from submitting their controversies for adjudication if an alternative third party decision-maker is not readily available.

¹³⁹ An ongoing dispute, such as an intergenerational blood feud, can be as destructive of a peaceful society as a dispute ended by one of the parties by violence. According to Hobbes, the state of war is liable to return where men fail to bring their controversies to an arbiter. Without an impartial decision-maker, a dispute cannot be settled except for in the condition of war: *ibid.* at 86.

¹⁴⁰ *Ibid.* at 87.

¹⁴¹ Of course, this situation would return the dispute to an impasse that could only be resolved by conquest. Hobbes writes that “no man is a fit Arbitrator in his own cause: and if he were never so fit; yet Equity allowing to each party equal benefit, if one be admitted to be Judge, the other is to be admitted also; & so the controversie, that is, the cause of War, remains, against the Law of Nature.” *Ibid.*

Hobbes' emphasis of the relationship of impartiality to adjudicative legitimacy is further demonstrated by his harsh warning to those entrusted with deciding disputes and the negation of the golden rule. First, the laws of nature require arbiters to deal with the litigants equally. Under the laws of nature, impartial adjudication is the only means to decide disputes peacefully.¹⁴² Judges exhibiting partial affections dissuade men from submitting their disputes before an arbiter in the first place. Hobbes condemns such judges in the harshest of terms, finding them guilty of breaching the fundamental law of nature and blaming them for causing war.¹⁴³ Second, the negation of the golden rule confirms impartiality at the core of third party adjudication. As a summation of the laws of nature, the rule advises men not to do something they would not want done to them. No man acting as an arbiter would want his own disputes to be decided by someone exhibiting partiality. Thus, he has an obligation to those entrusting him with deciding their case to treat them and the subject matter of their dispute with impartiality. If he cannot treat the parties fairly, he must not decide the matter as he is no longer a third party to the conflict.

III. IMPARTIALITY AND JUDICIAL INDEPENDENCE

In the previous section, the consideration of the historical record revealed the dawn of impartiality in ancient Egypt. The importance of impartiality to decision-making was then confirmed by the Hobbesian social contract. Since the legitimacy of judges

hinges on their status as third parties to the dispute, a decision-maker must treat the issues and the parties fairly to maintain legitimacy. Given that impartiality is identified by an early historical analysis and the Hobbesian social contract as essential to adjudication, what does impartiality reveal about the contemporary concept of judicial independence? This section sets out to answer this question through an examination of the concepts of impartiality and judicial independence in the context of judicial institutions.¹⁴⁴

First, this section looks directly at the judicial mind by considering the concept of impartiality. As a state of mind, impartiality requires judges to treat the issues and the parties fairly. However, the idea of actual impartiality is plagued by practical difficulties. There is no way to look inside the human mind to see biases and or prejudices, making it impossible to assess whether a judge was actually impartial in any particular case. Furthermore, it is likely that actual human impartiality is unrealistic. Judges are selected to decide cases because of their experience-based knowledge, and possess opinions and feelings that amount to partial affections. The difficulties of actual impartiality can be overcome by adopting a distinction between actual impartiality and the perception of impartiality. Given that impartiality is required to maintain a peaceful society, the perception of impartiality is the best that human institutions can accomplish. Judges seen as third parties to the dispute by litigants and the community possess the necessary legitimacy to determine

¹⁴² Impartial adjudication derives from the arbiter's status as a third party to the dispute, affording legitimacy to the decision. *Ibid.* at 86.

¹⁴³ *Ibid.* at 86.

¹⁴⁴ The state creates and maintains judicial

institutions to provide access to justice. This access to justice is accomplished by offering judges as trained third party arbiters to decide disputes that arise.

conflicts. Second, this section looks outside the judicial mind to external influences by considering the contemporary understanding of judicial independence. The definition of judicial independence as unqualified by the international community sets out the principle that judges must maintain complete freedom and autonomy from any other entity in the performance of their judicial functions. While establishing a starting point for judicial independence, unqualified judicial independence leaves difficult questions unanswered. Furthermore, unqualified independence provides no guidance for how to weigh the principle of complete judicial freedom against other principles.

Third, this section connects the concepts of impartiality and judicial independence by proposing independence as a means to the end of a perception of impartiality. This proposition provides a more satisfying explanation of judicial independence than unqualified judicial independence. Judicial independence is best understood in the context of a liberal democracy where the state appears as a litigant. In disputes involving the state, judges must maintain their status as a third parties to the dispute in order to preserve their legitimacy. Measures of judicial independence create the necessary space between the judiciary and sources of undue influence to ensure confidence in impartial adjudication.

A. THE PERCEPTION OF IMPARTIALITY

The Oxford English Dictionary defines impartiality as “[t]he quality or character

of being impartial; freedom from prejudice or bias; fairness”.¹⁴⁵ Impartial means “[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable”.¹⁴⁶ In other words, impartiality represents a state of mind free from prejudice or bias, a mind that considers others and their positions fairly. When applied to adjudication, this definition becomes fraught with practical difficulties. Assuming that impartiality has a concrete meaning, one cannot probe into the human mind to assess whether a judge holds bias or prejudice. Thus, it is impossible to determine with certainty whether a judge’s mind is impartial.

Even if an inquiry into judicial minds was possible, it is likely that every judge would hold certain personal affections. Judges are not blank slates; they are selected to adjudicate disputes because of their experienced-based knowledge. Former United States Supreme Court Justice Benjamin Cardozo admitted in a series of speeches that judges hold preconceived loyalties, but that these affections could be reduced by a certain attitude toward adjudication. According to Cardozo, a judicial temperament “will help in some degree to emancipate [judges] from the suggestive power of individual dislikes and prepossessions.”¹⁴⁷ The judicial temperament challenges a judge’s internal views because it will “broaden the group to which his subconscious loyalties are due.”¹⁴⁸ Justice Felix Frankfurter echoed Cardozo’s judicial temperament in the unanimous 1952 United States Supreme Court case of *Rochin v. California*¹⁴⁹:

To practice the requisite detachment and to achieve sufficient objectivity no

¹⁴⁵ *The Oxford English Dictionary*, 2d ed., s.v. “impartiality”.

¹⁴⁶ Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 176. Discussed in Russell, *The*

Judiciary in Canada, *supra* note 23 at 87.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Rochin v. California*, (1952) 342 U.S. 165, 72 S.Ct. 205 [*Rochin* cited to U.S.].

doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared.¹⁵⁰

As legal realists, Justices Cardozo and Frankfurter concluded that all judges held internal preconceptions from their experience. In grappling with the reconciliation of this internal bias with impartiality, they emphasized a relativist approach. Judges are to demonstrate "sufficient objectivity" in decision-making, achievable by practicing the "requisite detachment" from one's personal views.¹⁵¹ However, Justice Cardozo conceded that "[n]ever will these loyalties be utterly extinguished while human nature is what it is."¹⁵²

The defects of actual impartiality in an adjudicative context lie in the concept's factual indeterminacy and the understanding that all humans possess partial affections. These challenges are best overcome by substituting actual impartiality with a perception of impartiality. Given that impartiality can never be factually determined, nor does it appear to be humanly possible, its perception supplies the necessary legitimacy to third party decision-making. Stated simply, the perception of impartiality is the best that human institutions can achieve. The perception of impartiality takes into account that all humans hold internal views, but such views must not be seen to manifest themselves in the process of adjudication. Any action or status of the judge that, in the eyes of the litigants or the broader community, casts doubt on adjudicative fairness or reveals a personal interest in the outcome of the decision diminishes the appearance of impartiality.

A preference for the perception of impartiality as opposed to actual impartiality was realized by the ancient Egyptians. Most notably, the pharaoh directed his vizier to *show* impartiality as opposed to being impartial in fact:

It is an abomination of the god to show partiality. This is the teaching: thou shalt do the like, shalt regard him who is known to thee like him who is unknown to thee, and him who is near... like him who is far... Do not avoid a petitioner, nor nod thy head when he speaks.¹⁵³ If the judge nodded while one party spoke, litigants were likely to perceive the judge as partial. Support for the perception of adjudicative impartiality was also offered by Hobbes in the *Leviathan*:

For the same reason no man in any Cause ought to be received for Arbitrator, to whom greater profit, or honour, or pleasure *apparently* ariseth out of the victory of one party, than of the other...¹⁵⁴ Hobbes' use of the word "apparently" demonstrates his concern with the appearance of adjudicative impartiality to the litigants and the broader community. Under the social contract, a decision-maker can only possess legitimacy if he is seen a genuine third party to the issues and the parties. If litigants learn of the judge's personal interest in the outcome of the case, the perception of impartiality is lost and the decision-maker lacks legitimacy to decide the dispute. While extraordinary adjudicators may be capable of making fair decisions in cases where they have a personal interest in their decision, a disappointed party has no obligation to accept the judgment of a decision-maker who is not a genuine third party to the dispute.

