

## JUDICIAL POWER AND DEMOCRACY

### I. INTRODUCTION

The last decade has witnessed increasing debate about what is sometimes referred to as the “judicial phenomenon”. All over the world, judges are making more and more decisions in areas that seem to trench on policy and politics – areas previously thought by many to be the exclusive prerogative of elected legislators. Some people see this as a threat to good government and democracy. They see courts as undemocratic. Judges are usually appointed, and hence are not accountable to the electorate in the way politicians are. Furthermore, judges who enter the policy arena are viewed as going beyond their proper role. The task of judges, on this view, is to apply and interpret the law. Law-making by judges, it is argued, oversteps the proper bounds of the judiciary. Alarm bells ring and calls go out for measures to rein in the judiciary.

I will argue that the view that judges are a threat to good government and democracy rests on a simplistic and outdated view of how a modern democratic state functions. In fact, democracy is a lot more complicated than elected representatives making the law. Elected legislators are important, but so is the judiciary. Both are essential to effective and just government. We need both responsible effective legislators and responsible independent courts. Our task is not to curtail judicial power but to understand how it may most effectively contribute to the just society.

### II. THE GLOBAL EXPANSION OF JUDICIAL POWER

Courts have always played an important role in most western countries and many in Asia and Africa. Yet in recent years, it seems that role is expanding. Gibson, Caldeira and Baird note the worldwide ubiquity of courts and judges involved in resolving disputes and answering questions with heavy policy implications.<sup>1</sup> Shapiro and Stone state that “a political jurisprudence of rights is today endemic and occasionally epidemic”.<sup>2</sup> In Canada the perceived expansion of judicial power is often attributed to the adoption in 1982 of a constitutional bill of rights, our *Charter of Rights and Freedoms*. But the phenomenon is more profound and more complex than the simple change of a constitution. Peter McCormick offers the following examples of the global expansion of judicial power.<sup>3</sup>

1 James Gibson, Gregory Caldeira and Vanessa Baird, “On the Legitimacy of High Courts”, (1998) *American Political Science Review* 92.

2 Martin Shapiro and Alec Stone, “The New Constitutional Politics of Europe”, (1994) 26 *Comparative Political Studies* 409.

3 Peter McCormick, *Supreme at Last: the Evolution of the Supreme Court of Canada* (2000), p. 171.

- In the absence of an entrenched bill of rights, the High Court of Australia moved toward a rights-based jurisprudence in the area of free speech and aboriginal rights grounded in the preamble of the constitution and the fundamental precepts of democratic government. This produced a national debate on the proper role of the courts and the High Court appears to have retrenched somewhat as a consequence.<sup>4</sup>
- As a result of minor amendments in the mid-1970's the French Constitutional Council became very active in "judicializing" the legislative process. It has been suggested that the council's "surprisingly expansive approach" to constitutional issues "invites comparison to the United States Supreme Court".<sup>5</sup>
- The German federal Constitutional Court "has profoundly changed the perception of law and politics as being two separate arenas of decision making".<sup>6</sup>
- The European Court of Justice has been much more effective than supposed in playing a leading role in integrating Europe and imposing judicial review and entrenched rights on the courts of member countries.<sup>7</sup>

Other examples are not hard to find. In Israel, the High Court plays a pivotal role in negotiating the conflicts between different groups and maintaining human rights. In Scotland, the Convention for the Protection of Human Rights and Fundamental Freedoms in a few short months has led to the overthrow of the system of part-time judges in criminal cases.<sup>8</sup> England is bracing itself for challenges to a range of laws, including its laws on statements to police, when the same bill is introduced there this October. The House of Lords, which will rule on the challenges, is already playing a more interventionist role than in previous decades; witness its

4 McCormick (*ibid.*) cites Jeremy Kirk, "Constitutional Implications from Representative Democracy", (1995) *Federal Law Review* 23; Geoffrey Kennett, "Individual Rights, the High Court and the Constitution", (1994) *Melbourne University Law Review* 19; H.P. Lee, "The Australian High Court and Implied Fundamental Guarantees", (1993) *Public Law* 606; Peter Bailey, "'Righting' and the Constitution without a Bill of Rights", (1995) *Federal Law Review* 23.

5 McCormick (*ibid.*) cites Doris Marie Provine, "Courts in the Political Process in France", in Herbert Jacob *et al.*, *Courts, Law and Politics in Comparative Perspective* (1996), p. 192.

6 McCormick (*ibid.*) cites Erhard Blankenburg, "Political Regimes and the Law in Germany", in Jacob *et al.*, *Courts, Law and Politics*, *supra*, p. 309.

7 McCormick (*ibid.*) cites Renaud Dehousse, *The European Court of Justice: the Politics of Judicial Integration* (1998), p. 177 and J.H.H. Weiler, "A Quiet Revolution: the European court of Justice and its Interlocutors", (1994) *Comparative Political Studies* 26; see also Ingrid Persaud, "The Reconstruction of Human Rights in the European Legal Order", in C.A. Gearty, ed., *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (1997), p. 347.

8 *Starrs v. Ruxton*, 2000 J.C. 208, 1999 SCCR 1052, 2000 SLT 42.

intervention in the *Pinochet* extradition appeals.<sup>9</sup> It should thus not surprise us that “the judicialization of politics” has been described as “one of the most significant trends in late-twentieth and early-twenty-first government”.<sup>10</sup>

These examples raise questions. Is the ascendancy of the judiciary really new, or the continuation of a longer process? Whether new or evolutionary, why is it happening? And why now? Before addressing these questions, I will explore the case put against judicial law-making: that judicial power is fundamentally undemocratic.

