THE JUDGES' ROLE IN SOCIETY

LE RÔLE DU JUGE DANS LA SOCIÉTÉ D'AUJOURD'HUI

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The current debate read every day in the editorial pages of our newspapers and heard on the talk shows of this country, concerning the role of the judiciary in our society, is a desirable and valuable one. One need not be troubled about this kind of debate. It is quite natural for the roles of our public institutions, including the courts, to be the subject of lively discussion. It is healthy to our democracy and can only strengthen our society. After all, Americans have been weighing the appropriate role for their judges for more than two hundred years.

Accepting that this debate is healthy and sound, the Canadian judiciary recognizes a growing responsibility to enhance public and media understanding of the role of judges in the operation of the court system, including the judicial decision-making process. Judges cannot avoid making decision that will attract public attention and sometimes, for controversial decisions made under the *Charter*, negative commentary. The judiciary's role in public education is not to defend the Court's decisions, but to ensure that public commentary is based on an accurate understanding of the judge's role, especially the new judicial role in the post-*Charter* era. Traditionally, judges do not comment on judgments before their respective courts or on any issue in the public domain touching possible court cases before them. This strong tradition of silence on such matters is proper lest the judiciary sacrifice its independence or perception of impartiality.

The focus of this discussion is on the fundamental concept of judicial review and the act by which judges assess the validity of legislation. Since the *Charter*, the judiciary can strike down or modify the product of the democratic process due to nonconformity with *Charter* guarantees. My object is to aid public understanding of the judicial role, giving a definition of the role of judges and examining its historical

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origins and dimensions. Also, the development of the judges' role during this country's first century and the changes to this capacity precipitated by the enactment of the *Charter* in 1982 will be considered. The new constitutional role of Canada's courts under the *Charter* and especially the role of the Supreme Court of Canada as the country's highest court, with its landmark rulings on a wide range of controversial issues from aboriginal claims to gay rights require examination.

The *Charter* has empowered these courts to strike down provincial and federal legislation held to contravene Canadians' guaranteed basic rights. Common examples of the criticism about the merits of judicial power under the *Charter* include that unelected judges are running the country, we have a government of judges, judges are too activist, or simply that judges are engaging in policy making and usurping the role of the legislators. The question posed by some is whether it is appropriate that judges be invested with the power to strike down decisions of elected bodies. This brings into focus the democratic legitimacy of post-1982 judicial activity. En somme, la question essentielle que pose le sujet de ce débat est la suivante: selon la thèse que je vais vous soumettre et la conclusion que je vais retenir, il s'agit d'une dichotomie fondamentale qui s'exprime comme ceci: est-il possible de voir dans la montée en puissance des juges tout autant un instrument d'épanouissement démocratique qu'une menace a la démocratie?

First, concerning the role of judges, a definition of a traditional mode of judicial decision-making is restraint. The prevailing wisdom is that a judge is supposed to follow the law, not make the law. That is, a judge looks first to the law found in statutes, binding precedents and the constitution for answers. If the response is there, the judge goes no further and makes his or her decision based upon that law. He does not let personal preferences enter the decision-making process. The judge decides only what is necessary to resolve the presented dispute, eschewing broad general pronouncements about what is legal or constitutional unless such statements are necessary to the case at hand. For almost a century and a quarter this style of judicial decision-making, the function of which was to resolve private quarrels between individuals and sometimes public disputes involving fundamental constitutional questions, worked reasonably well. The relationship between the courts and other branches of government remained essentially static, fixed by the framework of the *BNA Act* which was modelled after the Westminster style of legislative sovereignty. Courts could rule on the respective legislative sphere of the federal or provincial power within the federal system of government, because this level of judicial review related to the formal content of the law.

The respective roles of the legislative, executive and judicial branches of

government were well defined and unquestioned. The legislatures, federal and provincial, made the law. The executive implemented and enforced the law. To the courts fell the task of interpreting and applying the law. This function has three facets: interpreting and applying the common law inherited from England and in Quebec the Civil Code; interpretation of statutes, the guiding principle behind the intent of the legislators; and the construction of the Constitution concerning the division of powers.

During this period, our democratic rights and freedoms were protected, but not guaranteed, by a number of statutes and legal principles which collectively comprised the rule of law. This underlying concept balanced the interests of the state and its citizens. Examples of the components of the rule of law include the supremacy of Parliament, the independence of the judiciary as assured by the *Act of Settlement, habeas corpus,* the presumption of innocence, and others. Canada was a country governed by the rule of law, meaning that we required all government institutions to act in conformity with the law.