¹⁵⁰ *Ibid.* at 171-72.

¹⁵¹ *Ibid.*

¹⁵² Cardozo, *supra* note 123.

¹⁵³ Breasted, *supra* note 51 at 665-68.

¹⁵⁴ Hobbes, *supra* note 84 at 87. Emphasis added.

1. Hidden Bias and the Perception of Impartiality

If the perception of impartiality replaces actual impartiality, why should judges strive to decide cases fairly if they can simply convince others that this is what they are doing? The perception of impartiality appears to open the door for judges to maintain hidden biases toward the issues or the parties; judges can simply conceal their interests and prejudices to preserve their legitimacy. This is a real possibility in individual cases; however, the viability of a surreptitious noble lie, where judicial institutions engage in a public conspiracy, is unlikely for several reasons.¹⁵⁵ First, a massive hoodwinking is liable to exposure simply because of its sheer complexity. In order to pull off a noble lie of adjudicative impartiality, an elite cadre of judges would have to possess considerable foresight to hide their interests and prejudices from litigants and the community. Moreover, the maintenance of secrecy would require the participation of every person with knowledge of the conspiracy; none could stand to gain more from its disclosure than its concealment. Second, records of judicial proceedings would likely reveal specific interests of decision-makers. For example, a pattern of deciding against litigants wearing blue ties may suggest the existence of a bias against blue ties. Third, the considerable risk of the noble lie scenario makes it unattractive from the outset. Participants in the conspiracy would have to accept the possibility of inadvertent disclosure with the knowledge that such a revelation would have devastating consequences. It seems unlikely that all decision-makers

would agree to take on the risk of this high-stakes gamble.

Conspiracy theories aside, individual judges are apt to act upon their general dispositions. The influence of a judge's worldview on the process of decision-making ranges from minimal to determinative. By practicing the judicial temperament advanced by Justices Cardozo and Frankfurter, judges can minimize the adjudicative impact of their partial affections. Since the perception of impartiality on its own provides no reason for judges to challenge their internal views, motivation is required from another source. For example, professional judicial training can demonstrate the value of adjudicative impartiality. Judges committed to an ethic of impartiality encourage the development of the law by carefully considering other points of view and novel arguments. However, it remains possible for judges to decide cases on their predetermined views as long as they come across as impartial. While the perception of impartiality cannot guarantee that judges will strive to act impartially instead of concealing their interests, its value as the legitimizing force of third party adjudication outweighs the disadvantages of hidden bias in individual cases. As demonstrated earlier, a peaceful society requires a mechanism to determine conflicts that inevitably arise between self-interested persons. The effectiveness of this mechanism depends upon its acceptance by the parties; in other words, a disappointed litigant must accept that the decision finally ends the dispute. The perception of impartiality supplies the mechanism of third party adjudication with the legitimacy necessary to fulfill this essential role.

¹⁵⁵ The noble lie scenario originates from Plato's *The Republic*, where a plan is devised to convince the population that they are constituted from different metals, and thus belong to different

classes. See Plato, *The Republic*, 2nd ed., trans. by Desmond Lee (London: Penguin Classics, 2003) at 115-17.

B. UNQUALIFIED JUDICIAL INDEPENDENCE

A series of international instruments sets out the recognition of judicial independence by the international community. The tenth article of the 1948 Universal Declaration of Human Rights establishes that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations”.¹⁵⁶ Similarly, the 1966 International Covenant on Civil and Political Rights recognizes the right of “all persons” to be treated equally before the courts.¹⁵⁷ Article fourteen states that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a

competent, independent and impartial tribunal established by law.”¹⁵⁸ Other international instruments, such as the 1948 American Declaration of the Rights and Duties of Man¹⁵⁹, the 1950 European Convention on Human Rights¹⁶⁰, the 1969 American Convention on Human Rights¹⁶¹, and the 1981 African Charter on Human and Peoples’ Rights¹⁶² refer to the right to access an independent or impartial court.

Although these instruments evidence the international community’s support of judicial independence, they do not consider what is practically necessary to achieve an independent judiciary. In 1983, Quebec Chief Justice Deschênes organized the World Conference on the Independence of Justice to provide further clarification.¹⁶³ The Conference partici-

¹⁵⁶ *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly resolution 217 A (III) of 10 December 1948, art. 10, online: <<http://www.un.org/Overview/rights.html>>.

¹⁵⁷ *International Covenant on Civil and Political Rights*, adopted by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, art. 14, online: <http://www.unhcr.ch/html/menu3/b/a_ccpr.htm>.

¹⁵⁸ *Ibid.* at art. 14.

¹⁵⁹ *American Declaration of the Rights and Duties of Man*, adopted by the Ninth Conference of American States in Bogota, Columbia 1948, art. 26, online: Human & Constitutional Rights <http://www.hrcr.org/docs/OAS_Declaration/oasrights.html>: “Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.”

¹⁶⁰ *European Convention on Human Rights*, adopted by the Members of the Council of Europe in Rome on 4 November 1950, art. 6(1), online: Hellenic Resources Network <<http://www.hri.org/docs/ECHR50.html>>: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

¹⁶¹ *American Convention on Human Rights*, agreed to at the Inter-American Specialized Conference on Human Rights in San Jos , Costa

Rica on 22 November 1969, art. 8, online: Human & Constitutional Rights <http://www.hrcr.org/docs/American_Convention/oashr.html>: “1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

¹⁶² *African Charter on Human and Peoples’ Rights*, adopted 27 June 1981, in force 21 October 1986, art. 7(1), online: Human & Constitutional Rights <http://www.hrcr.org/docs/American_Convention/oashr.html>: “Every individual shall have the right to have his cause heard. This comprises:... (d) the right to be tried within a reasonable time by an impartial court or tribunal.”

¹⁶³ The preamble to the Principles state:

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay... *Supra* note 4.

pants adopted a declaration on judicial independence entitled the Basic Principles on the Independence of the Judiciary. The Principles were subsequently endorsed by both the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and the General Assembly. According to the preamble, the Principles are to “assist Member States in ... securing and promoting the independence of the judiciary”.¹⁶⁴ Given this purpose, one would expect the Principles to provide guidance on the necessary and desirable level of judicial independence.

Instead, the Principles set out an unqualified definition of judicial independence that raises complex questions about judicial independence.¹⁶⁵ Although the Principles identify characteristics of an independent judiciary as a starting point, they avoid answering many salient questions. The Principles’ first article requires each state to guarantee judicial independence in its constitution or domestic law, and admonishes all government institutions to respect the independence of the judiciary. Article two sets out the unqualified view of judicial independence:

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹⁶⁶

Under the third article, judges possess jurisdiction over issues of a “judicial nature” and retain the “exclusive authority” to decide whether a matter falls within their jurisdiction.¹⁶⁷ Article four provides

for independence in the process of adjudication: “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision...”¹⁶⁸ The fifth article requires established legal procedures. Article six attempts to clarify the concept of judicial independence: “The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”¹⁶⁹ The seventh article calls on states to provide adequate resources to the judiciary. Articles eight and nine permit judges to freely express themselves and join associations, as long as these activities preserve judicial independence. Under article ten, judges are to possess the appropriate qualifications in law. The state must also select judges without discrimination based on certain enumerated grounds. The remaining ten articles identify characteristics of an independent judiciary. Article eleven requires terms of judicial office to be fixed by law. The twelfth article mandates tenure until a mandatory retirement age or the term of office expires. Judicial promotions must be made according to objective criteria under the thirteenth article. Article fourteen provides for the internal assignment of judges to hear cases. Judges must maintain professional secrecy under article fifteen. The sixteenth article calls for judicial civil immunity. Article seventeen requires a formal and fair procedure to decide judicial complaints. According to article eighteen, judges can only be suspended or removed when they are unfit to

¹⁶⁴ *Ibid.*

¹⁶⁵ Professor Russell concludes that the Principles are unrealistic. See Russell, “Toward a General Theory of Judicial Independence”, *supra* note 3 at 12.

¹⁶⁶ *Supra* note 4 at art. 2.

¹⁶⁷ *Ibid.* at art. 3.

