THE DEMYSTIFICATION OF THE JUDICIARY

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I. INTRODUCTION: THE DEMYSTIFICATION OF THE JUDICIARY- THE HISTORICAL PERSPECTIVE

Judges, like the angels, like to think themselves above criticism. Yet the odd publication of late gives cause to query whether the age of judicial immunity may be drawing to an end. Certainly, this seems to be happening in England, where the Spectator recently, and admittedly tongue-in-cheek, offered two articles bearing, respectively, the following titles.

"The Judge is a Bastard."[1]

"The Era of the Blabbing Judge."[2]

Canada, it seems, is not immune from the temptations of judicial criticism. A recent newspaper article pronounced: "Judges should be told their task is simply to decide legal cases." The author goes on to elaborate: "The answer is not to acquiesce in rule by judges, but to demand its end. We should send an unmistakable message to our judges -- stop trying to be our moral mentors and get back to deciding cases."[3]

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[1] J. Mortimer, *The Spectator* (25 August 1990) 14.

[2] M. Berlins, *The Spectator* (25 August 1990) 15.

[3] R. Martin, *The [Ottawa] Citizen* (10 September 1990) A9.

And it seems the journalists are not alone in their concern about the state of the judiciary. Last year the number of complaints about judges to the Canadian Judicial Council rose steeply, from about fifty to over eighty. Most on examination were found to have little substance.

All this has come as something of a shock to a judiciary which for centuries has been unaccustomed to public expressions of dissatisfaction. Whatever people might say in private, public criticism of judges and judicial institutions has traditionally been taboo. Politicians and public servants were fair game. But the courts must be respected, their edicts accepted unquestioningly. Anything less would threaten the bedrock of law and order upon which our society rests.

Judges had become accustomed to basking in the comfortable knowledge that they alone of all institutions were impervious to and, indeed, undeserving of public censure. They had come to share the expression of satisfaction which Lord Hewart gave the guests assembled at the Lord Mayor's banquet in 1936:

> His Majesty's judges are satisfied with the almost universal admiration in which they are held.[4]

In a similar vein Lord Devlin suggested in 1979 that:

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[4] As reported in R.M. Jackson, *The Machinery of Justice in England*, 7th ed. (Cambridge: Cambridge University Press, 1977) at 475.

> The English judiciary is popularly treated as a national institution ... and tends to be admired to excess.[5]

Perhaps judicial smugness reached its apogee with Lord Jessel, Master of the Rolls, who upon learning that Lord Chancellor Selborne proposed to include in an address to the Queen the phrase, "Your Majesty's judges are deeply sensible of their own many shortcomings", sniffed, "I am not conscious of 'many shortcomings', and if I were I should not be fit to sit on the bench."[6]

More than a few Canadian jurists, I venture to say, shared similar views, even if they lacked the effrontery to state them out loud.

A search of the historical record leaves one with the impression that public criticism of judges and the judiciary is a rare occurrence. Such incidents as may be found tend to be isolated and oblique. Criticism, it seems, might be ventured in the unlikely event of a judicial invitation. After a certain decision, Lord Mansfield, showing courage few modern judges could muster, asked the lawyer for the losing party to "tell us your real opinion and whether you don't think we are right." The lawyer replied that "he always thought it his duty to do what the Court desired and ... he ... did not think that there were four men in the world who could have given such an illsounded judgment." The record does not show

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[5] P. Devlin, *The Judge* (Oxford: Oxford University Press, 1979) at 25.

[6] From R.E. Megarry, *Miscellany-at-Law* (London: Stevens & Sons Limited, 1955) at 8.

what happened to the lawyer.[7] We are all familiar with Dickens' criticisms of the Court of Chancery in *Bleak House*, but the fact remains that he was obliged to resort to the medium of fiction to make them.

Those who would point to a tradition of criticism of the judiciary also point to certain adverse comments on appointments to the bench. The appointment to the bench of Justice Lawrance in 1890 provoked the *Law Times* to comment that "this was a bad appointment, for ... Mr. Lawrance has no reputation as a lawyer, and has been rarely seen of recent years in the Royal Courts of Justice."[8] As for Justice Ridley's 1897 appointment, the same paper opined that "the appointment can be defended on no ground whatsoever."[9] These comments are perhaps less significant than one might think, since the criticism focuses on the political process of appointment rather than judicial conduct.

