

Judges as Policy-Makers — A New Role or a New Catch-Phrase?

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Recently, in Canada, there has been much public debate surrounding the issue of the role of the judiciary in the making of public policy, and the legitimacy of such a role in a democratic society. Clearly, some members of the public perceive judges as powerful lawmakers. This is exemplified in the comments of John Crosbie at the Canadian Bar Association's Annual Meeting in St. John's, Newfoundland in August of this year. Mr. Crosbie stated :

*[...] our judges have clearly supplanted the elected legislators as the arbitrators of what is right, and conferred upon themselves authority to overturn political choices which don't meet the judges' standards of acceptability. Judges are more than willing to dictate to the other branches of government how they should manage their own internal affairs. Parliament clearly appears to be subordinate to the judges [...].*¹

Similar concerns have been expressed by others. Robert Martin, a law professor at the University of Western Ontario, was recently reported to have made this comment with respect to the Supreme Court of Canada :

The court itself has become politicized, it has with greater alacrity and greater frequency made decisions which I would regard as being largely, if not entirely, political.

*If you enter the political arena, as the Supreme Court of Canada has done, then you cannot express surprise, amazement and hurt at the fact that you find yourself subject to political criticism. It goes with the territory.*²

Such statements impact directly on issues of judicial independence and accountability.

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1. J. Crosbie, "Curb the judicial godzillas" *Ottawa Citizen* (August 27, 1998).
2. S. Bindman, "Court told to take its licks" *Ottawa Citizen* (August 25, 1998).

Highlighting the role of judges as policy-makers leads the Canadian public to see the judiciary in a role traditionally occupied by politicians. This has, in turn, led some members of the public to view the judiciary as part of the political process — as involved in the political arena. Mr. Crosbie's claims that judges are merely substituting their personal policies (or those of the interest groups with which they are perceived to sympathize) for those of the elected government are encouraging other members of the public to believe that judges are deciding cases based upon personal, political or social factors. Essentially, then, Mr. Crosbie, and those who are of the same mind, challenge the integrity of the decision making process by arguing that judges are not apolitical but politically motivated; that they are not independent decision-makers, but merely puppets of a particular interest group. Fundamentally, such arguments are an attack upon the perception of judicial independence — that is, the ability of a judge to decide a case absent any outside influences.

The perception that judges are a part of the political process has also led members of the public to question the accountability of judges. It has been argued that judges are making policy decisions which impact all Canadians, and are doing so illegitimately, as they have not been given a democratic mandate to do so.³ In fact, it was pointed out by Mr. Crosbie, with great relish, that the Supreme Court of Canada added words to Alberta's human rights legislation, which words had been specifically omitted by the democratically elected Alberta government.⁴ In other words, it is being argued that non-elected judges are negating policies implemented by elected bodies which were given the mandate to implement such policies by the majority of Canadians. This perception of judges as quasi-politicians has led to statements that judges should be accountable, as any politician is, to the public. It is argued that this can be achieved by means of such procedures as direct elections and the right to call back judges, by means of public members sitting on judicial selection committees (which, in fact, has already taken place in most Canadian jurisdictions), or by further opening up the judicial discipline mechanisms so that the public has a direct say in what constitutes inappropriate behaviour by a judge.

Fundamentally, then, some members of the public are beginning to question the legitimacy of the judiciary's role in Canadian democratic society. And public perception is powerful. Indeed, public respect is the foundation on which the legitimacy of the judiciary's decisions rests. Sir Gerard Brennan, Chief Justice of Australia, said it best in a lecture he delivered in Dublin in 1997. He said :

*Having no power but the power of judgment, the judiciary has no power base but public confidence in its integrity and competence in performing the functions assigned to it.*⁵

3. S. Bindman, "Godzilla' judges overpowering cabinets : Crosbie" *Ottawa Citizen* (August 27, 1998).

4. *Supra* note 1.

5. As reported in (1997) 16 Aust. B. Rev. 2 at 3.

Or as Alexander Hamilton put it :

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either sword or purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.⁶

Because members of the public are questioning the judiciary's role in Canadian society, it is appropriate to review the place of the judiciary in our democracy. Does the judiciary make policy? If so, is this a legitimate function of the judiciary? Should the judiciary be making policy when democratically elected officials are mandated to make laws and policies to reflect the public's needs and concerns?