¹⁶⁸ *Ibid.* at art. 4.

¹⁶⁹ *Ibid.* at art. 6.

discharge their duties. Established standards of judicial conduct are to govern judicial disciplinary proceedings under article nineteen. Finally, article twenty permits an independent review of disciplinary proceedings.

In adopting an unqualified view of judicial independence, the international community neglects to answer several key questions about judicial independence. What does independence practically mean, and how do states achieve it? One would be hard pressed to assess whether judges meet the definition of independence as established by the Principles. Influences inevitably result from a variety of sources. Judges in states implementing the ten characteristics of an independent judiciary are not immune from all sources of influence. Furthermore, corruption and partiality can infiltrate judiciaries enjoying the strongest guarantees of independence, a possibility not specifically contemplated by the Principles.¹⁷⁰ In the event that the Principles are interpreted as a norm requiring absolute independence, as opposed to establishing general principles, states would have to cut off their judges from as much influence as possible. What would an isolated judiciary look like? A judiciary approaching absolute independence would operate as a considerably elitist institution, disassociated from broader society. Judicial independence to this degree is not desirable since isolated judges would possess a limited context by which to make their decisions and appear unsuitable to litigants seeking sympathetic decision-makers.

If the Principles are interpreted as setting out general principles that are to

be weighed against other principles, what balance is necessary to ensure judicial independence? How far must states go before their judiciaries become sufficiently independent? By leaving the definition of judicial independence in unqualified terms, the Principles provide no answer to this key question. The extensive recognition of judicial independence in international instruments reveals its value, yet the source of this value is not expressly stated. While the drafters of the Principles may have presupposed impartiality as the source of judicial independence, identifying impartiality as the purpose of independence would have provided guidance to “assist Member States in ... securing and promoting the independence of the judiciary”.¹⁷¹

Even though the Principles leave key questions on the nature of independence unanswered, they require states to guarantee judicial independence in their constitutions or domestic laws.¹⁷² The Principles also require judges to maintain the power to determine the scope of their jurisdiction over matters of a “judicial nature”.¹⁷³ These provisions place judges in the position of interpreters of their own independence. An unqualified view of judicial independence must then decide whether to accept or reject impartiality as necessary to judicial independence. On one hand, the perception of impartiality may be compromised where judges possess exclusive legal authority to determine the appropriate relationships between themselves and others, particularly where the principles provide little guidance in their interpretation. If impartiality is necessary for independence, judges interpreting the requirements of judicial independence would no

¹⁷⁰ Professor Russell writes that impartiality does not automatically result from judicial independence. Russell, “Toward a General Theory of Judicial Independence”, *supra* note 3 at 6-7.

¹⁷¹ *Supra* note 4.

¹⁷² *Ibid.* at art. 1.

¹⁷³ *Ibid.*

longer be independent. On the other hand, if impartiality is not necessary for judicial independence, the Principles admit the possibility of independent judges who would appear partial.

While the Principles adopted by the international community identify the key characteristics of an independent judiciary that must be taken into account, and provide a useful starting point in understanding the concept of judicial independence, a more compelling theoretical elaboration is required to answer complex questions that arise.

A satisfactory alternative view must define judicial independence in qualified terms and expressly identify a principle to determine the desirable degree of independence.

C. THE LINK BETWEEN IMPARTIALITY AND INDEPENDENCE

The preceding sections identify impartiality as the core principle of third party decision-making. Adjudicative legitimacy depends upon litigants and the community perceiving judges as genuine third parties to disputes. When considered in the context of liberal democratic states, the perception of impartiality explains the need for judicial independence. In liberal democracies, the state often appears as a litigant in a variety of contexts: state lawyers prosecute criminal actions against individuals; individuals sue the state in civil and constitutional matters; and various branches and levels of government disagree over their respective rights and obligations. These cases call upon adjudicators to make decisions in conflicts between individuals and the state, and between various

emanations of the state. In these types of cases, close connections between the judiciary and a particular branch of the state could give rise to the apprehension that judges may favour the state's interests, causing a loss of perceived impartiality. Since the legitimacy of decision-makers hinges on their status as genuine third parties, individuals have no obligation to accept the decision of an adjudicator reasonably perceived as being in the pocket of the state.¹⁷⁴ For example, an accused facing a criminal prosecution by the state could hardly be faulted for having little confidence in the adjudicative fairness of a judge whose prospects for promotion are based on favourable treatment toward the state. In this case, the accused needs assurance that the judge does not stand to be promoted by doing what is unfair or demoted by doing what is fair.¹⁷⁵

Judicial independence furnishes this assurance by creating space between the judiciary and others, allowing judges to maintain their status as impartial third parties to the dispute. While judges are subject to a wide range of influences in their personal and professional lives, only influences from sources that the community views as capable of interfering in the decision-making process are undue.¹⁷⁶ Judicial independence acts as a prophylactic device to maintain the perception of impartiality that would otherwise be lost in the face of unregulated relationships between the judiciary and others holding undue influence. In order to accomplish this task, both judges and judicial institutions must be sufficiently separated from sources of undue influence to avoid the appre-

¹⁷⁴ The same is also true for one level or branch of the state against another.

¹⁷⁵ See Russell, "Toward a General Theory of Judicial Independence", *supra* note 3 at 10.

¹⁷⁶ The judiciary can only be shielded from

undue influences, as opposed to others that continue to exist. See John M. Williams, "Judicial Independence in Australia" in Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy*, *supra* note 3, 173 at 181.

hension that such sources may receive favoured adjudicative treatment.¹⁷⁷ By creating sufficient space to maintain the perception of impartiality, the concept of judicial independence preserves the community's confidence in the judicial determination of disputes.¹⁷⁸

Several key questions arise from the view of judicial independence as the means to maintaining confidence in adjudication by separating the judiciary from others. First, how much separation is required between the judiciary and sources of undue influence? Discovering the minimally necessary separation is required for assessing whether a judiciary is sufficiently independent to maintain its legitimacy. As the underlying objective of judicial independence, the perception of impartiality provides a yardstick to measure the required separation between the judiciary and others.¹⁷⁹ The minimum degree of separation is satisfied when both litigants and the community perceive adjudicative impartiality between the judiciary and a particular source of undue influence. In other words, the judiciary

possesses the requisite independence from each source of undue influence when a reasonable observer from the community would perceive adjudicative impartiality as a litigant against that source.

The use of a reasonable person from the community to determine the required separation between the judiciary and sources of undue influence demonstrates the relative nature of judicial independence.¹⁸⁰ In a hypothetical scenario where all members of the community possess unwavering confidence in adjudicative impartiality, separation between the judiciary and others would be unnecessary. Despite this theoretical possibility, maintaining a perception of adjudicative fairness in disputes against powerful interests is likely to require a certain degree of separation in most communities.

At the high end of the separation spectrum, communities lacking faith in their judicial institutions are apt to demand more separation between the judiciary and sources of undue influence. Litigants

¹⁷⁷ Where this apprehension is reasonably held by a member of the community as a potential litigant against the source of the influence, a loss of confidence would result since the judge is no longer perceived as impartial. Judges partial to the issues or the parties lose their status as a genuine third party. Under the Hobbesian social contract, judges must be genuine third parties in order to possess the necessary legitimacy to decide the dispute. Therefore, the apprehension that a judge may favour an influence results in the loss of adjudicative legitimacy.

¹⁷⁸ Confidence is necessary for courts to effectively perform adjudicative functions. See Shimon Shetreet, "The Critical Challenge of Judicial Independence in Israel" in Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy*, *supra* note 3, 233 at 239.

¹⁷⁹ Professor Russell points out that the rationale of judicial independence is key to knowing the appropriate degree of independence. See Russell, "Toward a General Theory of Judicial Independence", *supra* note 3 at 3-4, 9.

