Of Power, Democracy and the Judiciary

B.M. McLachlin*

> *We have already ceded the power to the judges, the new proconsuls of popular politics. The constitutional die was cast with the Charter's entrenchment in 1982.*
> *Whichever way the judges choose . . . it is a sad situation for a nation that prides itself on its commitment to democracy.*[1]

This quote, from a recent op-ed article in a leading Canadian newspaper, is only one of a number of recent comments decrying the alleged rise of judicial power and the correlative — if the writers are to be believed — decline of Canadian democracy. It has become fashionable of late to characterize the judicial role as increasingly powerful, political and, most devastating of all, essentially un-democratic.

Tonight, I would like to attempt a defence to these accusations. I will argue two points, on the theory that even if I fail to convince you, the exercise of examination will be worth the effort. First, I will argue that it is wrong to characterize the judiciary as excessively powerful. Second, I will contend that far from posing a threat to democratic society, a strong judiciary is essential to the maintenance of our democratic institutions.

My first point is that the judiciary is not too powerful, or in any event, certainly not as powerful as many would have us believe. The power we are speaking of is not the ordinary power which judges have always had of deciding the outcome of a particular case, but political and social power in a wider sense. It is true that judges in Canada are increasingly called upon to rule on issues of fundamental importance to individuals and groups within our society. A casual observer, upon

* The Honourable Madame Justice B.M. McLachlin, Supreme Court of Canada. This paper was presented as an address to a Dinner Meeting of the Lawyers Club, Toronto, January 7, 1991.

1. A. Hutchinson, "A case of private rights and public wrongs", *The Globe and Mail* (10 December 1990) A21.

seeing that the courts are handing down judgments in such matters as mandatory retirement, abortion, aboriginal rights and the criminal prosecution of hate propaganda — to mention only a few of the areas into which the Supreme Court has delved of late — might be forgiven for concluding that it is the judges who are calling the shots in our society. Yet despite its superficial attraction, such a conclusion is far from the truth.

The power of the judiciary, even in the post-*Charter* era, is hedged with limits and circumscriptions. One of the most important checks on the power of the judiciary is that the Court has no power to initiate measures, only the power to negate them. It merely rules on what others — usually Parliament or the Legislatures — have done. It sets the bounds and limits of appropriate legislative action; that is inevitable given its function as interpreter of the Constitution upon which Parliament and the Legislatures have agreed. But within those limits, the content of the law remains to be determined by the elected members of Parliament and the Legislatures. The same point has frequently been made with respect to the role of the Supreme Court of the United States. Thus it has been written:

> There is no way that the Supreme Court can be an instrument of despotism. Even those who deplore an activist Court must concede that the court has no power to initiate despotism, only the power to negate it. This is doubtless what Alexander Hamilton had in mind when he wrote (in *Federalist* 78) that 'the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.'[2]

A second limit on judicial power is the fact that the judiciary is subject to the conventions and rules which govern judges of the law, and hence bound to exercise such power as may have been conferred on it in a conservative, limited way. Judges are guided by precedents which dictate particular results, quite apart from the judge's personal views. Judges are also guided by conventions which limit how they exercise their power.

Recent decisions, for example, indicate a clear reluctance on the part of judges to trench unduly on the executive or legislative powers of government. Judges, by training, convention and conviction, do not wish to carry their functions further than constitutionally necessary.[3]

2. B.P. Percy, "The Judicial Power: The Cement That Holds The Republic Together" Judicature 71:2 August–September 1987, 65 at 67.
3. Examples include *Dixon v. Attorney General of British Columbia*, (1989), 35 B.C.L.R. (2d) 273, 59 D.L.R.(4th) 247 involving British Columbia's electoral districting, and the recent

Judges are unlikely to start telling Parliament or the Legislature when they must enact laws or what kind of laws they must pass, nor can they be expected to dictate to the executive how to run the country. They recognize that the judicial role is a limited one — limited in the constitutional context to setting the outside bounds of the territory open for legislation. Within those bounds, the other branches of government function autonomously.

Similarly, judges by convention cannot and do not function in furtherance of a particular political or social agenda. The traditions of judicial impartiality and independence — traditions enforced by judicial discipline where violated — dictate that judges stay above the partisan fray, that they avoid association with this cause or that. These traditions militate against the crude exercise of power in the political sense.