### III. JUDICIAL POWER AND DEMOCRACY

In order to understand the debate over the legitimacy of judicial power it is necessary to explore our evolving concept of democracy as we approach the twenty-first century. Democracy is in fact a complex thing. Despotism is easily understood and disliked; everyone knows the meaning of “L’état, c’est moi”. But “liberty, equality and fraternity”, the idea that replaced it, while widely acclaimed, is less readily understood.<sup>11</sup>

The idea that judicial power is undemocratic rests on a conception of democracy that means simply “the rule of the majority”. It rests on the premise that people should be governed only by laws to which they have consented through a majority of their elected representatives. Democracy thus defined seems incompatible with the idea that unelected judges should influence the laws that govern people. Therefore any judicial action beyond simple application of laws made by the legislature is illegitimate.

This argument is put succinctly by Peter Russell.<sup>12</sup> Law-making, he states, is “not easily reconciled with widely-held normative beliefs in liberal democracy”. The “phenomenon of non-elected and formally unaccountable judges making the law” conflicts with the “basic norms” of the democratic system. What are these basic norms? That people ought only to be governed by laws to which most of them, through their elected representatives, consent to be governed.

The premise upon which this argument is built – that people should be governed only by laws to which they have consented – does not bear out

9 *R.v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty and others intervening)*, [1998] 4 All E.R. 897; *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 2)*, [1999] 1 AH E.R. 577; and *R.v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)*, [1999] 2 All E.R. 97.

10 C. Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power*, (1995) p. 5.

11 Martin Taylor, “Making and Changing the Common Law: The Essential Democratic Function of the Courts”, (unpublished) (1996) 1.

12 Peter Russell, “Corry Lecture on Law and Politics” (1987), 12 *Queen’s L.J.* 421.

in reality. First, most laws in place in most countries were in fact not made by their legislatures. For example, much of the current law in common law countries is based on the laws made by autocratic monarchs and unelected judges in centuries past. Even in modern democracies, many laws are made by appointed administrators who create the rules of the road, set prices through marketing boards, and determine fisheries regulations. In fact, in most if not all democracies, neither the people nor their elected representatives have demonstrated approval for the vast majority of the laws by which they are governed.

Second, while majority rule is clearly a critically important element in the makeup of all democracies, it does not distinguish democracy from all other forms of government; indeed, it has been argued that rule of the majority is a principle that democracy shares with fascism, communism and other populist forms of totalitarian government.<sup>13</sup> History demonstrates that the people may consent to be governed by laws made by dictators as well as by democratically elected representatives. If this be so, then rule by the people's consent does not appear to be democracy's distinguishing feature. To put it in logician's terms, rule by popular consent is a necessary feature of democracy but not a sufficient one. Democracy requires something more. That something else is this: the will of the majority must be subject to limits, respecting the rights of others, if it is to create a genuinely democratic government and not merely mob rule.

The need for something more than majority rule arises from the impossibility of creating laws that can fairly apply to all people and the danger that the majority may not be concerned to do so even if it could. First, the majority may unintentionally undercut democratic values. No matter how fairly elected and how well-intentioned, legislators may draft laws that in practice give rise to lacunae, ambiguities and applications that create injustice in particular situations, thus denying "liberty, equality and fraternity" to some. Second, if more rarely, the majority may intentionally undercut democratic values, sacrificing the individual to the greater good of the majority. Taken to its extreme, this application of utilitarianism may create such acute unfairness as to justify the label the "tyranny of the majority". The terrible lesson of the history of popular totalitarian governments is that democracy requires not only majority rule but rule that protects individuals and groups of individuals and promotes fairness.

I cannot put it better than Taylor:

"As our understanding of the nature of modern democratic government improves, it becomes increasingly apparent that majority rule, while an essential ingredient of the system, can operate in ways

<sup>13</sup> Taylor, *supra*, p. 2.

which are as undemocratic as the rule of the minority – that democracy has to do not only with who exercises the power of the state, by and for the people, but also with the manner in which the state treats those who seek its assistance, or are obliged to submit to its authority, and with what the state allows people to decide and do of, by and for themselves.”<sup>14</sup>

Taylor adds that the *Canadian Charter of Rights and Freedoms* acknowledges this by referring not only to the value of democracy but to a “free and democratic society” and by its commitment to the rule of law.

The courts are the institution through which the rights of the individual are protected and through which basic fairness in the operation of the laws is assured in a democracy. To discharge this task, courts must be independent of the legislative branch of government. Absent institutional and individual independence, courts and the judges who operate them cannot properly fulfill their important roles. Courts which are subject to the whims of the executive or legislative branches of government cannot protect individuals and minorities from majority government excesses. As well, courts must have discretion to fill in the legislative blanks and adjust and limit the operation of the law where this is necessary to ensure the fair treatment and respect for individual rights upon which democracy rests. Judicial law-making thus emerges not as the enemy of democratic government, but as an essential feature of it. As McCormick puts it:

. . . democracy is not just about majoritarianism; it is also about individual and minority rights, about limits to what even a large and determined majority can do. Therefore, there is a sense in which a strong and independent judiciary is democratic – not because the Courts are overly democratic in their organization or their selection or their process (they are not), but because they are the mechanism that serves this ‘other face’ of democracy.<sup>15</sup>

Another feature of late-twentieth century and early twenty-first century democracy that favours, indeed requires, judicial law-making, is the transformation in recent decades of the old “politics of interest” into the new “politics of identity”.<sup>16</sup> Alongside the traditional emphasis on protecting individual rights through judges is a new emphasis on effecting value-based changes in society to enhance the situation of less favoured groups and individuals. The first focus of this activity is through the overtly political branches of government. But it also works through the judicial branch. The argument is simple and powerful. A society’s laws and the

<sup>14</sup> Taylor, *supra*, p. 31.