¹⁸⁰ The reasonable person from the community

test is both subjective and objective: the construction of the hypothetical reasonable person is objective while the community to which this person belongs introduces subjectivity. While a relativistic account of judicial independence is devoid of fixed content since it can require different things in different communities at different times, it would be a mistake to view the concept of judicial independence as meaningless. To the contrary, the *concept* of judicial independence has a precise meaning: independence separates judges and others potentially holding undue influence to the extent necessary to maintain a perception of impartiality. The *content* of judicial independence is subjective, determined by what is necessary for a reasonable person from a particular community at a particular time to perceive adjudicative impartiality. The relativity of judicial independence is also recognized by Professor Russell who writes, "One of the most interesting findings in comparative research may well be variation in the relationships that are perceived to have the greatest bearing on judicial independence in different states": *Ibid.* at 4.

from such communities will suspect favouritism between judges and others unless a high degree of separation assuages their concerns. For example, judiciaries of emerging states that lack a history of producing just decisions provide no initial reason to believe in their adjudicative fairness. In addition, judiciaries known to be easily corrupted by others require increased separation from the sources of corruption in order to preserve the community's confidence. However, even the highest degree of separation between the judiciary and sources of undue influence cannot always save the perception of impartiality. Perceptions are fragile like a house of cards, liable to come tumbling down from the slightest disturbance. Information suggesting bias in a specific case or judiciaries known to be rife with corruption destroys even the most independent judiciary's legitimacy. At the low end of the separation spectrum, communities possessing a tradition of confidence in their judicial institutions, arising from a history of fair decision-making, require less separation. While self-interested litigants from such communities will continue to scrutinize the relationships between judges and others, comparatively less separation between the judiciary and sources of undue influence is capable of supporting the community's perception of adjudicative impartiality.

Second, what sources could exert undue influence over the judiciary? The identification of these sources is nece-

ssary to target key relationships between the judiciary and others that are essential to the perception of adjudicative impartiality. A survey of judiciaries from around the world demonstrates the diversity of approaches to this task, producing different sources of undue influence in each state.¹⁸¹ These differences are likely the result of both cultural and institutional structures unique to each state community. The relativity of identifying sources of undue influence by each state community makes the construction of a universal list of threats to adjudicative impartiality unrealistic; instead, sources of undue influence must be based on each community's view of who presents a real risk of interference. Once a source has been identified, the community must then determine the points of interaction in the relationship between judges and the source where the potential for undue influence would cause a loss of confidence in the judiciary. These points of interaction are concerning to litigants because of the prospect of manipulation in the judicial process.

The relativity in identifying sources of undue influence and the context in which undue influence has the potential to arise explains the different views of judicial independence across legal systems.¹⁸² For example, it is common for German judges to be members of political parties, sit on city councils and even campaign for political office.¹⁸³ German judges engaging in these activities are not automatically considered subject to undue

¹⁸¹ While there are some commonalities in the identification of threats to adjudicative impartiality in democratic states, the points of interaction between the judiciary and sources of undue influence that are seen to erode confidence in the judiciary can vary significantly. See Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy*, *supra* note 3, for essays describing judicial independence in the United States, Japan, Russia, states in post-communist

Central and Eastern Europe, Germany, England, Australia, South Africa, Israel and Central America.

¹⁸² See *ibid.* for essays describing judicial independence in states around the world.

¹⁸³ See, *i.e.* Donald P. Kommers, "Autonomy versus Accountability: The German Judiciary" in Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy*, *supra* note 3, 131 at 137, 139.

influence by the state, whereas the active political involvement by Canadian judges would be seen to undermine their adjudicative impartiality.¹⁸⁴

Third, how is the necessary separation between the judiciary and sources of undue influence achieved? Measures of judicial independence are actions taken to create space at the key points of interaction between judges and others with the goal of maintaining the community's confidence in adjudicative impartiality.¹⁸⁵ These measures limit opportunities for undue influence by regulating the relationships between judges, both individually and collectively¹⁸⁶, and sources of undue influence. A creative assortment of measures can increase space between the judiciary and others, such as legal guarantees to reduce the financial reliance of judges on sources of undue influence, the design of state institutions to provide more autonomy to decision-makers and the requirement for judges to relinquish connections with powerful interests. Given the objective of creating space sufficient to maintain the perception of impartiality, the success of measures undertaken must be based on this goal and not by whether undue influence occurs in any individual case.¹⁸⁷ It is unlikely that measures of independence can eradicate the factual

possibility of undue influence from any source of undue influence. For example, a judge enjoying a high degree of independence from the state could still face undue influence if personally threatened by a senior state official. At best, measures of judicial independence patrol the key points of interaction between judges and others to minimize the possibility of undue influence.

Historical examples demonstrate measures of independence targeting the relationships between judges and others. For example, in the context of ancient Egypt, measures of judicial independence were enacted by the state in order to foster a perception of impartiality that had been weakened by rampant corruption. The pharaoh Horemheb decreed several measures to create space between judges and wealthy litigants who had become a source of undue influence, eroding confidence in the adjudication of disputes. These measures created sufficient distance from the deep pockets of wealthy litigants by establishing judicial salaries; judges would no longer require bribes as a source of income.¹⁸⁸ In addition, Horemheb strengthened the financial independence of judges by exempting them from paying taxes.¹⁸⁹

In contemporary liberal democracies, the community often sees the state as the most significant source of undue influence

¹⁸⁴ The Canadian Judicial Council advises its judges that they must cease all political activity when they are appointed and "refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity." The Council specifically requires judges to refrain from various political activities such as membership in political parties, political fundraising, attending political gatherings and events or contributing to political parties. See Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004) at 28-29.

¹⁸⁵ Professor Russell writes that since impartial

minds cannot be manufactured, arrangements must be made to increase the separation between judges and others. See Russell, "Toward a General Theory of Judicial Independence", *supra* note 3 at 8.

¹⁸⁶ Individually, judges require separation from other potential sources of undue influence, including other members of the judiciary. Collectively, judicial institutions require separation in order to operate the administrative aspects of the judicial process without perceived interference.

¹⁸⁷ Of course, a pattern of undue influence is likely to erode the perception of impartiality.

¹⁸⁸ Wilson, *supra* note 52 at 120-23.

¹⁸⁹ *Ibid.*

in the judicial decision-making process as it possesses extensive powers over judicial appointment, remuneration, promotion, discipline, jurisdiction¹⁹⁰ and security. Given the interdependent nature of the relationship of the judiciary and the state, litigants opposing the state are likely to require assurance that judges possess the autonomy to make their decisions free of state pressure or interference. Each of the numerous interactions between the judiciary and the state presents the potential for interference. Measures of judicial independence provide the necessary space at these critical junctures to ensure the community's confidence in adjudicative impartiality.¹⁹¹ For example, with respect to the remuneration of judges, a guarantee of a non-diminutive salary would assure litigants that the judge has no reason to fear the state retaliating against an adverse decision by slashing the judge's earnings.

Enacting measures of judicial independence to separate the judiciary from state interference assumes that the functions of the judiciary, itself a branch of the state, and other state actors are defined with sufficient precision to identify distinctions between them. By analogy, in order to differentiate apples from oranges one must be able to ascertain their differences, such as color, size, shape, texture and taste. The political

doctrine of separation of powers found in liberal democracies provides assistance in this endeavour by expressly delineating the capacities of each branch of government with the objective of achieving a system of checks and balances on the exercise of political power.

For example, the constitution of the United States reserves the "judicial Power" to the judiciary as opposed to the legislative or executive branches of government.¹⁹² However, adjudication does not take place in a vacuum even in states purporting to constrain state actors to watertight compartments. Other branches of government may have a legitimate role to play in the adjudicative process to ensure the proper functioning of the state. While measures of judicial independence must always provide the necessary space at key points of interaction to maintain the community's perception of adjudicative impartiality, they must do so in a way that takes into account the proper roles of each organ of the state. The lack of bright lines between state actors demands a special receptivity by the measures of judicial independence to maintain their delicate interactions. A parliamentary democracy, such as Canada, provides comparatively less clarification in determining the constitutional roles of each branch of government.¹⁹³ The functioning of the

¹⁹⁰ Jurisdiction is used in a broad sense, meaning both the types of cases that can be heard by judges and the role of the judiciary within the particular state. The role of the judiciary has become increasingly contentious in modern liberal democracies where courts have accepted constitutional invitations to fulfill a more political role by making decisions between competing interests that have a direct effect on public policy. This new role of the court has created a tension between judicial independence, which requires a separation of the judiciary from the other branches of government, and the accountability, which requires a democratic mandate for those making broad policy decisions. See "Independence and the Problem of

Accountability", *infra*.

¹⁹¹ Similarly, Professor Russell notes that measures of judicial independence cannot cover all of the connections between the judiciary and others. Russell, "Toward a General Theory of Judicial Independence", *supra* note 3 at 12.

¹⁹² United States Constitution, Article III, section 1.

¹⁹³ While the Canadian constitution sets out the powers of each level of government in its federal structure, it fails to establish the functions of each branch of government, or even expressly identify different branches of government. See Peter W. Hogg, *Constitutional Law of Canada*, 5 ed., vol. 1 (Toronto: Thomson Carswell, 2007) at 1-3, 1-4.