Leaving aside these aberrations, the overwhelming weight of evidence suggests that until recently, public criticism of judges was a rare phenomenon. And on those few occasions when it did surface, it was quickly and decisively stifled. Judicial records are replete with examples of lawyers and citizens being imprisoned or chastised for daring to criticize the judiciary. For example, in 1900, after a trial before Mr. Justice Darling

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[7] From *Lord Eldon's Anecdote Book*, A. Lincoln & R. McEwan, eds, 1960 at 42-43.

[8] D. Pannick, *Judges* (Oxford: Oxford University Press, 1988) at 120.

[9] *Ibid.*

of the Birmingham Assizes, the *Birmingham Daily Argus* published an article describing the judge as "an impudent little man in horsehair" and "a microcosm of conceit and empty headedness". A fine for contempt was imposed on the newspaper.[10] A variety of sanctions have been imposed on critical lawyers -- including prison sentences,[11] threats of a professional boycott by solicitors,[12] denial of the rank of King's Counsel,[13] and suspension from practice by the Benchers for "conduct unbecoming a barrister".[14]

Judges traditionally have shown little charity toward their critics. In 1527 Sergeant Roo, 'a great lawyer of that time, more eager to show his wit than to be made a Judge', authored a satire on Lord Wolsey's judicial -- or more accurately unjudicial -- practices, which he delivered in the presence of the King. His reward? Summary dispatch to prison.[15]

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[10] *R. v. Gray* [1900] 2 Q.B. 36.

[11] For example, in *Mr. Lechmere Charlton's Case*, (1837) 40 E.R. 661, a barrister wrote to the judge regarding a case in which he had appeared, and was subsequently sent to prison for three weeks. Lord Chancellor Cottenham believed that "every insult offered to a Judge in the exercise of the duties of his office is a contempt".

[12] B. Abel-Smith & R. Stevens, *Lawyers & the Courts: A Sociological Study of the English Legal System 1750-1965* (London: Heinemann, 1967) at 33.

[13] John Lord Campbell, *Lives of the Lord Chancellors*, 5th ed., Vol. 10 (London: John Murray, 1868) at 276-77.

[14] S. Shetreet, *Judges on Trial* (Amsterdam: North-Holland, 1976) at 239.

[15] *Supra*, note 13, Vol. 1 at 405.

Even constructive criticism presented in good faith has often been viewed as reprehensible. Consider the case of the Nova Scotia lawyer who in the mid-part of the last century was driven by concerns with the system of justice in his province to write a letter to the Chief Justice voicing the following complaint:

> I can't help thinking that I am not fairly dealt with by the Court or Judges, and that the well-beaten track is often departed from for some bye-way to defeat me....

The lawyer went on in the letter to state that:

> [he] could also recall cases where the decision was ... largely influenced, if not wholly based, upon information received privately from the wife of one of the parties by the Judge. Is this justice?

The Judicial Committee of the Privy Council proved unsympathetic when the matter came to the attention of their Lordships. Lord Westbury castigated the lawyer's complaint in the following trenchant terms. It was, he opined:

> undoubtedly ... a letter of the most reprehensible kind ... a contempt of court, which it was hardly possible for the Court to omit taking cognizance of.[16]

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[16] *In the Matter of Thomas Wallace*, (1866) 1 L.R.P.C. 283 at 286, 294.

It is hardly surprising that in this atmosphere public criticism of the judiciary was rare. While the cases distinguished between wilful contempt calculated to bring the administration of justice into disrepute, and "the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice",[17] more often, it seems, the broad assumption prevailed that any criticism of the judiciary was not only improper, but dangerous.

All this is changing. True, it is still possible to go to prison for contempt of Court. Although the offence of contempt of court by "scandalizing the judiciary" has been found contrary to s. 2(b) of the *Charter*, it may still apply if the remarks made create a real danger to the fair and effective administration of justice.[18] Nevertheless, the old hands-off attitude is less and less in evidence. It is this new attitude toward the judiciary which I take as my theme tonight. I would sum it up in one phrase -- the "demystification of the judiciary". No longer are judges held in awe as a species of super beings, ranking somewhere between man and the angels, and in any event beyond error and censure. Increasingly they are seen as mortals, well-meaning, for the most part competent, but all the same, fallible.

