JUDICIAL FREE SPEECH: JUSTIFIABLE LIMITS

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The very core of free speech in a democratic society is the right to engage in public debate on the political issues of the day. Surely at the heart of democratic citzenship are political advocacy and dissent, putting forward one's own political ideas and criticizing others', and supporting and attacking policies, parties and governments. Yet, it is precisely this kind of political speech so essential to a free and democratic society that should be denied to our judges.

Why should this be? The answer can be formulated in terms that will be all too familiar to Canadian judges: this limit on their free speech is reasonable and demonstrably justified in a free and democratic society. Let me proceed with the demonstration.

The objective of the limit is the maintenance of an independent and impartial judiciary – an objective of supreme importance in a *liberal* democracy. Liberty depends on enjoying rights under law. Further, when disputes arise about these rights, liberty requires that the dispute be adjudicated by a third party who is neither bound nor partial to either of the parties to the dispute. It is the judiciary's function to provide such adjudication. To do so, the judiciary must be as independent and impartial as possible.

Judicial independence and impartiality cannot be absolutes. Judges, individually and collectively, are dependent in many ways on other parts of the state for, among other things, their appointments, material support of themselves and their institutions, and enforcement of their judgments. Nevertheless, a liberal democracy endeavours to maximize independence by establishing institutional arrangements and practices that protect the judiciary from any outside interference, direct or indirect, in performing their adjudicative function.

Although impartiality will never be achieved in an absolute sense, it would be a betrayal of the very ideal of enjoying freedom under law to abandon the effort to minimize judicial partiality. This effort is more easily made with respect to party impartiality. Judges with close personal ties to one of the parties are expected to disqualify themselves; if they fail to do so, they may find their judgments overturned on appeal for bias. Over the years, jurisprudence has developed determining which ties disqualify and which do not.[1] Regarding impartiality on the issues – as opposed to impartiality with respect to parties – there is a deeper problem of great importance which is much more difficult to

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[1]For a summary of this jurisprudence see The Hon. J.O. Wilson, *A Book for Judges* (Ottawa: Ministry of Supply and Services, 1980).

overcome or minimize. It is precisely for this reason that judges must accept a limit on their freedom of speech.

Members of our society who are appointed to the judiciary are bound to have developed, before their appointments, well formed positions on many of the issues that bear on the interpretation and application of the law. These issues range from the relatively narrow policy or value choices embedded in particular areas of legal practice to broader questions of political economy and constitutional philosophy. Often in their pre-judicial careers, judges have taken strong public positions on these issues as politicians or as professional advocates. Even if their positions on questions of public policy or legal philosophy have not been publicly prominent, virtually all who assume judicial office will come to the bench with strongly held views on some of these questions. If we are to have a judiciary with both intellectual depth and public awareness, we surely would not want it otherwise.

We cannot expect judges on assuming office to shed their ideas on these issues as easily as they can – and should – sever their professional and political associations with parties who may appear before them as litigants. Indeed, we would not want them to even try to forget everything they think they have learned about these issues prior to joining the judiciary. So, if it is unreasonable to expect judges to assume office without well formed points of view or to completely wipe their mental slates clean once they are on the bench, what can we reasonably require of them in this regard?

Our answer to this question must distinguish between how judges are expected to discharge their professional responsibilities on the bench and how they are expected to behave off the bench. It is in the latter realm that the question of judicial free speech comes up most acutely: to what extent should judges in their private lives as citizens be constrained from enjoying the freedoms available to all other citizens? Clearly, the constraints on judges *qua* citizens should be minimal and based solely on what is required to maintain their capability in the first realm – to discharge properly the distinctive civic and professional responsibilities of a judge.

So, what should we require of the judge *qua* adjudicator? While we cannot expect the total abandonment of all previously held opinions, we can expect from the judge a certain discipline in the way personal viewpoints enter into decision-making. To begin with, we expect the judge, as a *third* party adjudicator in a dispute about legal rights and duties, to give full consideration to the submissions of both parties to the dispute – even if one of the parties represents a political cause or advances an argument contrary to the judge's predisposition. Full consideration of both sides' positions must be apparent and real. If this capacity for hearing both sides is not real – if it is simply play-acting – then it will not be

apparent for long. If it is not apparent, one of the parties will believe he or she cannot get a fair hearing in the judge's court.