<sup>15</sup> McCormick, *supra*, p. 173.

<sup>16</sup> See e.g. Manuel Castells, *The Power of Identity* (Vol II of the *Information Age*) (1997); McCormick, *supra*, p. 173.

way it treats all of its citizens should reflect the values that underlie that society — the values enshrined or implicit in its constitution. Ethnic minorities, women and aboriginal peoples have successfully raised this argument in legislatures and courts around the world to improve their situation. Some suggest that this is undemocratic, and refer darkly to the politics of interest groups.<sup>17</sup> But there is nothing inherently undemocratic about less powerful individuals joining together to improve their position, nor in the suggestion that the treatment of all citizens, whether in the majority or minorities, should conform to the fundamental tenets of the constitution.

It is not mere coincidence that people or groups seeking total power over a society typically begin by attempting to control the courts and the judges. The more a particular person or group seeks undemocratic power, the more threatening will appear an independent judiciary. Ways are found, sometimes subtle, sometimes not so subtle, to undercut judges who “err”, to bring them into line. Judges who make decisions not to the liking of the group may find themselves sent to unattractive venues, deprived of work or removed from office. Nor is it mere coincidence that one of the first things nations moving from a totalitarian to democratic regime typically seek is to establish the rule of law and a strong, independent judiciary. Thus the end of Soviet hegemony in eastern Europe and the establishment of democracies in former satellite countries has been accompanied by attempts to establish credible independent courts and convince people that they can trust the judges and use the courts to get fair resolution of their disputes and assert their individual rights.<sup>18</sup>

The rising importance of courts in countries of many political hues should not surprise us. Courts played an important role in England long before it became a democracy. Indeed, the rule of law and a strong independent judiciary may be one of the factors conducive to transforming dictatorial states into democracies. I conclude that judicial power, far from posing a threat to democracy, is essential to modern democratic governance.

#### IV. THE RISE OF OPEN JUDICIAL LAW-MAKING

Against this background I return to the question I broached earlier: what is the cause of the global expansion of the judicial power? Is it new, or does it merely reflect a new stage in something that has been happening for a long time? I hope to show that judicial law-making is not new, and

<sup>17</sup> See e.g. Rainer Knopff and F.L. Morton, “Does the Charter Hinder Canadians from Becoming a Sovereign People?” in Joseph Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (1999), p. 277.

<sup>18</sup> See Michel Herbiet, “Commentary”, in European Commission on Democracy through Law, *Rule of Law and Transition to a Market Economy* (1994).

has been going on in democracies, and indeed less democratic countries, for a long time. This said, courts are now playing an enhanced role in governance as a consequence of the increasing recognition of their importance in good governance, justice and social and political stability.

The indisputable fact is that judges have been making law – important law – for a very long time. Judges long held to the fiction that they merely “discovered” the common law and that once discovered, it could only be changed by elected representatives of the people. Yet even a first year student of the common law knows that this is not how courts work. Courts, even conservative courts, work by applying previous cases or precedents to new situations. In the process the rules evolve and change to meet the new situations society throws up. This is how courts must operate if they are to fulfill their role in a changing society. So judges and anyone caring to cast more than a casual glance at what they do (and this is not hard, as everything is done in open court with reasons) have long known that judges do make law, even if, as one English judge is reputed to have declared, “the less said about it the better”. The judges of the King’s Bench made law 400 years ago when they decided in *Shelley’s Case*<sup>19</sup> that certain words used in the conveyance of land were to be taken as words of limitation and not purchase, and titles then were as controversial as any aboriginal title issue in Canada, Australia or New Zealand today.<sup>20</sup> Lord Mansfield made law over 200 years ago when in *Somnerset’s Case* he said, “Let the Negro go free.”<sup>21</sup> And Lord Atkin made law in 1932 when he introduced the modern law of negligence which holds us liable for failure to take reasonable care to avoid acts or omissions which we can reasonably foresee would be likely to injure our neighbours.<sup>22</sup>

Canada, despite the status of its Supreme Court as a colonial court under the supervision of the Privy Council until 1949, has its own examples of judicial law making that changed the legal firmament. In 1938 the Supreme Court led by Duff C.J. held, in the absence of an entrenched bill of rights, that free political discussion was fundamental to democracy and that therefore the government of Alberta could not subject newspaper articles about the government to prior review.<sup>23</sup> (Interestingly, while the decision did not appear to create much fuss in Canada, two similar pronouncements by the Australian High Court in the early 1990s created a storm in that country.<sup>24</sup>) But sometimes judges are not so courageous. In the “Persons Case”, the Supreme Court of Canada applied formal black letter reasoning

<sup>19</sup> *Wolfe v. Shelley* (1581), 8 *Cohld.* 308; 11 *Deeds* 390, 415; 14 *Eqy.* 554.

<sup>20</sup> Taylor, *supra*, p. 8.

<sup>21</sup> *Sommerset’s Case* (1772), 7 *Confl.* 71; 11 *Cr. Proc.* 31; 38 *Trade* 218, 219.0

<sup>22</sup> *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

<sup>23</sup> *Reference re: Alberta Legislation*, [1938] S.C.R. 100.