The first issue is whether judges make policy. The topic is not a new one. Indeed, it has been debated in the United States for almost 200 years, and is currently being extensively discussed in Australia. It is now widely accepted, even by the judiciary, that one of the things which judges do is "make law" or "policy" or at least have major impacts on it. More fundamentally, it has been acknowledged that judge-made law is not novel.⁷

However, since the inception of the Charter, judicial "law-making" has, by definition, become more obvious. This could only have been expected. The language of the Charter has required judges to define concepts such as "freedom of conscience and religion," "freedom of expression," "the right to security of the person" and "reasonable limits." When such broad concepts are contained within a constitutional document, without further definition, it is inevitable that interpretation will be perceived to be, to some extent at least, "law-making." Judicial "law-making" has also become more publicly visible, as Charter litigation has presented the courts with more occasions to rule upon notoriously controversial issues of public policy and civil rights. Because Canadian courts are increasingly having to pronounce upon Charter rights which relate to public policy, some might argue that the court's focus (especially the Supreme Court's) has changed — it has gone from a quasi-law-making role to a quasi-policy-making one.

If it is accepted that courts do make law or pronounce on policy, the question next raised by members of the public is whether judges should be doing this in a democratic society in which politicians are elected to implement laws and policies. This, of course, depends on the role of a judge in the Canadian constitutional democracy. And

6. A. Hamilton, *The Federalist Papers* (No.78) (New American Library : New York, 1961) at 465 (first published in 1787).

7. See Mr. Justice P.W. Young, "Courts making law" (1997) 71 Aust. L. J. 324 and "Judges make law — so what!" (1997) 71 Aust. L. J. 351.

to better understand the role of a judge in the Canadian constitutional democracy, the nature of the Canadian constitutional democracy itself must be examined.

In *Reference re Secession of Quebec*⁸ the Supreme Court of Canada emphasized that the Canadian democratic system is not merely a system of majority rule, but is "fundamentally connected to substantive goals." The Court restated some of the values inherent in the notion of democracy, as previously articulated in the case of *R. v. Oakes*.⁹ The Court reiterated that :

[...] the values and principles essential to a free and democratic society ... embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

The Court went on to state, at paragraph 67 of the *Quebec Reference*, that :

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. [...] [A] system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. [...] It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

And at paragraph 68, the Court concluded :

*No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices and seeking to acknowledge and address those voices in the laws by which all in the community must live.*¹⁰

8. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

9. *R. v. Oakes*, [1986] 1 S.C.R. 103.

10. *Supra* note 8 at 254 and 256.

In this context, then, what is the role of the judge in our society? In the *RJR-MacDonald* case,¹¹ McLachlin J. made the following comments :

11. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 332.

*Parliament has its role : to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role : to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.*¹²

In *Vriend*,¹³ both Cory and Iacobucci JJ. further clarified the role of the courts in relation to democratically elected governments. Cory J. put it this way :

*It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge [...] To do less would be to undermine the Constitution and the rule of law.*¹⁴

These comments emphasize that the rule of law is a fundamental aspect, if not the fundamental aspect, of the Canadian constitutional democracy.

In the *Quebec Reference* case, the Supreme Court of Canada reviewed the three elements of the rule of law. The Court stated, at paragraph 71 :

[...] first, [...] the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, [...] "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" [...] A third aspect of the rule of law is [...] that "the exercise of all public power must find its ultimate source in a legal rule." Put another way, the relationship between the state and the individual must be regulated by

12. *Ibid.* at 332-333.

13. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

14. *Ibid.* at 531-532.

*law. Taken together, these three considerations make up a principle of profound constitutional and political significance.*¹⁵

For the rule of law to achieve its full promise, an independent judiciary is required to review the laws and actions of the government, when called upon to do so, so as to ensure that those laws and actions conform as closely as possible to a democratic society's enduring "principles of normative order." The review of legislation by a body, independent of government, is precisely what the rule of law is all about and that is, by definition, the role of a judge. Without the opportunity to review the legality of legislation or government acts, by an independent body, democracy may be an illusion. One need only look at the emerging democracies in Eastern Europe and Asia as examples. Those states have all the trappings of democracies, but lack the fundamental concept of adherence to the rule of law. Consequently, those states have serious difficulties with corruption and human rights violations. Without the rule of law, democracy is in danger of becoming merely the expression of the will of the majority, or the government. The weak are not protected and equality before the law may become meaningless.

In this light, then, it is clear that independent judicial review promotes, rather than endangers, democratic ideals. There should be no fear about judicial review by an independent judiciary. It is the very essence of a mature democracy.

Therefore, the answer to the question whether judicial policy-making is a legitimate function of the judiciary in a democracy is a very emphatic "yes."