Canadian state depends extensively on political convention as opposed to a formal system of legal checks and balances.¹⁹⁴

The relative independence thesis presented in this section addresses the problems identified with the unqualified view of judicial independence, thus providing a more compelling theorization of judicial independence. First, unlike unqualified independence which sets out a general principle of complete liberty from all sources of influence, the relative independence thesis offers a realistic and pragmatic view of the relationships between the judiciary and others. Second, while unqualified independence fails to provide direction to achieve sufficient judicial independence, the relative independence thesis provides both the means and a yardstick to realize desirable independence. Third, unlike unqualified judicial independence which creates significant legal obligations without expressly stating its underlying motivation, relative independence clearly presents its rationale which demonstrates the necessity of certain measures of judicial independence. Finally, the relative independence thesis respects the proper limitations of a theoretical framework by not advocating the incorporation of judicial independence in the law of all states. Thus, the relative independence thesis does not automatically result in a conflict of interest unlike unqualified independence which presents a problem of judges defining the boundaries of their own independence.¹⁹⁵

IV. INDEPENDENCE AND THE PROBLEM OF ACCOUNTABILITY

The recent enlargement of the judicial power in many liberal democracies has raised a tension between judicial independence and the principle of accountability. Courts in these states have accepted an express or implied constitutional invitation to embark on a path seen as more political than judicial. This new role requires judges to choose between competing interests in cases that raise issues of public policy, making decisions that directly influence political discourse and the policy-making powers of the legislative and executive branches. Professor Russell provides a concise summary of the tension between judicial independence and accountability:

[T]he growth of judicial power within long-established liberal democracies and the assignment of major responsibilities to the judiciary in new or emerging liberal democracies raise the ... question of how independent a powerful judiciary can be without undermining democracy. Here the liberal principles of judicial independence runs up against the democratic principle of accountability.¹⁹⁶ It comes as no surprise that the prospect of unelected judges acting as legislators raises concerns given that the choice between competing interests has been traditionally left to those enjoying a popular mandate.

Compelling arguments to resolve this tension are made on both sides. Supporters of judicial independence argue that the separation of the judiciary from the other branches of government is required to check the political power of

¹⁹⁴ A key political convention is the principle of responsible government that makes each state actor accountable to Canadians. *Ibid.* at 9-1 to 9-3.

¹⁹⁵ Although such a conflict of interest may be likely to arise in most states, it is not practical to deal with such a conflict in an abstract theoretical

way. Instead, solutions to a conflict of interest must arise within the context of the particular state.

¹⁹⁶ Russell, "Toward a General Theory of Judicial Independence", *supra* note 3 at 2. Footnotes omitted.

the other branches.¹⁹⁷ From their perspective, the fracturing of political power in a liberal democracy requires judges to strike down democratic action that violates constitutional guarantees. However, judges are not free to fulfill this essential role unless they are free from the state's undue influence. By contrast, advocates of democratic principles argue that an elitist judiciary striking down laws subverts the will of the people. Judges tend to come from similar backgrounds, hold similar philosophies and simply replace democratically formulated decisions with their own.¹⁹⁸ Public policy enacted by individuals unaccountable to democratic impulses can itself lead to a crisis of confidence if the population refuses to recognize or implement judicial decisions that reject the democratic will.

There does not appear to be an easy resolution to this tension in states where the judiciary exercises significant political power, and where tradition demands that political power be exercised according to the democratic principle of accountability. The compromise struck in liberal democracies facing this conflict reflects the relative values each community places on judicial independence and accountability. While the debate over which principle takes priority continues, it needs to be remembered that measures of judicial independence must, at a minimum, create the necessary space between the judiciary and sources of undue influence to maintain the community's confidence in the adjudication of disputes.

CHAPTER 2: JUDICIAL INDEPENDENCE IN CANADA

I. THE DOCTRINE OF JUDICIAL INDEPENDENCE

This section outlines developments in the Canadian doctrine of judicial independence. Given the nature of Canada's mixed constitution, being comprised of both written and unwritten elements, judicial decisions are primarily responsible for the development of judicial independence in Canadian law. While the written constitution provides for the independence of judges in limited circumstances, the judiciary has interpreted these provisions as part of a much broader unwritten constitutional principle. This section presents relevant provisions of the written constitution and then turns to key decisions to flesh out the doctrine of judicial independence.

Sections of the constitution provide for judicial independence in specific circumstances. The constitutionally entrenched *Charter of Rights and Freedoms*¹⁹⁹ guarantees the independence of tribunals exercising jurisdiction over persons charged with an offence. Section 11(d) of the *Charter* characterizes this guarantee as a right belonging to the accused: 11. Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

¹⁹⁷ See, *i.e.* A.E. Dick Howard, "Judicial Independence in Post-Communist Central and Eastern Europe" in Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy*, *supra* note 3 at 89.

¹⁹⁸ See, *i.e.* Andrew Petter, *The Politics of the Charter* (Toronto: University of Toronto Press) [publication forthcoming] at chapter 1, who observes that judicial recruitment takes place from within a small group of affluent middle-aged lawyers. Given

the judiciary's homogeneity, it fails to reflect or understand the economically and socially disadvantaged, instead basing its decisions on a philosophy of private ordering. Petter concludes that democratic process is better positioned to reflect these interests, pointing to a legislative record of public interest initiatives.

¹⁹⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

In addition, the *Constitution Act, 1982*²⁰⁰ establishes measures of independence for federally appointed superior court judges by guaranteeing their tenure and fixed salaries.²⁰¹

These sections of the written constitution paint an incomplete picture of judicial independence in Canadian law; their judicial treatment is required to fully understand the doctrine. Shortly after the enactment of the *Charter* in 1982, a series of Supreme Court of Canada decisions began to develop a broader constitutional principle of judicial independence. In the 1985 case of *R. v. Valente*²⁰², the Court first considered the meaning of an independent judiciary under the *Charter*. The case arose when the independence of a provincial court was questioned in the context of a criminal case. Writing for the unanimous Court, Le Dain J. recognized the uncertainty surrounding the *Charter* guarantee, admitting that the “concept of judicial independence has been an evolving one.”²⁰³ After reviewing academic commentary and the United Nations Basic Principles on the Independence of the Judiciary, Le Dain J. held that an independent judiciary was necessary to ensure justice and confidence in the administration of justice.²⁰⁴ The Court considered independence and impartiality to be closely related, but distinct concepts.²⁰⁵ According to Le Dain J., impartiality means a state of mind free of actual or perceived bias, whereas independence includes both individual and institutional

relationships resting upon objective guarantees.²⁰⁶ These guarantees provide assurance that the tribunal can “act in an independent manner and will in fact act in such a manner.”²⁰⁷ Le Dain J. concluded that a tribunal is independent under the *Charter* when it is perceived as possessing three essential conditions: security of tenure, financial security and institutional independence.²⁰⁸

Shortly after *Valente*, the Supreme Court of Canada expanded the meaning of judicial independence in *Beauregard v. Canada*²⁰⁹ where a federally appointed judge challenged legislation requiring judges to contribute towards their pension plan. On behalf of a majority of the Court, Chief Justice Dickson held that judicial independence required the “complete liberty” of judges in deciding cases.²¹⁰ Judicial independence must also take into account the new role of the judge in a constitutional democracy, which demands more than the “adjudication of individual cases”, judges are now called upon to protect the constitution and its underlying values by reviewing the exercise of governmental power.²¹¹ In emphasizing the importance of judicial independence to this new role, Dickson C.J. described it as the “lifblood of constitutionalism in democratic societies.”²¹² This role requires that judges “be completely separate in authority and function from all other participants in the justice system.”²¹³

In the 1989 case of *MacKeigan v. Hickman*²¹⁴, McLachlin J. delivered the opinion of a plurality of the Supreme Court

²⁰⁰ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

²⁰¹ Sections 99 and 100 respectively.

²⁰² [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161 [*Valente* cited to S.C.R.].

²⁰³ *Ibid.* at 686, 691.

²⁰⁴ *Ibid.* at 689.

²⁰⁵ *Ibid.* at 685.

²⁰⁶ *Ibid.* at 685, 687, 689

²⁰⁷ *Ibid.* at 688.

²⁰⁸ *Ibid.* at 694, 704, 708.

²⁰⁹ [1986] 2 S.C.R. 56, 30 D.L.R. (4th) 481 [*Beauregard* cited to S.C.R.].

²¹⁰ *Ibid.* at 69.