The court's function as interpreter of the common law was not without its creative aspect. The courts could introduce changes in the common law but only acted at the pleasure of legislators who retained the right to nullify judicial doctrine. There are many examples of creative leaps in Canadian law, especially during the post-war period in human rights including *Roncarelli v. Duplessis* [1959] SCR 121, *Saumur v. City of Quebec* [1953] 2 SCR 299 and the "Padlock" cases including *Switzman v. Elbling* [1957] SCR 285. However, one interesting case in the old common law, which is less well known, is the decision in which the courts abolished slavery in England long before Parliament abolished it. This is the 1772 decision of Chief Justice Mansfield in *Somerset v. Stewart* 98 Eng Rep 509, in which he said,

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political ... it's so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from such a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

The facts were that an Englishman had bought a slave in Africa and stopped at a port in England on his way to sell the slave in Jamaica. The slave, held in the custody of the ship's captain, brought an application of *habeas corpus*. Much has been written about this case and the inspiring language of counsel who asked,

> Will not all the other mischiefs of mere utter servitude revive, if once the idea of absolute property, under the immediate sanction of the laws of this country, extend itself to those who have been brought over to a soil whose air is deemed too pure for slaves to breathe in?

This decision ended slavery in England and it was not until 60 years later, in 1833, that Parliament abolished slavery in England, the Colonies and New Brunswick with the enactment of the *Abolition Act.*

The question is whether the judicial role and traditional allocation of powers between the judiciary and other branches of government continue in view of the change caused by the adoption of the *Charter* in 1982, particularly considering the impact of the *Charter*, not only on the judiciary, but on the relationships between the judiciary and other branches of government. The *Charter* added a new overriding limit on the power of the legislators by requiring them to conform with the fundamental precepts established therein and by giving the Courts the new capacity of determining whether laws passed by these bodies violate the rights and freedoms guaranteed by the *Charter*. This expanded role is not confined to passing on the validity of the laws but extends to all government action as well.

The adoption of the *Charter* overturned the settled British and Canadian tradition of parliamentary supremacy and replaced it with the regime of constitutional supremacy in which the courts provide us with authoritative answers to the applied meaning of our new constitutional rights. This is clearly indicated in section 52 of the *Charter*. The *Charter* has established a new constitutional state in Canada. In less than 20 years it has effected a constitutional revolution, it has redesigned Canada's system of governance and facilitated a new type of politics. As supreme law, its directives have transformed the roles of legislators, courts and the executive to constrain every exercise of state power to the fundamental values embodied in the *Charter*. These values are being crystallized by a wide array of rights, both democratic and legal as well as fundamental freedoms, all based on the central idea of equal individual human dignity, the cornerstone of liberal democracy in the post-war world. (See the paper by Lorraine E. Weinrib entitled *"The Charter Critics: Strangers in a Strange Land*).

Concerning the last question of the democratic legitimacy of the judge's new role, a consideration of the views of the Supreme Court judges is instructive. The question of the legitimacy of the role of the courts in striking down legislation passed by democratic bodies has not been addressed often by judges. The reason for this paucity of jurisprudence is that it is rarely at issue, the fact that people appear

before the court means that they accept the jurisdiction of the court. However, in the recent case of *Vriend v. Alberta* [1998] 1 SCR 593, both Mr. Justice Cory and Justice Iacobucci addressed the question directly. Ceci est l'explication qu'ils ont donnée où ils abordent vraiment la légitimité de rôle des juges. La question de légitimité se pose de la façon suivante: pourquoi les vues des juges non élus devraient-elles prévaloir sur celles des représentants élus?

Voici l'analyse du juge Iacobucci: le peuple canadien, par l'entremise des élus, a redéfini la constitution pour marquer le passage d'un système de suprématie parlementaire à un système de suprématie constitutionnelle. Deuxièmement, par ce nouveau contrat social, les tribunaux se sont placés en situation de fiduciaires des droits fondamentaux et d'arbitres de la Charte. Troisièmement, leur statut indépendant et leur obligation de motiver leurs décisions est garant de la conformité de leurs jugements à la constitution. Quatrième point, le respect par les tribunaux de l'autonomie législative est assuré par l'application de la loi conformément a l'article 7 qui prévoit la nécessité de se conformer aux principes de justice fondamentale; par l'analyse commandée par l'article 1; par la retenue judiciaire; et par la possibilité d'invoquer l'article 33. C'est l'article qui contient la clause dérogatoire qui permet à un parlement ou une législature d'adopter une loi même si elle viole les droits garantis mais il faut le faire expressément. C'est valable pour 5 ans et c'est ce que l'on appelle le "safety valve." Il s'est instauré un dialogue entre les autres organes du gouvernement et les tribunaux. Cinquièmement, la démocratie transcende la règle majoritaire et mobilise certaines valeurs fondamentales qui sont rehaussées au-dessus des lois, par exemple, le principe de la dignité de l'être humain. Sixièmement, la souveraineté parlementaire est un moyen de parvenir à la démocratie et non une fin en soi.

Pour conclure, une citation qui provient d'un article de professeur Peter Hogg et Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, Osgoode Hall Law Journal, 35:1 (Spring 1997) 75-124:

> The critique of the *Charter* based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty.

Donc on dit qu'effectivement, il y a un dialogue qui est entamé entre les tribunaux et les parlements ou assemblées législatives et c'est ce dialogue, finalement, qui est démocratique et qui devrait conduire à un plus grand épanouissement démocratique.