<sup>24</sup> *Australian Capital Television Pty. Ltd. v. Commonwealth of Australia (No. 2)* (1992), 108 A.L.R. 577; *Nationwide News Pty. Ltd. v. Wills* (1992), 108 A.L.R. 681; see Lee, *supra*.

and held that women were not “persons” and hence could not take up public office as members of the Senate.<sup>25</sup> The Judicial Committee for the Privy Council in Britain set things straight with some stellar law-making. Lord Sankey justified the then-radical step of holding women to be persons by propounding a metaphor that has been the bedrock of Canadian constitutional interpretation ever since – the Constitution of Canada, he proclaimed, is a “living tree, capable of growth and expansion within its natural limits.”<sup>26</sup> It is difficult to conceive of a more effective expression of the oxymoron of a fixed law subject to modification by judges than Lord Sankey’s “living tree”: the tree of the law exists, but it is the judges who promote and prune its growth. Again, well before the *Charter* the Supreme Court introduced important reforms in family law to recognize the contribution and independence of women.<sup>27</sup>

The reality is that courts have been making important law for a very long time, while maintaining, more or less, the fiction that the law they were making had been there all the time, waiting to be “discovered”. However, after the Second World War, perhaps emboldened by the new conception of democracy as more than majority rule, perhaps influenced by the scholarship of legal realism in the United States, courts in the Commonwealth “came out of the closet” and acknowledged their role in the law-making process.

The case that opened the closet door in the Commonwealth was *Chancery Lane Safe Deposit Co. v. Inland Revenue Commissioners*, in which the House of Lords announced that henceforth it would not consider itself bound by its former decisions.<sup>28</sup> The impact of this cannot be overstated. Prior to this revolutionary statement, the fiction prevailed that judges “discovered” the law and that it remained fixed and immutable, save as altered by Parliament. Judges were, by legal definition, infallible. Past court decisions were unchallengeable. After the statement, it was clear that judges can and do change the law – that judges make law. And its less attractive corollary was also clear — that judges make mistakes and when they do, should correct them. Lord Reid opined that it would be “pedantic and unreasonable” to apply the long-established rule that the House regards itself as bound by its previous decisions.<sup>29</sup> Lord Upjohn said: “My Lords, we are not bound to follow a case merely because it is indistinguishable on the facts.”<sup>30</sup> No ifs, no buts, no hedging. One could not ask for a clearer statement of the now-acknowledged fact that judges make law.

<sup>25</sup> *Edwards v. Attorney General of Canada*, [1928] S.C.R. 276.

<sup>26</sup> *Edwards v. Attorney General of Canada*, [1930] A.C. 124 (P.C.).

<sup>27</sup> See e.g. *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

<sup>28</sup> [1966] 1 All E.R. 1.

<sup>29</sup> *Ibid.*, p. 10.

<sup>30</sup> *Ibid.*, p. 21.

Down in the Court of Appeal the Master of the Rolls, Lord Denning, who himself was known to make a little law from time to time, had some fun with the Lords' pronouncement, five months later in *Re Halden's Settlement Trusts*.<sup>31</sup> When the House of Lords gives two decisions, he observed wryly, one right and one wrong, the House and therefore other courts are bound only by that which is right, not that which is wrong.<sup>32</sup>

The pronouncements in *Chancery Lane* shook the legal world. Did precedent bind or didn't it? Could any court refuse to follow pronouncements of a higher court it found wrong, as Lord Denning suggested? What then of certainty in the law? The effect was such that the Lord Chancellor, Lord Gardiner, felt moved to rise in the House two months later to issue his now-famous "Practice Direction" on behalf of all the Law Lords.<sup>33</sup> In this statement he sought to shore up precedent as "an indispensable foundation upon which to decide what is the law and its application to individual cases" and as the mechanism that "provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for the orderly development of legal rules". At the same time, however, he stated that their Lordships recognized "that too rigid adherence to precedent may lead to injustice in particular cases and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so." And then the clincher, aimed directly at upstarts in the lower courts like Lord Denning, perhaps: "This announcement is not intended to affect the use of precedent elsewhere than in this House". The Court of Appeal would continue to be bound by its own decisions and those of the House of Lords.

With the Practice Direction of 1966, judicial law-making was in the open. It was not only legitimate, but recognized as legitimate – at least for the highest court of the land. But it is difficult to keep genies bottled up, and once acknowledged, judicial creativity was increasingly recognized at all levels through a variety of techniques – the selective application of precedents, the selective distinguishing of cases, the way judges see the facts, and recourse to the legislator's "purpose" as conceived by the judge. If the House of Lords could admit that it creatively overturned its own precedents, judges at the trial and appellate level could admit that while not overruling precedents, they were engaging in law-making in a variety of ways. Henceforward, courts of all levels would be openly involved in the development of the law.

<sup>31</sup> [1966] 2 All E.R. 661 (C.A.).

<sup>32</sup> *Ibid.*, p. 667.

<sup>33</sup> [1966] 3 All E.R. 77.

Thus judicial law-making is not new and has been openly acknowledged at least since 1966 in the Commonwealth. In the United States the acknowledgment had come even earlier. As early as 1803 in Chief Justice Marshall's decision in *Marbury v. Madison*, the U.S. Supreme Court has shown its willingness to make law when necessary.<sup>34</sup> The development of the philosophy of legal realism in the early decades of this century prompted a more general recognition of the active lawmaking role of judges.<sup>35</sup> The civil rights decisions of the 1950s and 1960s also demonstrated a frank willingness to make new law.<sup>36</sup> This open recognition of the courts' role in developing the law contributed to a new, bolder style of judging, where courts no longer pretended to simply apply precedent mechanically and instead openly addressed policy issues.