²¹¹ *Ibid.* at 70-71.

²¹² *Ibid.* at 70.

²¹³ *Ibid.* at 73.

²¹⁴ [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688 [*MacKeigan* cited to S.C.R.].

of Canada on whether a judge could be compelled to testify at how a decision was reached. In her reasons, McLachlin J. backtracked from Dickson C.J.'s unqualified definition of judicial independence in *Beauregard*, noting that the judiciary must necessarily maintain relationships with other branches of the state:

It is important to note that what is proposed in *Beauregard v. Canada* is not the absolute separation of the judiciary, in the sense of total absence of relations from the other branches of government... It is impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government. Statutes govern the appointment and retirement of judges; laws dictate the terms upon which they sit and are remunerated. ... It is inevitable and necessary that relations of this sort exist between the judicial and legislative branches of government. The critical requirement for the maintenance of judicial independence is that the relations between the judiciary and other branches of government not impinge on the essential "authority and function"... of the court.²¹⁵

Two years later, in the 1991 case of *R. v. Lippé*²¹⁶, the Supreme Court of Canada considered whether a municipal court system employing part-time judges met the *Charter* requirements of an independent tribunal. Writing for a unanimous Court on this point, Chief Justice Lamer separated the legal doctrine of independence and impartiality. Lamer C.J. held that judicial independence serves the perception of impartiality:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality;

judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.²¹⁷

However, the Court split over Lamer C.J.'s contention that judicial independence was limited to independence from the government; two judges agreed with the Chief Justice's restricted view while four others preferred to interpret independence as shielding judges from all sources of influence.²¹⁸

The leading 1997 *Provincial Judges Reference*²¹⁹ case placed the issue of judicial independence and the interaction between the branches of the state squarely before the Supreme Court of Canada. During the economic recession of the 1990's, the governments of Alberta, Manitoba and Prince Edward Island legislatively reduced the salaries of public sector employees as a cost-cutting measure. These reductions included the salaries of provincial judges. In Alberta, the independence of the provincial court was challenged by three accused. In Manitoba, judges brought an action challenging the reduction of their salaries after the executive negotiated directly with the provincial judges association. In Prince Edward Island, the executive submitted a reference on the constitutionality of the salary reductions. These three appeals were amalgamated into one case before the Court.

On behalf of six of the seven judges hearing the case, Chief Justice Lamer comprehensively explored the doctrine of

²¹⁵ *Ibid.* at 827-28.

²¹⁶ [1991] 2 S.C.R. 114, 128 N.R. 1 [*Lippé* cited to S.C.R.].

²¹⁷ *Ibid.* at 139.

²¹⁸ *Ibid.* at 137-38, 152-53

²¹⁹ *Supra* note 9.

judicial independence, finding that the salary reductions violated the guarantee of an independent tribunal under section 11(d) of the *Charter*. Lamer C.J. started his reasons by noting that the Court needed to “explain the proper relationship” between the judiciary and the other branches of government to alleviate the “strain on this relationship”.²²⁰ Lamer C.J. observed that judicial independence was not for the benefit of judges, but rather to secure societal goals.²²¹ One of the goals of independence was the maintenance of confidence in judicial impartiality, “essential to the effectiveness of the court system.”²²²

Since the appeals at issue were argued under the *Charter*, the Court felt compelled to decide the case under section 10(d).²²³ However, Lamer C.J. held that serious limitations emerged from viewing the text of the Constitution as an “exhaustive and definitive code for the protection of judicial independence.”²²⁴ The judiciary’s broad interpretation of these provisions in previous cases demonstrated “a deeper set of unwritten understandings which are not found on the face of the document itself.”²²⁵ According to the Chief Justice, the Constitution does not authoritatively set down fundamental rules in a set of documents.²²⁶ Unwritten organizing principles are rooted in the Preamble to the Constitution which states that Canada’s Constitution is similar in principle to the unwritten constitution of the United Kingdom.²²⁷

These unwritten constitutional principles demonstrate the “special legal effect” of the Preamble which fills in gaps in the express terms of the constitutional text.²²⁸ Lamer C.J. held that a foundational principle of judicial independence could be traced back to the United Kingdom, flowing through the Preamble to the Constitution: I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867...

Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.²²⁹

The Chief Justice found that judicial independence was part of the separation of powers doctrine since it insulated the courts from interference by the other branches of government.²³⁰

While reductions to the remuneration of provincial judges do not automatically infringe judicial independence, the Constitution requires that changes proceed through an “independent, objective and effective” process to avoid the appearance of political interference and a loss of confidence in the judiciary.²³¹

²²⁰ *Ibid.* at para. 8.

²²¹ *Ibid.* at para. 9.

²²² *Ibid.* at para. 10.

²²³ *Ibid.* at para. 82.

²²⁴ *Ibid.* at para. 85.

²²⁵ *Ibid.* at para. 89.

²²⁶ *Ibid.* at para. 92.

²²⁷ *Ibid.* at paras. 94-104. The relevant part of the Preamble states: Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have

expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom...

²²⁸ *Ibid.* at para. 104.

²²⁹ *Ibid.* at paras. 83, 109.

²³⁰ *Ibid.* at para. 130.

²³¹ *Ibid.* at para. 133.

This special process involves an independent compensation commission to recommend the appropriate level of judicial remuneration.²³² While the commission process is mandated by the Constitution, Lamer C.J. found that the design, procedures and arrangements of the commissions should be left to the legislative and executive branches.²³³ Even though the compensation commission's recommendations are not binding, the government must justify a decision to depart from them.²³⁴ Lamer C.J. strongly cautioned that it is never possible for the judiciary to negotiate directly with other branches of the state.²³⁵ Such negotiations are "fundamentally at odds with judicial independence" because of horse-trading involved in negotiations over remuneration.²³⁶ Furthermore, since the Crown is often a litigant before the court, negotiations between the judiciary and the legislative or executive branches result in a conflict of interest.²³⁷ In addition, the salaries of judges cannot be reduced by the government below a certain threshold which would make the judiciary susceptible to economic manipulation.²³⁸

In elaborating the relationship between the principle of judicial independence and the separation of powers, the Chief Justice held that section 11(d) of the *Charter* must be interpreted to protect the separation between powers of the state. This separation requires the exclusive reservation of certain functions to particular branches of government.²³⁹

However, Lamer C.J. acknowledged the inevitable interaction between state actors. For example, the executive branch is constitutionally obligated to implement policies enacted by the legislative branch.²⁴⁰ Separation of powers requires the relationships between the judiciary on one hand and the legislative and executive branches on the other to be depoliticized: the legislative and executive branches cannot be seen to exert pressure on the judiciary.²⁴¹ While the interaction between branches of the state is primarily governed by convention, conventions do not have the force of law and therefore the *Charter* must establish constitutional requirements for these relationships.²⁴²

In a strongly worded dissent, La Forest J. attacked the majority's discussion of judicial independence as an unwritten constitutional principle on the basis that the appeals were argued primarily under the *Charter*.²⁴³ According to La Forest J., public confidence in the judiciary rests on judges responding to legal disputes as opposed to initiating legal recourse.²⁴⁴

[Judges] respond to grievances raised by those who come before them seeking to have the law applied, listening fairly to the representations of all parties, always subject to the discipline provided by the facts of the case. This sustains their impartiality and limits their powers. Unlike the other branches of the government, the judicial branch does not initiate matters and has no agenda of its own. Its sole duty is to hear and decide cases on the

²³² *Ibid.*

²³³ *Ibid.* at para. 167. Though Lamer C.J. sets out binding comprehensive guidelines for the creation of the commissions in any event. See *ibid.* at paras. 169-185, 287.

²³⁴ *Ibid.* at para. 133. Lamer C.J. writes that where the government singles out judges in a pay cut, the justification required for departing from the judicial remuneration commission's will be "heavy".

²³⁵ *Ibid.* at para. 134.

²³⁶ *Ibid.*

²³⁷ *Ibid.* at para. 187.

²³⁸ *Ibid.* at para. 135.

²³⁹ *Ibid.* at para. 139.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.* at para. 140.

²⁴² *Ibid.* at para. 141.

²⁴³ *Ibid.* at para. 297.