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[17] *Ambard v. Attorney-General for Trinidad and Tobago,* [1936] A.C. 322 at 335.

[18] *R. v. Kopyto*, (1987) 39 C.C.C. (3d) 1, 61 C.R. (3d) 209 (Ont.C.A.).

The prolific English lawyer and writer, John Mortimer, speaks of "a general decrease in the awe and wonder with which the population looks at its established institutions," an attitude from which the courts are not excepted. Mortimer puts it this way:

> Many years ago, when I first took up the law, proceedings in court were shrouded in myth. In those days the country at large believed that trials invariably came to the right conclusion, that police officers told nothing but the truth, and that judges were miraculously conceived and were born unencumbered with the usual human luggage of preconceived ideas, knee-jerk reactions, prejudice, failures of the imagination, inability to admit mistakes or pure bloody-mindedness.
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> These myths have now, no doubt to the regret of many members of the legal profession, gone the way of witchcraft and the Flat Earth Society. Trials have, despite energetic whitewashing by appeal tribunals, been shown to have gone horribly wrong. Police evidence is now taken by juries with large helpings of salt. And the pronouncements of some judges, before and since retirement, have gone beyond endearing eccentricity to give some cause for alarm.[19]

I hasten to distinguish the attitude of critical scrutiny to which Mortimer refers from dissatisfaction with the judiciary. One can argue that notwithstanding its increasing willingness to comment on the judiciary and its perceived shortcomings, the public has never held the judiciary in higher esteem. This is demonstrated by the fact that it turns to the judiciary more and more for the resolution of its problems. As one writer recently put it, "the [Supreme] Court may be the only major national

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[19] *Supra*, note 1 at 14.

institution to escape public resentment".[20] The new powers which the governments of our country conferred on the courts through the adoption of the *Charter* in 1982 represent nothing if not a vote of confidence in the Canadian judiciary. The increase in litigation in courts of all levels similarly attest to the confidence in which the general public holds the judicial system. Canadians appear to share a profound belief that when other institutions fail, one can count on fairness from the courts.[21]

These observations provoke me to pose the questions which stand at the heart of my paper this evening. First, what are the causes of the demystification of the judiciary? Why this sudden willingness to stand in judgment on the judges? Second, where do the proper limits lie between legitimate criticism and illegitimate contempt of court? Finally, assuming the phenomenon of a public, demystified judiciary is here to stay, how should judges and the legal community respond? What changes will the new era bring to the relationship between the courts, the public and other institutions?

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[20] J. Geddes, "Our Supreme Court under scrutiny: Should our judges be subject to public review?", *The Financial Post* (13 November 1990) 14.

[21] Witness, for example, the public reaction in the dying days of the Meech Lake Accord to the suggestion that the matter be referred to the Supreme Court. The overwhelming reaction to this suggestion seemed to be "if anyone can solve this mess, the Supreme Court can".

II. THE CAUSES OF THE DEMYSTIFICATION OF THE JUDICIARY

What lies behind the critical attitude toward judges and the courts which Mortimer has identified? The answer is far from simple. In part it relates to social and intellectual currents found throughout the western world. And part of it relates to the new, more powerful role of the Canadian judiciary under the *Canadian Charter of Rights and Freedoms*, introduced in 1982.

The most fundamental factor leading to the demystification of the judiciary is common to Canada, the United States and Great Britain. It is the existence of a better educated, more skeptical, and above all more demanding public. I recently attended a lecture by an American scholar which correlated increasing demands on the legal system in the United States with the "increasing narcissism of American society."[22] The decade of the eighties is lately being tagged as the decade of gratification, unalleviated and preferably instant. As one wag put it, "The problem with instant gratification is that it takes too long." The "me generation" is a demanding generation, and the law is not exempt from its demands. We want it all, we expect it all, and when we don't get it all, we sue. And if at the end of the day the judge doesn't give us all, we blame the judge. The consequence is predictable. Results which in another generation would

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[22] C. Massey, 1990 Stanford Lectures of the Canadian Institute for Advanced Legal Studies. The paper presented at the Lectures was subsequently published as "American Fiduciary Duty in an Age of Narcissism", (1990) 54 Sask.L.R. 101.

have been accepted as the luck of the draw today provoke protest. Have my rights been infringed? Did I get less than I was entitled to? A society such as this is not likely to shower judges with uncritical adulation. It is not surprising that such attitudes foster a demystification of the judiciary.