Against this background, I return to the question: what are the sources of the global expansion of judicial power? A number of interconnected factors can be identified.

The first, as mentioned, was the emergence of a new conception of democracy after World War II that acknowledged that democracy was more than mere majority rule, that the rights of individuals and groups of individuals must be protected, and that some judicial discretion was required for the fair application of general laws to the diverse range of situations that arise in real life.

A second factor was the increasing acknowledgment by legal scholars and courts that judges can and do make law through a variety of techniques, from choosing what precedents to emphasize through interpreting the facts to outright overturning of previous rules, at the level of the highest courts. Acknowledging that judges made law not only recognized what had been going on, but helped step it up; judges no longer needed to worry that they were doing something suspect when they used creativity or discretion in deciding cases, but could proceed to do so guilt-free, relieved of the myth that they were mechanically applying existing law. Judicial law-making became legitimate.

A third factor contributing the prominence of judicial power in recent decades around the world is the increasing prominence of rights – particularly group rights and human rights — in democratic debate. Earlier I alluded to the fact that interest groups increasingly seek to advance their agendas both through legislatures and the courts. They are able to use the courts because equality and similar rights are now seen as legal entitlements. Often they are cast in concrete legal form, entrenched in the constitutions of nations and groups of nations, like the European

<sup>34</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>35</sup> For an overview, see Gary J. Aichele, *Legal Realism and Twentieth-Century American Jurisprudence: The Changing Consensus* (1990).

<sup>36</sup> See Lawrence Baum, *American Courts: Process and Policy* (1994), p. 297.

Union.<sup>37</sup> More diffusely, they find expression in international conventions like the *United Nations Declaration of Human Rights*, the *Declaration of the Rights of the Child*, and the international covenants on *Economic, Social and Cultural Rights* and *Civil and Political Rights*.<sup>38</sup>

When scholars look back on the closing decades of the twentieth century and the opening decades of the twenty-first century, they will see the rise throughout the world of the principle of human rights – the idea that each human being is entitled to a bundle of rights and freedoms simply because she or he is human – as perhaps the most important intellectual current of our times. Increasingly, human rights are acknowledged as an ideal everywhere in the world, even though they are not always respected in practice. The notion that each person is endowed with certain inalienable rights stands as an ideal – an ideal to which the nations of the world through conventions and constitutions have increasingly committed themselves. In every country there are those who seek to pursue the ideal. And, because the ideal is cast in terms of rights, they go to the bodies that have traditionally dealt with rights – the courts.

So we arrive at this point. Courts are playing a more important role in governance and playing it more openly than ever before. This role is not inconsistent with democracy. Nor is it inconsistent with good government – indeed, it appears to aid good government and social and political stability. Legislatures and majority rule are still the foundation of democracy, but courts are necessary, too. Legislatures and courts are partners in democracy. This brings me to the next inquiry: what is the proper relationship between the legislatures and the courts? How should each function to the end of achieving effective democratic rule?

## V. THE RELATIONSHIP BETWEEN LEGISLATURES AND COURTS

I earlier addressed the primary argument against judicial law-making power – that judicial law-making is essentially undemocratic because it allows unelected judges a role in the development of the law. I hope I have shown that this argument is not tenable. There is a second argument against judicial law-making and judicial power that merits serious consideration – that important social issues are best resolved not through the courts but through debate and discussion in the legislative chamber.

<sup>37</sup> See Persaud, *supra*.

<sup>38</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810; *United Nations Declaration of the Rights of the Child*, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No.16); *The International Covenant on Economic, Social and Cultural Rights* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, Art. 10(3); and *The International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

The first argument — that judicial law-making is inherently inimical to democracy because all laws in a democracy should be made by elected representatives — is an argument of principle. By contrast, the second argument — that it is better for laws to be made by the legislature — is a pragmatic argument. The premise is that the legislature is best suited to the role of making law. This begs the question: what do legislatures do best? and what do courts do best?

Russell, who supports the principled argument that courts should not make law, also makes the pragmatic argument against judicial law-making. He argues that judicial law-making represents a “flight from politics”, from “the procedures of representative government and government by discussion as means of resolving fundamental questions of political justice.”<sup>39</sup>

There is something to be said for this position. Legislatures are better equipped than courts to debate and discuss the complex ramifications of adopting a particular law. They can commission studies on the problem. They can consult with elected members from all parts of the state or country. They have at their service an organized and sophisticated civil service to research laws, advise on their impact and draft them. They have the means to calculate how much particular measures will cost and to prioritize on the basis of costs and benefits. They provide a forum for debates where clashing views and visions may be aired and compromises hammered out. At the end of the day, when the difficult compromises have been made, public satisfaction is likely to be high. The public will either accept the law on the basis that its representatives have made the best compromise possible, or they will vote out those legislators and elect new ones to change the law. All these are advantages that courts cannot offer. This suggests that the legislatures should remain the primary focus for law-making in a democracy.

The courts, on the other hand, play an essential and complementary role. Their role also involves law-making, although in different ways. First, in the domain of judge-made common law, the courts continue to hold the primary responsibility for developing and changing the law to meet the changing needs of society in specific situations. Legislation is broad and general. Legislators may not foresee every possible application. When those unexpected cases come to court, judges must develop the law to deal with them. This responsibility and power is subject to the legislature, which can and on occasion does intervene either to “correct” what it perceives to be unwise judicial decisions or to enact more general codes of rules in particular areas.