A second distinctive requirement of judicial decision-making is that judges be prepared to give reasons for their decisions which are persuasive to more than the judge's immediate soulmates. I say "prepared to give reasons" because many judges – perhaps most judges – do not have time under crushing case-loads to craft carefully reasoned justifications for their decisions. Nevertheless, even when the decision is rendered through no more than a few words from the bench, we expect that the judge could justify it by reference to an understanding of the law and the facts that goes beyond personal opinion or predisposition.

This last point does not mean that judges are expected to render decisions that are entirely "neutral". The law itself is not neutral. Any legal system is full of value-laden choices about how citizens and governments ought to behave. Moreover, judicial development of the law cannot be a "neutral" process. The generality and the complexity of the law mean that there are inescapable opportunities for judges to nudge it this way or that in the course of interpreting and applying it. Without doubt, the backgrounds and predispositions of judges can and will make a difference as to which way the law is nudged. Yet, even accepting this hard core of judicial realism, we can require that judges be able to justify nudging it one way rather than another with reasons capable of persuading as large a constituency of interest as possible.

Meeting these distinctive requirements of judicial decision-making requires a professional self-discipline that is not required of those who run for elected office or advocate public causes. This kind of self-discipline was well described by Benjamin Cardozo, a great American judge and a strong judicial realist, as the cultivation of a "judicial temperament" which, as he put it, "will help in some degree to emancipate [the judge] from the suggestive power of individual dislike and prepossession ... to broaden the group to which his subconscious loyalties are due."[2] Note that Cardozo did not give a counsel of perfection: it is only "to some degree" that emancipation from prepossession can be achieved. Still, because it is imperative that we strive to maintain a degree of credible judiciousness on the bench, limits must be imposed on how judges conduct themselves off the bench.

If judges were free off the bench to push for or against changes in public policy, or to support or oppose politicians, political parties or governments, then it is doubtful that they would maintain any credibility as *third* party adjudicators. Judges will have opponents on virtually any of the public issues on which they might take a public stand who will expect a fair hearing when they come to court.

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[2]Justice B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 176.

The same is true of governments, political parties, and other politically active organizations that a judge might support or attack in public. If, before being appointed, a judge was among the active protagonists of any of these contestants in democratic politics, then some of them will have difficulty enough believing that the judge is sufficiently impartial to hear their cases, but, if participation in the cut and thrust of democratic politics is carried on after appointment, then all credibility will be lost.

There is one important exception to the bar against judges participating in the public discussion of controversial political issues. The Canadian Judicial Council noted this exception in its decision in the Thomas Berger case when it stated that "[t]he Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the courts."[3] On occasion, there may be matters concerning, for instance, the adequacy of court resources or the proper management of the courts on which judges, especially chief judges and chief justices, have a particular responsibility to speak out because no one else will or can with the same degree of knowledge and experience. Even in this area, judges should endeavour to speak out in a manner that is as non-partisan as possible. Support of the judicial branch should not depend on an alliance with any political party.

The Berger case points to a further rationale for constraining judges' off-the-bench participation in political controversies. Not only does such participation undermine judicial impartiality, but, in the long run, it could threaten the independence of the judiciary – particularly that of a powerful judiciary. An independent judiciary would not last long if judges exercised their political muscle not only on the bench by overturning policies and laws that in their view violate legal rights but also by taking on the politicians in the political arena. That is exactly what Justice Berger, as he then was, did when he permitted his critique of the first ministers' constitutional deal to be featured on the op-ed page of the *Globe and Mail* in November, 1981. He took on the leading politicians of the day on their turf on an issue of supreme importance to them, and, I might add, on an issue – the legitimacy of repatriating the *Constitution* without Québec's consent – on which the judiciary might well be asked to adjudicate. If judges expect politicians to not attack them for the decisions they render *qua* judges in the judicial arena, the *quid pro quo* is that judges not attack politicians in the political arena.

The scope of the constraint on judicial free speech should be no greater than necessary. This means it should be confined to politically contentious issues and

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[3] *Report of the Committee of Investigation to the Canadian Judicial Council* (Ottawa: Canadian Judicial Council, 1982) at ii.

legal questions that may become the subject of adjudication. Outside this forbidden area there is plenty of scope for judges to write, speak and otherwise express themselves. In the field of legal scholarship they can, and often do, contribute to legal and judicial history and biography. Analyses of legal issues of contemporary relevance are much more questionable as they will likely be seen as committing the judge to a hard position on a particular subject before it is argued in court. Addresses or essays by judges re-explaining or "clarifying" decisions they have previously made on the bench should be avoided like the plague. Rather than clarifying the law, such efforts would more likely set up a confusing set of authorities parallel to the judicial decisions themselves.