Even so, there may still be a concern that judges are making policy decisions which a democratic society might prefer to be debated in a legislative forum, where precise legislation can be carefully constructed to give weight to all viewpoints. It must be remembered, however, that the courts only become involved in matters of policy when specific cases come before them. There must be a litigant who is claiming that his or her rights or freedoms have been infringed by legislation or government actions, which are contrary to Charter guarantees or the rule of law (or there is a reference in which the government itself is asking the court whether a certain action can be taken according to the rules of law; for example, the *Quebec Reference*). Such proceedings often raise issues which are in the realm of public policy or human rights, which are concurrently being vigorously debated in democratic society as a whole. Should a court simply refuse to hear such cases, on the basis that the government will eventually recognize the concern and pass or amend legislation accordingly? Or tell the litigants that their concerns are "too silly" to listen to, as Mr. Crosbie has argued?¹⁶ The suggestion that the courts should refuse to hear a case because it impacts on current public policy issues or current human rights issues is a wrong-headed notion, and contrary to the rule of law. Indeed, if the judiciary refused to deal with issues concerning current laws, policies or actions of the government, the judiciary would be perceived to be tacitly supporting those laws, policies

15. *Supra*, note 8 at 257 and 258.

16. *Supra* note 1.

or actions. Obviously, this would endanger, if not destroy, the public's perception of judicial independence.

It is always a concern to the judiciary when we strike down laws or policies of government, since they will normally (but not always) have been thoroughly debated. This is all the more so when the government perceives that it had a clear mandate to move ahead with the policy subjected to judicial scrutiny. However, as already discussed, the courts have no choice but to pronounce on the legal validity of a certain law or policy once some objection to it is made in a court of law.

A recent example of a decision which caused considerable controversy, and one that clearly aroused the ire of Mr. Crosbie, is the *Thomson Newspapers Co.*¹⁷ case. In that case, the Supreme Court of Canada struck down section 322.1 of the *Canada Elections Act*, which required a total ban on the publication and reporting of new election polls 3 days prior to a federal election, in order to protect the public against last-minute, inaccurate polls. The legislation had apparently been extensively reviewed beforehand; furthermore, the Bill enjoyed the support of both the government and opposition. Despite this, the majority of the Supreme Court of Canada held that the legislation violated section 2(b) of the Charter (freedom of expression) and was not a reasonable limit in a democratic society. Here again, it must be remembered that the court did not, on its own volition, simply leaf through the *Act*, spot a "questionable" section and decide to rule on its constitutionality. *Thomson Newspapers Co.* brought an application to the court asking that the section be declared unconstitutional. It argued that freedom of expression was being unjustifiably curtailed in a manner inconsistent with the ideals of a free and democratic society. The Court agreed that the freedom of expression was taken away in a constitutionally unjustified manner. In so doing, the court discharged precisely the task which it was required to perform. If the government truly believes that the public needs to be protected against last-minute, inaccurate polls, it can review the reasons of the Court and pass legislation that will protect the public without unnecessarily infringing on the freedom of expression.

This brings us back to our underlying topic — Judges and Public Policy : Judicial Independence and Accountability. It can be accepted that, in some form and in some way, judges do make or affect public policy. I argue, however, that the manner in which this is done is legitimate in a democratic society. The freedom of the courts to "make policy" which is contrary to the policy of the government supports and enhances the fact that the judiciary is independent of governmental influence. Independent judges are essential to the proper application of the rule of law. And the rule of law itself is essential to the survival of democracy as we know it. If the public is made aware of the reasons why an independent body is given the power to review government legislation, when legal objections to that legislation are voiced, there is every confidence that the public will appreciate why judicial review is required, even in matters touching upon controversial issues of public policy.

What about the public's concern, more recently expressed, that the courts are too supportive of the rights of "marginal" interest groups? That a particular judge or judgment might go "too far?" Indeed, one may suspect that much of the concern about the judiciary's policy-making role is simply a disagreement with the public consequences of

17. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

the court's decisions. The controversy surrounding the *Vriend*¹⁸ decision is a recent example.

This perception has led to a concern that the majority's views are being increasingly overlooked, by the judiciary, in favour of the views or interests of a few. These fears have led some members of the public to argue vociferously that the judiciary needs to be more directly accountable to the public. It is only through elections, they argue, that citizens can ensure that the views of the majority are adhered to. Through recalls, the majority of citizens can express their displeasure with a particular judge and replace that judge with a candidate who will support their views. If the public fully participates in the selection of judges, the "best" candidate can be chosen. It has even been suggested that greater public input into the judicial complaints process will make it more likely that a judge could be removed for making a decision which is seen to give too much weight to "social" and "policy" factors, as opposed to "the law."

There are several responses to these concerns.

The first thing to note is that the election of judges is not a panacea in and of itself. Elections do not guarantee results. Not all "politicians" deliver on their election promises.

More importantly, while the ability to vote against the incumbent judge in the next election, or the possibility of recalling a judge may give the majority a sense of confidence that its views, especially on major social issues, will be adhered to by the judiciary, I would argue that the existence of these measures, in and of themselves, politicizes the judiciary. The reaction by some members of the public to the judiciary's increased policy-making role, especially in constitutional matters, has been seen to be negative. The public has characterized this behaviour as being too political. I suggest that what this means is that the public do not want political judges, they want independent and impartial judges. Electing judges will not depoliticize judges, but rather, will require them to participate in the political process and to take positions pleasing to the majority of voters by whom they hope to be elected.