<sup>39</sup> Peter Russell, “The Effect of a Charter of Right on the Policy-Making Role of Canadian Courts,” (1982) 25 *Canadian Public Administration* 32.

In the area of the common law, courts may feel less constrained than in other areas to make important innovations, on the ground that they are operating in the traditional domain of judge-made law. For example, in 1978 the Supreme Court of Canada placed a cap on damage awards for severely injured plaintiffs, on the ground that damage awards should serve a useful function and that large awards for pain and suffering or punitive awards did the plaintiff no good while unfairly burdening the defendant.<sup>40</sup> This was a bold step, almost legislative in nature. Yet it was accepted and after initial grumbles from plaintiffs' lawyers, has proved popular, as attested by the fact that none of the provincial legislatures have moved to change it.

Subsequently the Supreme Court has set down general guidelines for changing the common law.<sup>41</sup> The change should be incremental and not portend complex and unforeseeable ramifications. In addition, the change should be consistent with the fundamental values set out in the *Charter of Rights and Freedoms* where these are engaged. For example, in a recent Canadian case the Supreme Court refused to amend the common law of torts to allow the government to apprehend a pregnant woman on behalf of the unborn foetus.<sup>42</sup> The Court held that giving rights to the foetus would be a major legal change with significant public policy ramifications, and best left to the legislature. In a similar case two years later, the Court held that a pregnant woman could not be held liable to her foetus for damage caused allegedly caused by the woman's negligent driving.<sup>43</sup> Again, the Court held that it would not make such a major change in the law but that the legislature could do so if it chose.

Courts also play an important role in interpreting statutes in a way that best achieves the aims of the legislature and ensures the just application of the law. I earlier alluded to the fact that it is impossible to draft general legislation that applies to everyone and every situation in a fair and just manner. The legislature paints with the broad brush of general policy; the courts by contrast are the specialists in how the law actually affects the lives of men, women and children. The law may catch situations where, if applied, it will produce injustice and negate the legislature's purpose. Should the judge simply apply the law and let injustice result? Or should the judge search for a fairer solution that better represents what the legislature probably intended? Where the language is absolutely clear, the judge may have no choice but to apply the law and let injustice fall where it may, hoping the legislature will take the matter up again. However, where the language can be interpreted in more than one way, the judge is more likely to search for the solution that avoids unfairness

<sup>40</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

<sup>41</sup> *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654.

<sup>42</sup> *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925.

<sup>43</sup> *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753.

and unintended results. This may be seen as changing the law; certainly the judge is adding to it and in this sense making law.

Critics of judicial power sometimes attack the “purposive” or intentionalist decision-making involved in statutory interpretation. Some suggest that judges assign meaning to vague constitutional provisions on the basis of their own ideological preferences.<sup>44</sup> Others worry that when interpreting constitutional and statutory law, judges may not fully grasp the long-term impact of their decisions.<sup>45</sup> However, what this criticism points to is not the need to abandon interpretation by reference to the legislature’s intention, but the need to use it appropriately. The fallacy in the criticisms is that legislation can be mechanically applied to all situations. In fact this is impossible. Legislation simply cannot descend to the level of particularity required to clearly indicate the desired result in all conceivable cases. Judges have no choice but to assign meanings to phrases where none emerge clearly from the legislative text. Not to do so would be as “activist” as to do so. And in assigning the meaning, they must, if they are acting reasonably and not at whim, think about what the legislature was trying to accomplish – its purpose. All this is good. What is to be avoided is making up a legislative purpose to suit the solution desired by the judge. In fairness to judges, it must be said that sometimes the legislature is not as clear as to its purpose as it might be. The statement of purpose is typically found in the preamble of the act. Formerly, when the myth dominated that the law was an existing datum and the judge had only to discover it, courts paid little attention to preambles. Now, having adopted purposive interpretation, judges in Canada use preambles as well as debates in the legislature and ministerial statements as guides in ascertaining the goals the legislature had in mind.<sup>46</sup>

A third role of the courts involving judicial law-making concerns the constitution. Most modern democracies and many less democratic countries operate under written constitutions. This places on the courts two related obligations. First, the courts must interpret the constitution when doubt arises as to its application, just as they would any law. Second, the courts must, when challenges are brought, decide whether the legislature had the power to enact the law or take a challenged executive action. When a court interprets the constitution in a way people do not like, or strikes down a law as invalid, it is likely to be criticized for usurping the role of the legislature. Yet this cannot be avoided in a constitutional democracy. There must be a body that determines whether

<sup>44</sup> See e.g. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994).

<sup>45</sup> See Richard Devlin, “Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson” (1996), 22 *Queen’s L.J.* 81.

<sup>46</sup> Stéphane Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998), 43 *McGill L.J.* 287

the legislature is acting within its powers under the constitution. That body must be judicial, since the issue is a legal issue. Again, the concern is not that the courts perform this function, but that they perform it sensitively with due respect for the legislature and its special role. Courts do this by recognizing the difficulty of legislative drafting, by according appropriate deference to the solutions chosen by the legislature, and by appropriate remedies, including suspended declarations of invalidity giving the legislature a period of time to amend the law in constitutional fashion, “reading up” and “reading down”.<sup>47</sup>

A fourth judicial role, one that overlaps with the first three roles, concerns individual rights. The legislature should be concerned to ensure that its laws respect the individual rights of all citizens, but it may not foresee applications that infringe these rights. Laws often compromise between conflicting rights, giving rise to grievances and litigation. Finally, rights tend to be cast in broad, elastic terms, requiring judicial determination of their ambit in particular circumstances. All these factors mean that the courts are likely to be involved whenever rights are implicated. As they judge unforeseen applications, review the constitutionality of legislative compromises on rights, supervise the work of administrative tribunals like human rights commissions, and interpret the ambit of the rights and freedoms, the courts necessarily find themselves engaged in law-making. Much of this law-making could not be done by the legislatures, however much they might wish to do so.