Then, of course, outside of law there are many realms of expressive activity in which judges are entirely free to engage. Art, history, literature, music, philosophy, religion, science and sports – in all of these fields, Canadian judges have in the past made distinguished – and undistinguished – contributions. Let us hope they will continue to do so in the future as unfettered in their freedom of expression as any other citizen!

In this respect, I have difficulty accepting Rule 8 of the *Judicial Code of Ethics* that was cited in the case concerning Québec's Judge Andrée Ruffo. According to this Rule, "[i]n public, the judge should act in a reserved, serene and courteous manner."[4] I have no problem with "courteous" – we should all try to be courteous – but "reserved" and "serene" are unreasonably restrictive. Off the bench, in public, judges should be free to indulge with gusto and, save for their time commitments, unreservedly in their recreational and intellectual passions. Maintaining judicial impartiality and independence does not require that when judges take off their judicial robes they become dull individuals. It requires only that when they doff these robes they refrain from entering the fray of political and legal controversy – except when necessary, and in the most judicious manner possible, to defend and to explain their own institutions.

The spirit of minimal impairment also requires that limits on judicial free speech, for the most part, be enforced in a relatively light and informal manner. In the Berger affair, the Canadian Judicial Council, as contrasted with its Committee of Inquiry, got this right when it ruled that Justice Berger's mistake was not a ground for removal from office. Judicial independence would be

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[4]O.C. 643-82, 17 March 1982, G.O.Q. 1982.II.1253. See also *Ruffo* v. *Conseil de la Magistrature* [1995] 4 R.C.S. 267. In this case, the Supreme Court rejected a constitutional challenge alleging inherent bias in Québec's legislative framework for dealing with judicial discipline. It further rejected the argument that Rule 8 should be found void for vagueness. However, because the Committee of Inquiry in Judge Ruffo's case and the lower courts reviewing the committee's decision had not had an opportunity to hear the merits of her section 2(b) *Charter* challenge to Rule 8, the Supreme Court declined to deal with the issue.

seriously at risk if judges were removed for the occasional indiscreet public utterance. In most cases, a private or public reprimand by the body responsible for judicial discipline should be enough of a sanction. However, if a judge appears to ignore such a reprimand and continues to indulge in a public and political crusade, then the stiffer sanction of removal would have to be considered. A judge who sees no reason to refrain from engaging in political controversy off the bench may not be able to function effectively in a judicial capacity.

Advocates of an unrestricted judicial license to engage in political debate are apt to put too much weight on the merit of the causes judges may wish to publicize. I find myself sympathetic to the causes advocated by both Justice Berger and by Judge Ruffo – the need for Québec's consent to constitutional changes affecting its powers and the need for better government support of child welfare services, respectively. The trouble is that many others are not, and among these others are governments and political parties whose members and supporters will be coming to court expecting a fair hearing from a third party adjudicator who is not numbered among their political opponents.

There can be no doubt that judges have the ability to be eloquent political advocates. The judicial office they hold can give added weight to their advocacy. Even so, there is no political cause or law reform issue, other than the strength and integrity of the judicial system itself, so lacking in effective advocates that it requires judicial defenders. Moreover, the very weight of judicial office that is seen as enhancing judicial advocacy, giving it that extra measure of credible judiciousness, will soon be lost if judges become free-wheeling combatants in the give and take of democratic politics.

We collectively, and judges individually, have to decide where citizens who are capable of being good judges are to exercise their power. We cannot have a powerful judiciary whose members exercise their power both on and off the bench. The power of courts to restrict and constrain the most powerful political forces in our society depends on those very forces accepting the legitimacy of judicial power. That legitimacy would be quickly eroded if judges were to endeavour to wield their influence directly in the political arena. Similarly, the citizen who accepts the offer of a judicial position must be willing to exchange the right to influence public affairs as an ordinary citizen for the judge's power to shape the rights and legal duties of citizens and governments. Disenfranchisement from the normal – and central – political freedoms of democratic citizenship is a self-imposed professional obligation that brings with it an extraordinary power. Both the judge's loss of the ordinary citizen's freedom and gain of extraordinary power are necessary conditions of a liberal democracy.