²⁴⁴ *Ibid.* at para. 300.

issues presented to it in accordance with the law and the Constitution.²⁴⁵

La Forest J. viewed the majority's opinion as defining the proper relationships between the branches of government without the benefit of arguments on point. Given this consideration, the majority of the Court "can hardly be seen to be indifferent, especially as it concerns their own remuneration."²⁴⁶ Furthermore, it is critical to "remember that judicial independence is not an end to itself. Independence is required only insofar as it serves to ensure that cases are decided in an impartial manner."²⁴⁷ La Forest J. concluded that the salary reductions would not have caused a reasonable person to perceive a lack of independence.²⁴⁸

In the 2002 case of *Mackin v. New Brunswick (Minister of Finance)*²⁴⁹ the Supreme Court of Canada again adopted an unqualified view of judicial independence. On the facts of the case, New Brunswick supernumerary judges challenged the elimination of their office as a violation of judicial independence. Writing for a majority of the Court, Gonthier J. noted that the constitutional principle of judicial independence was essential to a properly functioning democratic state.²⁵⁰ Citing the United Nations Basic Principles on the Independence of the Judiciary, Gonthier J. held that judges must be "completely independent of any other entity in the performance of his or her judicial functions."²⁵¹ The relationship between judges and others must be defined by an "intellectual separation" so that decisions can be made solely on the requirements

of law and justice.²⁵²

II. CRITIQUE OF THE DOCTRINE OF JUDICIAL INDEPENDENCE

This section critiques the doctrine of judicial independence in Canadian law from the perspective of the theoretical framework developed in Chapter 1, with particular emphasis on the *Provincial Judges Reference* case.

The Supreme Court of Canada's unqualified view of the principle of judicial independence results in an impractical constitutional doctrine in Canadian law. When considering the independence of the judiciary, the Supreme Court of Canada has frequently invoked the United Nations Basic Principles on the Independence of the Judiciary to characterize independence as unqualified. First mentioned in *R. v. Valente*, the Court expressly adopted an unqualified definition of judicial independence when it held that the judiciary required "complete liberty" in *Beauregard v. Canada*.²⁵³ In his elaborate description of the judge as a noble protector of the Constitution, Chief Justice Dickson held that judicial independence required the complete separation of judges from all sources of influence.²⁵⁴ While the Court backtracked considerably from this position in *MacKeigan v. Hickman*, where it held that judicial independence was only necessary for essential judicial functions, the Court most recently returned to this view in *Mackin v. New Brunswick (Minister of Finance)*.

As demonstrated by the framework set out in Chapter 1, practical requirements

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.* at para. 302.

²⁴⁷ *Ibid.* at para. 332.

²⁴⁸ *Ibid.* at para. 342.

²⁴⁹ [2002] 1 S.C.R. 405, 209 D.L.R. (4th) 564

[*Mackin* cited to S.C.R.].

²⁵⁰ *Ibid.* at para. 34.

²⁵¹ *Ibid.* at para. 35.

²⁵² *Ibid.* at para. 37.

²⁵³ *Supra* note 186 at 69.

²⁵⁴ *Ibid.* at 73.

to achieve judicial independence are impossible to define under the view of judicial independence as unqualified. Furthermore, the Supreme Court of Canada comes dangerously close to interpreting general principles of judicial independence as an absolute norm. The impracticality of this position is demonstrated by the Supreme Court of Canada's circular definition of judicial independence in *R. v. Valente*, where the Le Dain J. held that the *Charter* guarantee of independence requires courts to act in an "independent manner".²⁵⁵ Given that judges are subject to numerous influences, judicial independence must target the key points of interaction between the judiciary and sources of undue influences that are seen as capable of interfering in the decision-making process. These points of interaction have the most impact on the perception of adjudicative impartiality.

Despite its adoption of unqualified independence, and unlike the international community, the Supreme Court of Canada has clearly expressed the rationale of independence as ensuring confidence in the adjudication of disputes. For example, in *R. v. Valente*, the Court held that the purpose of independence was to promote confidence in the administration of justice.²⁵⁶ More explicitly in *R. v. Lippé*, Chief Justice Lamer noted that the purpose of independence was to serve the end of a perception of impartiality.²⁵⁷ Similarly, in the *Provincial Judges Reference* case, the Court recognized judicial independence as necessary to maintain confidence in judicial impartiality.²⁵⁸ Regrettably, the

application of judicial independence to concrete cases reveals this rationale as nothing more than empty rhetoric. In *Provincial Judges Reference*, after determining that the Constitution required a compensation commission process, the Court dressed up its opinion in the clothes of public confidence. Without any evidence in support of his position, Chief Justice Lamer declared that the absence of a compensation commission would lead to a lack of confidence in the adjudicative process.²⁵⁹ This contention appears to be without merit given that a reasonable person from the Canadian community is unlikely to think that provincial judges would start convicting innocent persons to curry favour with the state because of an across-the-board pay cut.²⁶⁰ Therefore, while the judiciary properly identified confidence in adjudicative impartiality as the underlying rationale of judicial independence, it failed to use this rationale to inform and constrain its independence.

Furthermore, by invoking an unwritten constitutional principle in the *Provincial Judges Reference* case where the perception of adjudicative impartiality was not impaired, the Supreme Court of Canada muddied the doctrinal waters of judicial independence. The case law fails to reveal a clear standard by which to assess the constitutionality of action touching upon the judiciary. This uncertainty has the potential to chill the relationship between the judiciary on one hand and the legislative and executive branches on the other, particularly given Lamer C.J.'s holding that judicial independence defines the "proper

²⁵⁵ *Supra* note 179 at 688.

²⁵⁶ *Ibid.* at 689.

²⁵⁷ *Supra* note 193 at 139.

²⁵⁸ *Supra* note 9 at para. 10.

²⁵⁹ *Ibid.* at 186.

²⁶⁰ See Hogg, *supra* note 11. According to Angus Reid, 78% of Canadians trust judges: "Fire Fighters Top Canada's Most Trusted List" *Angus Reid Global Monitor: Polls & Research* (25 March 2006), online: Angus Reid <<http://www.angus-reid.com/polls/view/11338>>.

relationship” between the judiciary and other branches of the state.²⁶¹ Facing a judiciary patrolling the interactions between the judiciary and the other branches of government, under the authority of an uncertain constitutional principle, the legislative and executive branches are likely to tread cautiously in dealing with the judiciary.

This retreat of the legislative and executive branches is problematic given that the judiciary relies on the other branches of government to enact measures of independence. Without the support of the legislative and executive branches, the judiciary becomes separated from the key protectors of its independence. Since the judiciary possesses jurisdiction only when petitioned by litigants involved in a legal dispute, it remains susceptible to undue influence and manipulation from a variety of sources. While the judiciary has a legitimate interest in maintaining public confidence by ensuring sufficient separation in key points of interaction with others, legislative and executive action is required to protect judicial independence and ensure the proper operation of the judicial process. McLachlin J. noted this vital relationship in *MacKeigan v. Hickman* when she held that it was “impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government.”²⁶²

The *ex post facto* legal review of the interaction between the judiciary and other state actors is particularly ill suited to the Canadian context, where informal conventions regulate the relations between constitutional actors.²⁶³ In the *Provincial Judges Reference* case, Chief

Justice Lamer noted that the non-legal status of conventions did not sufficiently guarantee judicial independence necessary to maintain public confidence.²⁶⁴ Unfortunately, this approach both misstates the perspective of the Canadian public and misunderstands the importance of the dynamic character of the interactions between branches of the state. First, a tradition of functional interaction between the judicial, legislative and executive branches, coupled with a history of fair judicial decision-making, has provided Canadian litigants with reason to possess a high level of confidence in their judicial institutions. Absent information revealing bias or undue pressure in a specific case, a reasonable litigant from the community is likely to presume judicial impartiality, even where the relationships between the judiciary and others are governed by convention. In the words of La Forest J.:

It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.²⁶⁵ Second, the flexibility of constitutional conventions permit them to change over time to meet new circumstances and challenges, making them well suited to the changing requirements of judicial independence. The conversion of these constitutional conventions into binding legal rules freezes the relationships between the branches of the state, making the judiciary the supreme ruler over this interaction.

²⁶¹ *Provincial Judges Reference*, *supra* note 9 at para. 8.

²⁶² *Supra* note 191 at 827-28.

²⁶³ See Hogg, *Constitutional Law*, *supra* note

170 at 1-21 to 1-30, 9-3.

²⁶⁴ *Supra* note 9 at 141.

²⁶⁵ *Ibid.* at 337.