We therefore see that the legislature bears the primary responsibility for adopting new laws and changing old laws to meet the needs of society and are the best place to resolve sensitive economic, political and social conflicts. It is its task to set policy direction and pass laws expressing that policy. The courts, on the other hand, continue to play a heightened role in the development of the common law, the interpretation of statutes, constitutional adjudication and rights adjudication — a role that necessarily engages them in law-making. Both roles are essential to a free and democratic society. The answer to the pragmatist’s fear that judicial law-making threatens to undermine the political process by deflecting into the courts cases that would be better resolved in the legislatures, is not to curb judicial law-making; this would put the free society at risk. Rather, the answer is to define which institution should be doing what and to work to ensure that each is performing its role as well as possible. I have spoken about who should do what – the proper respective law-making functions of the legislatures and the courts. I now turn to the question of how they can do that better.

<sup>47</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679; see also *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Reference Re Manitoba Language Rights*, [1992] 1 S.C.R. 212.

## VI. ENHANCING THE FUNCTIONS OF COURTS AND LEGISLATURES

As scholars train their focus on the global expansion of judicial power and judicial law-making, they are beginning to formulate suggestions on how legislatures and courts may best fulfill their respective law-making functions.

While the courts have attracted most of the attention, it is not amiss to ask what legislators can do to ensure effective political dialogue and law-making. I earlier suggested that legislators have many advantages in the formulation of policy over courts and that they should be the main policy-setting body in a democracy. The main function of the courts, by contrast, should be to ensure that the policy set out by the legislature is applied fairly and equitably and in general accordance with the objectives of the legislature, while ensuring that the constitution and the fundamental rights upon which democracy rests are respected. To discharge their primary policy-making function, legislatures should follow the following practices.

First, they should tackle the issues of the day, no matter how difficult or divisive. Politically, it may be more attractive to allow issues that divide the country and caucus to lie fallow. The result is discontent and building tension. Like water at a dyke, it will find an outlet. If the legislature does not provide the outlet, dissatisfied citizens will cast their concerns in the language of rights and turn to the courts, and the courts will have little choice but to hear them. If we accept that the legislative chamber is the best forum for debating and resolving the issues that divide us, then we must hope that the legislative chamber take them up.

The second thing legislatures must do is to use their superior ability effectively to engage in debate, dialogue and compromise. Parliament watchers in my country not infrequently bemoan the paucity of informed debate on issues before the House. This said, the legislative chamber is not the only forum of debate and compromise. In most modern democracies, much good work is done in Committee. The important thing is that the work get done, and done effectively.

A third thing legislatures might consider is addressing themselves more systematically to the relationship between the legislatures and the courts and the challenges presented by the modern conception of democracy discussed above. Janet L. Hiebert argues that the Canadian *Charter* affects how legislatures go about their work in a variety of ways. She suggests that Parliament develop “more rigorous methods for assuming responsibility to assess whether legislation is constitutionally justified”.<sup>48</sup>

<sup>48</sup> Janet Hiebert, “Wrestling with Rights: Judges, Parliament and the Making of Social Policy”, (1999) 5 I.L.R. P.P. no.3, p. 31.

To this end, she suggests that Parliament create a *Charter* committee whose members would be provided with a summary of the government's *Charter* concerns and how the *Charter* has influenced the development and design of proposed legislation. She also endorses legislative debate on *Charter* issues and preambles to "afford judges a more full and complete appreciation of the purposes of legislation and the reasons for choosing particular policy means".

Finally, legislatures might give advance thought to appropriate responses in the event that a court decision creates difficulty in terms of governance or majority desires. Dialogue between governments and courts is essential.<sup>49</sup> The court's decision on a divisive issue is seldom the final word. The legislature may pass laws to address the new situation. Even where statutes are struck down, it is usually possible to redraft them in a way that achieves much of the original goal while avoiding conflict with the constitution. The executive branch of government may similarly respond in creative ways to avoid confusion and difficulty that might otherwise result from a court decision in a sensitive area. Accepting that judicial law-making plays a vital role in a functional democracy, the government should anticipate it and be ready to respond to it.

This leaves the judiciary. I have argued that judicial law-making is neither anomalous or objectionable, but indeed essential to the operation of modern democracy. Yet it is limited. The first limit is obvious. To the extent that legislators make clear laws within their constitutional bounds, judicial law-making is appropriately limited. Conversely, to quote Taylor, "[s]o long as legislatures cannot find time to deal with all the problems of mankind the courts must fill the void".<sup>50</sup> Courts most often make law where legislators decide that it is best to leave the law to develop on a case-by-case basis, frequently in areas where the issues involved "are so finely balanced as to be incapable of resolution in a 'political' forum".<sup>51</sup>

However, it is not enough that courts be limited by the legislature. Within the area left to them, courts must limit themselves. Accepting that judges do make law does not mean accepting that judges can make any law they like. The Victorian pronouncement of Baron Parke in *Egerton v. Brownlow* that judges are not entitled "to establish as law everything that [they] may think for the public good, and prohibit everything that [they] think otherwise" still stands judges in good stead.<sup>52</sup> As he elaborated:

It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public

<sup>49</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Mills*, [1999] 3 S.C.R.