The same phenomenon can be seen in the public attitude to other professions and institutions. Consider the medical profession. Once medical doctors were virtually deified -- "the-little-black-bag-walking-on-water" syndrome. Today the medical profession, notwithstanding a level of overall competence perhaps heretofore unequalled, finds itself not infrequently the subject of criticism. Medical malpractice suits proliferate to the point that some doctors find it difficult to obtain insurance. Consider, too, our elected representatives. The level of public disenchantment and private vitriol directed to our governmental leaders seems to have reached a new high -- or low, depending on one's point of view. In short, the modern public is an educated public, a demanding public. When entrenched institutions fall short, the public scrutinizes and, not infrequently, criticizes. While the judiciary may have been much less criticized than most other major institutions, it can no longer claim immunity from critical scrutiny and comment.

The readiness of the public to question its institutions and the consequent demystification of the judiciary has been abetted, as Mortimer points out, by increasingly aggressive journalism, journalism which is not content to merely report the issued judgments but goes behind them to dig

into the facts. We need only consider the role of the British press in securing reconsideration of the cases of the Guildford Four[23] or our own press's role in the *Marshall* case, for evidence of the role which persistent media attention may play in bringing to light shortcomings in the functioning of the judicial system.

In Canada, the demystification of the judiciary has been accelerated by the introduction in 1982 of the *Charter of Rights and Freedoms*. The *Charter* dramatically readjusted the traditional balance of power between the legislative and executive branches of government on the one hand, and the judiciary on the other, giving the courts an immensely enlarged role in a whole range of questions that touch everyday life-- Sunday shopping, abortion, mandatory retirement and hate propaganda -- to name only a few examples. Prior to the *Charter*, the main business of the courts was maintaining the criminal justice system and resolving private disputes. What the courts did was hardly likely to excite debate at the family dinner table; most people passed their lives without going near the courts or finding themselves in any way directly affected by them. All that

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[23] The Guildford Four were three men and a woman charged, convicted and sentenced to life imprisonment for the 1974 bombing of two public houses in Guildford, Surrey which killed five people. The only evidence against the four were confessions made to the Surrey Police during police interrogation. In 1977 the Prisoners unsuccessfully sought leave to appeal to call new evidence consisting of statements by four I.R.A. terrorists who claimed to have been involved in the bombings and who were adamant that none of the Guildford Four had been involved. In 1987 an inquiry into the case was launched, in large part because of questions raised by the press, and in October 1989 the convictions were quashed by the Court of Appeal as a result of doubts about the reliability of the officers responsible for the interrogation. Criminal proceedings may be taken against these officers.

has changed with the *Charter*. Suddenly the courts have power. They matter. Increased relevance can only mean increased scrutiny. And increased scrutiny means demystification.

It is sometimes suggested that this scenario is the avoidable product of an over-zealous judiciary. The courts, proponents of this view assert, have unnecessarily arrogated power to themselves under the guise of applying the *Charter*. A law professor recently proclaimed in a leading Canadian newspaper:

> The judges have used the *Charter of Rights and Freedoms* to make themselves the final arbiters of what is right and just. They proclaimed themselves the "guardians of the Constitution."
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> ....
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> I don't recall being asked if I wanted our social and political values determined by nine black-robed men and women in Ottawa. And I don't believe anyone, even the *Charter's* staunchest advocates, ever imagined it would result in putting so much power in the hands of the judges....

The solution proposed is to send a message to the judges that they should "stop trying to be our moral mentors and get back to deciding cases."[24]

In defence, it must be said that it was not the judges who proclaimed themselves the guardians of the Constitution; it is rather the Constitution itself. The Constitution is a legal document, and whatever is

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[24] *Supra*, note 3.