How can a judge be perceived as independent when litigants, who have supported her in the past, may be adversely affected by the outcome of a "policy" decision which the judge is now called upon to make? What if the litigant's views are contrary to the majority's views on an issue? There is a grave danger if the public perceives that the judiciary may depart, for any reason, from the rule of law. In our democracy, the law applies equally to all members of the population, whether rich or poor, powerful or weak. Without the rule of law, and the perception that it is unwavering, the public's confidence in the courts will rapidly wane.

What about public participation in the judicial complaints process? There exists an effective and credible judicial conduct complaints process with respect to both federally and provincially appointed judges. At present, the public is not involved in the process at the federal level, and there is an ongoing, healthy debate about this, which is

18. *Supra* note 13.

a good thing. It is difficult to quarrel with the general proposition that transparency in the complaints process enhances the public's confidence in the legitimacy of that process. But it must be emphasized that the complaints process can never be concerned with whether a judgment accords with the majority's views; it must only be concerned with the conduct of the judge in the particular circumstances.

Much the same can be said about the debate over whether the public should participate more directly in the selection of judges. While such a process might increase the public's confidence in the selection process, care must be taken to ensure that judges are never chosen, or perceived to be chosen, based upon expectations that they will make "the right kind" of decisions.

Can it be said, then, that no accountability to the public is required of the judiciary? Of course not. I return to the words of Sir Gerard Brennan :

*Having no power but the power of judgment, the judiciary has no power base but public confidence in its integrity and competence in performing the functions assigned to it.*¹⁹

If it is accepted that the judicial process requires public support for its legitimacy and authority, then there can be no question but that judicial accountability is required. But what is it fundamentally that the public is demanding? Do they merely want the opportunity to "vote out" or replace a judge for unpopular decisions, or do they want a judiciary which inspires their confidence and respect? I argue that it is the latter — that when the public calls for "judicial accountability," what they really desire is that the judiciary justify why they should have confidence in it, and respect for its decisions.

How, then, is this "judicial accountability" achieved? In much the same way as it has always been achieved — by having a competent, conscientious and ethical judiciary, presiding in open court, supporting its judgments with careful reasons for decision.

By sitting in public, secrecy is never allowed to cloak the representations made to, or facts placed before the judge. By providing reasons for judgment, judges give an account of how they exercise their judicial powers. Reasons for judgment permit all concerned to understand the principles upon which a decision was arrived at. Furthermore, by requiring judges to give reasons for decisions, those reasons, and the decision itself, are amenable to scrutiny and correction by an appeal court (except at the level of the Supreme Court of Canada!). And, of course, the decisions of the judiciary, the court process, and the appeal process are not only accessible to those members of the public directly concerned, but are also accessible to the media. Media access provides the public with yet another opportunity to contemplate the court process, one that may indeed be more elucidating and thought-provoking than may be experienced from personal attendance in a courtroom!

19. *Supra* note 5.

The public nature of our justice system is important. As was stated by Bentham :

*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial.*²⁰

Or, in the words of Sir Frank Kitto, a Justice of the High Court of Australia from 1950 to 1970 :

*The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance.*²¹

I do not wish to be understood as saying that the public should automatically support or agree with all of the decisions of the court merely because the courts are open to the public. Something more fundamental is at stake. The public nature of our justice system makes the decision-making process of the judiciary transparent. And it is that transparency which ultimately enables the public to have confidence in and respect for its judiciary.

As I have stated earlier, public perception is all powerful. Not too long ago, the courts were viewed with a sense of mystique, if not reverence by the Canadian public. As we all know, this has changed. But the perceptions of the public are ever-changing. With a better explanation of the role of the courts in Canadian democratic society, and a reminder to Canadians that this country's democracy depends on tolerance and mutual respect, and an independent judiciary which applies the rule of law, the public's confidence in its judiciary can be restored.

I would like to conclude by quoting, once again, the words of Sir Gerard Brennan :

*The rule of law depends in the ultimate analysis upon public confidence in the competent and impartial administration of justice according to law by the courts of each country. So long as high standards are maintained, society lives in peace [and] individuals are secured in their person and property [...] [emphasis added].*²²

20. J. Bentham, as quoted by Sir Gerard Brennan in (1997) 16 Aust. L. Rev. 2 at 5.

21. Sir Frank Kitto, "Why Write Judgments?" (1992) 66 Aust. L. J. 787 at 790 (previously presented in 1973).

22. *Supra* note 5 at 2.