<sup>50</sup> Taylor, *supra*, p. 31.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Egerton v. Brownlow* (1853), IV H.L.C. 1.

good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community.

Yes, judges can and should change the law where lacunae arise and injustice looms. But they should be guided by the agenda of the legislature and the strictures of the constitution, not by their private agendas.

Wise judges and scholars have suggested rules which may guide judges in ensuring that they do not overstep the proper limits of their office.

The first counsel of wisdom is that attributed to Cardozo J.: the judge should “accept the discipline of the case”. The case sets out what must be decided. The judge as a rule should decide that and no more. Judging is case-specific. Exceptionally, final courts of appeal may find it wise to offer guidance for other cases to avoid uncertainty, but such occasions should be carefully chosen and the guidance itself carefully tailored to permit future revision. Generally speaking, judges should change the law only where injustice will result from not changing it, and only to the extent required to avoid injustice in the case at hand.

Second, before changing the law, the judge should be satisfied that injustice to others will not result. The judge must survey the legal terrain and search for pitfalls and problems. The change, to quote Taylor yet again, must “be beneficial not in the one case only, but for all similar cases.”<sup>53</sup> Considerable research and careful thought may be required for the judge to ascertain whether the proposed change will produce unintended injustice in other cases. A good guide is that the judge should contemplate no change in the law that counsel have not thoroughly canvassed. In a federal jurisdiction like Canada, regard must be had not only to individuals and the government involved in the case, assuming this is so, but also to other governments.

Third, courts should take great care to express any change to the law in clear, precise language. The propositions of law should not be wider than necessary. Where different judges write reasons, special care is required to ensure that the exact ambit of the change emerges clearly from the case. The court’s goal in every case must be to give clear guidance. This helps people to plan their affairs. This, in turn, helps reduce the likelihood of future disputes. And finally, when disputes arise, they are readily settled by reference to previous cases and the principles the court has established.

<sup>53</sup> Taylor, *supra*, p. 27.

Fourth, courts should seek to minimize the disruption to the rule of law and to avoid additional expenditure. The first way to accomplish this goal is to seek an interpretation of the law that best reconciles conflicting interests. Where they cannot be reconciled, choosing the appropriate remedy is important. Where the decision is that a law is unconstitutional, the court may choose to read the law up, read it down or suspend its declaration of invalidity for a period of time sufficient to permit the legislator to address the problem. Particular care is required with respect to orders that may increase the burden on the public purse. The principle “no taxation without representation” suggests only elected representatives should be able to impose new financial demands and burdens on the taxpayer. This said, compliance with the constitution may cost money. Indirect costs may be the inevitable result of a court order, but direct court-ordered expenditures are best avoided.<sup>54</sup>

Fifth, courts must be alive to the economic and social consequences of new pronouncements of law. This does not mean that judges should conduct cost-benefit studies or produce sophisticated impact statements each time they make an incremental change to the law. Nor does it mean that judges should shy away from making decisions that may have important, even controversial impact. However, judges need to be aware in a general way of how their decision may play out in the real world of the economy or social conflict. They should also be sensitive to the fact that changing the law may impact adversely on people who have structured their dealings and relationships on the basis of the previous law. Unintended adverse impacts make bad policy and bad justice.

Sixth, judges should practice the discipline of “conscious objectivity”. They should step back from their own inclinations and views and by an act of the imagination put themselves in the shoes of each of the opposing parties. How would I feel if I were in her position? Or in his? This is simply good judging practice, but it has special importance where a judge is asked to make a change to the law. In such a case the inquiry necessarily expands to encompass other people and institutions that may be affected by the change. This act of conscious objectivity may prevent the judge from being influenced by her own unacknowledged agenda.

Finally, judges must avoid the twin shoals of straying too far from the societal values on the one hand, and adhering slavishly to public opinion on the other. Judges, to quote Justice Oliver Wendell Holmes, should respond to “the felt necessity of the time”.<sup>55</sup> At the same time, they must avoid mechanical responses to popular opinion and public moods. Judges, while they must change the law incrementally to keep it in harmony with

<sup>54</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

<sup>55</sup> *The Common Law* (1881), at p. 1.

changing social realities, must stand fast against the whim or mood of the moment. The courts are the last defence of the individual against the tyranny of the majority. They must be prepared to go against majority views. As Justice Rehnquist (as he then was) aptly noted, judges must make the legally right decision even if it is not what “the home crowd wants”.<sup>56</sup> Justice is not concerned with the ebb and flow of public opinion; it is a long-term thing.

I conclude with this thought. As we enter the twenty-first century, we are embracing a new conception of democracy, one that does not exclude judicial action, but includes it. The fact is incontrovertible; we can only achieve a free and democratic society through the aegis of a strong legislative power combined with a strong independent judiciary. There is little point in decrying the fact that judges make law; they do and they must. Our efforts should rather be directed to discovering the proper parameters of action of these fundamental institutions, to the end of building a stronger, more democratic and more just society. Today I have offered a few thoughts on the subject. Much work, however, remains to be done. It is time to begin. Justice is important business. And we are all in it together.

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<sup>56</sup> “Dedicatory Address: Act Well Your Part: Therein All Honor Lies” (1980), 7 *Pepperdine L. Rev.*, 227, 229–30.

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