However, the most troubling aspect of the doctrine of judicial independence in Canadian law is the damage that the *Provincial Judges Reference* case inflicted on the perception of adjudicative impartiality. The decision unleashed an unprecedented storm of academic criticism.²⁶⁶ Commentators viewed the decision as greedy and self-serving since provincial judges received large salary increases after the implementation of the compensation commission process demanded by the Supreme Court of Canada.²⁶⁷ These accusations arise from the perceived conflict of interest between the Court's role as the decision-maker in a case where the judicial branch appeared as a litigant. Even operating under the assumption that the judges acted impartially, the obvious conflict of interest and the resulting substantial legal obligations imposed on the legislative and executive branches diminished confidence in adjudicative impartiality. How could the legislative and executive branches have faith in the fairness of judges hearing a case about the financial compensation of judges? Even though judiciaries in a liberal democracy must decide claims against the state, they must also maintain their status as third parties to the dispute in order to preserve their legitimacy.

According to Hobbes, adjudicators appearing to gain from the outcome of a decision take an unavoidable bribe in the sense that there is an inherent conflict of interest.²⁶⁸ Since persons are presumed to do everything in their own interest, the

Hobbesian social contract theory concludes that no man is a fit adjudicator in his own dispute.²⁶⁹ Judges in a conflict of interest can no longer claim legitimacy as third parties to the dispute. While the relationships between the branches of government are best governed by convention as opposed to formal rules, disputes are increasingly ending up before judges as conventions become interpreted as legal rules. The question is whether the judiciary can maintain the perception of impartiality, and its legitimacy as a third party, in cases where judges appear as litigants against other branches of the state.

A solution to this problem was first proposed by Michael Plaxton.²⁷⁰ According to Plaxton, distinguishing between constitutionally mandated rules and prophylactic rules could preserve the Court's legitimacy when facing an unavoidable conflict of interest.²⁷¹ Prophylactic rules are directives fashioned by judges to prevent violations of the Constitution. Unlike ordinary constitutional rules, prophylactic directives are not mandatory if the state devises an alternative method of fulfilling its constitutional obligations.²⁷² Prophylactic rules present just one of several possible strategies to achieve a constitutional end, thus providing a role for non-judicial actors to fashion ways of protecting substantive constitutional requirements.²⁷³ An example of a prophylactic rule is the infamous case of *Miranda v. Arizona*²⁷⁴, where the United States Supreme Court held that the police must inform

²⁶⁶ See especially Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389, Jean Leclair and Yves-Marie Morissette, "L'indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance" (1998) 36 Osgoode Hall L.J. 485 and Hogg, *supra* note 11.

²⁶⁷ *Supra* note 12.

²⁶⁸ *Supra* note 84 at 87.

²⁶⁹ *Ibid.*

²⁷⁰ *Supra* note 15.

²⁷¹ *Ibid.* at 130-32, 138-43.

²⁷² *Ibid.* at 130-32.

²⁷³ *Ibid.* at 130.

²⁷⁴ *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S. Ct. 1602.

arrested persons of their right to remain silent, and that anything said may be adduced against them in evidence at their trial. The Court devised this warning as a way to protect the underlying constitutional right against self-incrimination. However, since the “Miranda warning” is not expressly required by the Constitution, it is not obligatory where the state finds alternate ways of protecting the underlying right. In other words, while following the Supreme Court’s directive ensures compliance with the Constitution, it may not be the only acceptable course of action. In a case where an accused was not warned, the court must decide whether any statements made to the police were made voluntarily.

Prophylactic rules are well suited to the Canadian constitutional context as they encourage dialogue and promote conventions to regulate interaction between the branches of government. The Court’s decision is not seen as the final word if the political will exists to devise an alternative strategy. With respect to the *Provincial Judges Reference* case, Plaxton writes:

Had the Court recognized prophylactic rules, it would have regarded itself as bound either to justify its claim that the strategy generated in [*Provincial Judges Reference*] is dictated by the terms of the constitution (knowing that its reasons would undergo scrutiny and possible challenge at a later date), or to concede that the strategy is strictly prophylactic. In making that concession, the Court would have invited provincial legislatures to examine strategies that would have fulfilled their constitutional responsibilities without guaranteeing perfect public confidence in the independence of judges. Such strategies might well have involved more direct interaction between the

judiciary and the legislative branch. On the other hand, provincial legislatures might have concluded that they should have precisely the sort of commissions prescribed in [*Provincial Judges Reference*]. That would have been their decision to make, for better or for worse.²⁷⁵ The use of prophylactic rules by the Supreme Court of Canada in *Provincial Judges Reference* would have initiated a dialogue with the legislative and executive branches, and involved them in the decision-making process. These branches of government would then have to decide whether to follow the Court’s directive or come up with a different way of setting judicial salaries that protected judicial independence. While a conflict of interest cannot be avoided where the judiciary appears as a litigant, the resolution of the dispute through dialogue between the branches of government avoids placing the judiciary in the position of a biased decision-maker.

CONCLUSION

The conceptual framework set out by this thesis considered key issues and answered complex questions of judicial independence with the goal of unlocking its most significant problems. Chapter 1 addressed the confused theoretical state of judicial independence by setting out a framework from within which further research and discussion can take place. The search for the theoretical underpinnings of judicial independence commenced with a detailed inquiry into the often-neglected early history of adjudication. This inquiry demonstrated the dawn of a tradition of impartiality in ancient Egypt, now a core principle of western legal traditions. The development of impartiality in ancient Egypt helped to

²⁷⁵ *Ibid.* at 143. Footnotes omitted.

explain impartiality as the rationale of judicial independence. Hobbesian social contract theory further confirmed the importance of impartiality to adjudication. Under the social contract, men give up certain liberties that they previously enjoyed including the right for a man to judge his own disputes. This necessarily results in third party adjudication to resolve legal conflict. Decision-makers showing partiality no longer act as third parties to the dispute.

The unqualified view of judicial independence advanced by the international community neglected to answer several key questions about judicial independence. The practical meaning of independence, and how states are to achieve it, remains unclear. Unqualified independence presented several interpretation difficulties, particularly the weighing of judicial independence against other principles. In order to maintain the perception of impartiality, the judiciary must be perceived as independent from undue influence. Under this view, the judiciary possesses the requisite independence when a reasonable observer from the community would presume adjudicative impartiality. Given the relative nature of independence, judiciaries enjoying long-established traditions of the community's confidence require less formal protection than those in emerging democracies or those whose members are known to be corrupt. Measures of judicial independence limit opportunities for undue influence by creating space between the judiciary and others. These measures regulate relationships where undue influence is most likely to arise. The growth of judicial power in many liberal democracies raises questions about judicial independence and whether it undermines democratic principles. There is no easy resolution to this tension because good arguments can be made on both sides.

Chapter 2 took the conceptual framework established in Chapter 1 and applied it to the doctrine of judicial independence in Canadian law. The enactment of a constitutionally entrenched bill of rights in 1982 through the *Charter of Rights and Freedoms* expanded the role of the Canadian court as an interpreter of broadly worded constitutional rights. Specific measures providing for the separation of the judiciary from the influence of the legislative and executive branches appear in the text of the Constitution Acts, but a general principle of judicial independence has become a deeply rooted tradition. In the *Provincial Judges Reference* case, the Supreme Court of Canada recognized judicial independence as an unwritten constitutional principle. The Court held that judicial independence prevented direct negotiations between the judiciary and other branches of government. Instead, the Constitution required compensation commissions to depoliticize judicial remuneration. The government must first consult these commissions before changing judicial salaries.

Doctrine of judicial independence in Canadian law is obscured by invoking judicial independence in the *Provincial Judges Reference* case where the perception of impartiality was not impaired. The result of the decision may paradoxically diminish judicial independence since judicial institutions are incapable of responding to acute attacks on their independence. Non-judicial branches of government must protect the judiciary and enact specific guarantees of judicial independence. However, the legislative and executive branches of government are now likely to be cautious in taking action touching upon the judiciary, particularly since such action may be found unconstitutional. A chilling effect on deliberative action necessary to protect and enhance judicial independence is likely to result.

Provincial Judges Reference also inflicted damage on the perception of impartiality since the salaries of provincial judges increased dramatically following the implementation of the commission process. A conflict of interest was seen to arise from the role of the Court as the decision maker in a dispute involving the judiciary. While there does not appear to be an ideal solution to this unavoidable conflict, courts can alleviate a perception of bias by adopting prophylactic rules. As judicially crafted directives to prevent violations of the constitution, prophylactic directives are not mandatory where the state produces an alternative method of fulfilling its constitutional obligations. Prophylactic rules are well suited to the Canadian context as they encourage dialogue and promote informal conventions to regulate interaction between the branches of government.

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