Professor Peter Russell has written on the importance of these judicial conventions in limiting judicial power. Speaking in the early days of the *Charter*, he predicted that:

> . . . there will be a tendency to see courts and judges as simply exercising raw political power and to deny that the judiciary is subject to a special set of normative requirements that do not apply to the other branches of the political system. Some political scientists may contend that the special procedures of judicial decision-making, and even the reasons judges give for their decisions, are nothing more than a device for legitimizing the judges' assertion of their own values in the interests of those who appointed them.
>
> But this reaction — this tendency to look upon the judiciary as simply an undifferentiated segment of the ruling elite — is a serious mistake. An adequate political science analysis of the judicial process must be built on a political theory that recognizes that the ideals of judicial impartiality and independence are not pieces of a folklore cleverly manufactured by a governing class but represent normative concerns arising from the fundamental needs of a just and effective political order.[4]

A third convention that internally limits judicial power is the recognition by judges of the inherent limitations on their own juris-

---

mandatory retirement cases decided by the Supreme Court of Canada: *McKinney v. Board of Governors of University of Guelph, University of British Columbia v. Connell, Douglas College v. Douglas/Kwantlen Faculty Association*, and *Vancouver General Hospital v. Stoffman* (judgments rendered December 6, 1990, not yet reported).

4. "The Paradox of Judicial Power" (1987) 12 Queen's L.J. 421 at 423.

diction or power. Courts refuse to act beyond the limits of the power conferred on them by the Constitution and the law. That is why jurisdiction bulks so large in the legal lexicon.

Yet another check on excessive judicial power is s. 33 of the *Canadian Charter of Rights and Freedoms*, the judicial override section. That section has both its supporters and detractors, and it is not my intention to engage in the debate between them. I merely make the point that the power of the Court to negate legislation on the ground that it infringes the fundamental rights and freedoms guaranteed by the *Charter* can be ousted by Parliament or any of the Legislatures upon a simple majority vote, subject only to the condition that the process be repeated within five years. Only s. 3 of the *Charter* — the right to vote — is exempted. There could be no more conclusive answer to those who argue that the *Charter* gives judges too much power than s.33. If the judges take too much power through the *Charter*, or exercise it in a manner which is deemed unsuitable, Parliament or any Legislature can simply vote to nullify their rulings.

A final limit on judicial power is the fact that apart from the executive branch of government, the judiciary possesses no means to compel compliance with its judgments. Judicial power thus ultimately rests on the executive power of government. The executive, by convention, enforces the law. This is as it must be in any civilized society governed by the rule of law as opposed to the rule of executive fiat. Nevertheless, this symbiotic relationship negates any suggestion that we need fear the despotic exercise of judicial power. The judiciary is part of a democratic system of government. As such it exercises certain powers, but only in conjunction with the other branches of government. The vulnerability of the judiciary in the absence of executive and legislative cooperation was amply demonstrated in the decade following the landmark de-segregation rulings of the Supreme Court of the United States; for years municipalities and states successfully evaded full compliance with the Court's decisions.[5]

I argue then that it is wrong to view judges as excessively powerful. Such powers as they possess (apart from deciding the fate of this litigant or that) are largely negative and reactive and necessarily exercised within the constraints of precedent and convention and in accordance with the dictates of judicial impartiality and independence. And should all of these checks fail, Parliament and the legislatures have the final word through the judicial override in s. 33 of the Charter.

I turn then to my second point — that the judiciary, far from posing a threat to our system of democratic government, is an essential

adjunct to it. The Right Honourable Sir Robert Megarry has observed that

> . . . the position of judges in a democracy is paradoxical; for the judiciary is an undemocratic institution which nevertheless is an essential part of democracy, and is indispensable for the maintenance of democracy.[6]

As Judge Megarry observes, the judiciary is an undemocratic institution; in this sense the commentator with whom I introduced my remarks tonight got it right, although, I would submit, only partly right. The judiciary is undemocratic because judges are appointed, not elected; because they are appointed for life, (or until mandatory retirement), and do not retire with the government that appointed them; and because the judicial role is by its very nature "authoritarian and authoritative".[7]

The concept of judges being appointed and appointed permanently requires little elaboration. We appoint judges because we have always done so, but also, I suspect, because there really is no other satisfactory way to choose them. Even in the United States, where some state judges are still elected, one detects little enthusiasm for the process. One may debate whether the process of appointment should be more open, in the sense of having public confirmation hearings as is done for the United States Supreme Court, but even if that were done, it would not eradicate the essentially undemocratic nature of judicial appointment. The people do not choose their judges and the judges are not ultimately responsible to the people in the same way as members of Parliament.

The idea of a judge as "authoritarian and authoritative", however, bears explanation. Judge Megarry explains it this way:

> I say that a judge is authoritarian and authoritative because his duty is to decide what the law is, and to apply that law, with authority, to the case before him, however unpopular his decision will be with the public, the government or anyone else. Though appointed to the Bench by the government in power at the time, the judge owes no duty of gratitude to that government, as many a President of the United States has found to his dismay. The judge's duty is one of obedience to the law and to his judicial conscience. He must do not what

5. For a discussion of the reaction to *Brown v. Board of Education* (1954) 347 U.S. 483, see L. Baum, *The Supreme Court*, 3rd ed. (Washington: Congressional Quarterly Press, 1989) at 206 ff.
6. "The Judge" (1983), 13 Man.L.J. 189 at 189.
7. *Ibid.*

> he wants to do but what he ought to do. Even if the law seems to operate unfairly in the case before him, he must obey and apply it; for if the judges do not obey the law, who will?[8]

Other judges have expressed similar sentiments. Justice Blackmun of the United States Supreme Court, alluding to the history of massive resistance to desegregation in the South, has affirmed that "(a)s judges . . . we are sworn to uphold the law even when its content gives rise to bitter dispute."[9] And in the recent Supreme Court decision on abortion in the United States, *Webster v. Reproductive Health Services*[10] Justice Scalia pronounced:

"We can now look forward to at least another term with carts full of mail from the public, and streets full of demonstrators, urging us — their unselected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will — to follow the popular will."

In short, the judge's function is the opposite of the elected representative's function. The judge must not be swayed by public opinion or the party line. The judge's concern is not the majority will, but the rights of the individual or group in question, a concern which often places him or her in the role of protecting minorities. The judicial function is, at its heart, anti-majoritarian.

But the other side of the paradox is that the judiciary is essential to the proper functioning of democracy. This is because democracy as we know it is based on the notion that power — even legislative and executive power — is limited. The limit on that power is the law. For this reason, it is said that our democracy is grounded in the rule of law.

Democratic government has not always been viewed thus. The system we enjoy has evolved over the centuries through the pragmatic process of trial and error, and reform. The first democracy in Athens was based on the simple notion that the people (which did not include women or slaves) determined all questions by direct vote. This was pure democracy. Each citizen voted on each law. Each citizen was also a judge. There were no separate courts. Guilt or innocence, sentence, and civil disputes were determined by the assembly voting as a whole. The judicial function was not differentiated from the legislative function, and the "court" was truly democratic. The powers of the assembly

---

8. *Ibid.* at 190.
9. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) at 771.
10. 109 S.Ct. 3040 (1989) at 3065–66

were not limited in any way, and the powers of the executive were limited only by the assembly, which was at once court and legislature.

The Athenian model, while truly democratic, suffers from defects which our system of democracy does not. From the judicial point of view, it is impossible to imagine the variety, complexity and quantity of litigation a society such as ours generates being resolved by the vote of citizens. Nor, if this could be achieved, would it necessarily be desirable. There is much to be said for judges who strive for impartiality and independence from the political process; such a system, it can be argued, provides for a systematic and coherent development of the law and for a fairer and more equitable application.

But the Athenian model is impossible from the political point of view as well. First, it would be impractical in a society which recognizes the right of millions of citizens to participate in the democratic process. For his reason we elect representatives of the people, instead of ruling by plebescite. The Athenian model is also arguably too unstable. Representative democracy, combined with a party system, provides a measure of stability essential in our modern, complex society. But while our representative system of democracy possesses undoubted advantages, it also introduces the risk of abuse of power. In electing representatives, we divide ourselves into two classes, the ruled and the ruling. The moment this happens, the possibility of abuse of power arises. And that is a great danger. We are all familiar with the famous aphorism of that great historian, Lord Acton: "Power tends to corrupt, and absolute power corrupts absolutely." So it becomes necessary to find a way to control power and prevent its abuses.

The way we do this in our society is by the rule of law. All power, whether of the executive or the legislature or the courts themselves, is circumscribed by the law. It is interesting to observe formerly totalitarian countries in eastern Europe emphasizing the need for the rule of law and a judiciary independent of the executive of government as they struggle to embrace democracy. In a world of uncertainty, one truth emerges clearly: there can be no true freedom without the rule of law.

This fundamental proposition places the courts at the heart of a functioning democracy. The courts are the mechanism by which the limits of power for all those who wield it are determined. Our democracy could not function without an independent judiciary to determine the limits of power and pronounce on when those limits have been exceeded. It may be that in exercising this function, the courts are perceived as themselves wielding too much power. But, as I have suggested earlier, the power of the courts is constrained by many

factors, including their own rules, which forbid the exercise of power beyond their own statutory and constitutional mandate. It is neither coincidence nor arid legal technicality that courts spend so much time with issues of jurisdiction. Recognition of the importance of not exceeding jurisdiction is the bedrock upon which all judicial action is based and the ultimate safeguard against abuse of judicial power.

It is inescapable that in exercising their function of defining the limits of power, judges in one sense represent ultimate power. They have the final say, and what they say necessarily becomes right. In a moment of levity Justice Robert Jackson once remarked, speaking of the United States Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final."[11] But should we be dismayed by the inescapable marriage of fallibility and finality in the judicial function? I, for one, think not. Someone must have the final say on the exercise of power in our democratic system and the judiciary, not only because of its expertise but because of the practical and conventional limits on its power, is the institution best suited. Lord Denning summed up his views on the same question in a fashion which applies in Canada as much as in England:

You need have no fear. The Judges . . . have always in the past — and always will — be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges.[12]

11. *Brown v. Allen*, 344 U.S. 443 (1953) at 540.
12 "Misuse of Power" (1981), 55 Australian Law Journal 720 at 726.