

THE ROLE OF JUDGES IN MODERN
COMMONWEALTH SOCIETY*

We all possess a certain image of a judge. He is old, male, and wears pinstriped trousers. He decides only what is necessary, says only what is necessary, and on no account ever talks to the press. He is respected and revered. His word is, literally and figuratively, the law, eternal, majestic. Even those of us who do not fit naturally into the traditional image tend to grow into it. The truth cannot be avoided. We judges like the old image. We cling to it. And why not? It brings comfort, the comfort of knowing one is right, at least pending the verdict of the Court of Appeal, although most of us have learned to rationalise that as well. It brings security, the security of knowing what to do and when to do it. And it brings gratification, the gratification of knowing we are important and appreciated. As Lord Hewart is said to have put it to the guests at the Lord Mayor of London's banquet in 1936:

"His Majesty's judges are satisfied with the almost universal admiration in which they are held."¹

In similar vein Lord Devlin suggested in 1979 that:

"The English judiciary is popularly treated as a national institution . . . and tends to be admired to excess."²

In similar vein also can be cited the story of Sir George Jessel M.R., who upon learning that Lord Selborne L.C. proposed to begin an address to the Queen with the words "We, Your Majesty's judges, conscious as we are of our manifold defects," is said to have objected strongly, saying "I am not conscious of manifold defects, and if I were I should not be fit to sit on the bench."³

But wait a minute. What is this I'm hearing? What is this I'm reading? Is this the world I thought I knew? Not too long ago I picked up

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¹ This wording is given, without authority, in the 7th ed. (1977) of Jackson, *The Machinery of Justice in England*. Lord Hewart's own *Essays and Observations* (1930), however, give a slightly different version delivered at the same banquet in 1928: "My distinguished colleagues . . . are not really dissatisfied with the combined affection and admiration in which they are almost universally held." In a speech to the Law Society's dinner at Hastings in 1935 he said that the phraseology derived from a suggestion of Avory J., to which he had added "almost": Hewart, *Not Without Prejudice* (1937), pp. 238-239. However, in a speech at the Guildhall in 1933 he had said "But they are quite satisfied with the admiration in which they are universally held:" *Not Without Prejudice*, p. 247. Whether in 1936 he used the actual words given by Jackson or not, he was obviously attracted by the general sentiment.

² *The Judge* (1979), p. 25.

³ See Megarry, *Miscellany-at-Law* (1955), p. 8; the source of the story may be Underhill, *Change and Decay* (1938), p. 83.

a copy of *The Spectator*, and was shocked to stumble on an article entitled "The Judge is a Bastard",⁴ followed closely by a second entitled "The Era of the Blabbing Judge."⁵ In my own country, Canada, journalists have declared open season on judges. Not a week goes by, it seems, that one does not read some commentary critical of the judiciary. And the criticism is not confined to the journalists. While for the most part they prove unsubstantiated, public complaints about the judiciary are on the increase. This is not the world we judges thought we knew, comfortable and secure. What, we are driven to ask, is happening?

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 exempted. He 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, kneejerk reactions, prejudice, failures of the imagination, inability to admit mistakes or pure bloody-mindedness.

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."⁶

We arrive, then, at an apparent paradox. Judges in the Commonwealth are more and more the subjects of critical scrutiny. But at the same time the truth is that 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, speaking of the Canadian situation, "the [Supreme] Court may be the only major national institution to escape public resentment."⁷ 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

⁴ J. Mortimer, *The Spectator*, August 25, 1990, p. 14.

⁵ M. Berlins, *The Spectator*, August 25, 1990, p. 15.

⁶ *Supra*, note 1 at p. 14.

⁷ J. Geddes, "Our Supreme Court under Scrutiny: Should Our Judges be Subject to Public Review?", *The Financial Post* (Toronto), November 13, 1990, p. 14.

judiciary. The increase in litigation in courts of all levels similarly attests to the confidence in which the general public holds the judicial system. Canadians at least, and I am sure it is the same elsewhere in the Commonwealth, appear to share a profound belief that when other institutions fail, one can count on fairness from the courts.

I believe that the combination of these two phenomena—increasing critical scrutiny of judges and increasing reliance on judges to sort out society's problems—is not, on closer scrutiny, a paradox at all, but the other result of a radical alteration in the public perception of the role of judges in modern Commonwealth society. The old role of the judge as a symbol of authority, sometimes scrutable, sometimes not, whose edicts from on high must be uncritically accepted as just and fitting, has gone the way that absolutist-classist government went in the nineteenth century. The judges in modern society are not potentates: they are rather servants, servants of the people in the highest and most honourable sense of that term. The judge has a task, a more important task than ever before. It is precisely because of the importance of this task that the judge is expected to perform it well and efficiently, to be responsive and responsible.

This new view of the judge involves changes on every front. Changes in the task and duties of the judge. Changes in the way they discharge those duties. Changes in the process through which the duties are discharged: the administration of justice. Changes in the terms of office of judges: how they get their jobs and how they are disciplined and removed. And finally, changes in the way judges relate to the public. I would like to discuss each of these areas of change in a little more detail.

Changes in the work of judges

There was a time, not so long ago, when the main job of judges was to resolve disputes. The whole common law is predicated on this notion. Two parties find themselves in a disagreement. They cannot resolve it. So they go to a judge for a decision. Parliament made the laws. The judge applied them to the case. That was the entire story, or almost.

Resolving disputes is still the primary and most fundamental task of the judiciary. But for some time now, it has been recognised that the matter is not so simple. In the course of resolving disputes, common law judges interpreted and inevitably, incrementally, with the aid of the doctrine of precedent or *stare decisis*, changed the law. The common law thus came to recognize that while dispute resolution was the primary task of the judge, the judge played a secondary role of lawmaker, or at least, law-developer. In the latter part of the twen-

tieth century, the lawmaking role of the judge in Commonwealth countries has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, formerly the exclusive right of Parliament and the legislatures.

This expansion can be attributed to a number of factors. One is the trend to the constitutionalisation of rights. The new perspective of social policy which confronts modern courts is fuelled in large part by a heightened collective awareness of human rights. It is this feature, perhaps more than any other, which characterises legal thinking as we approach the twenty-first century. In Canada, a series of human rights statutes has culminated in a constitutional bill of rights, the *Charter*. In the European Community, similar documents shape policy for hundreds of millions of people. And the trend continues. Israel, for example, not in the Commonwealth but whose legal system, like ours, is grounded in the British tradition, is working toward passage of a comprehensive Basic Law of fundamental rights and freedoms. This trend has its effect even in countries which themselves do not possess a constitutional bill of rights, like England and Australia. Wherever we live, the legal dialogue increasingly centres on individual rights and liberties: the political liberties of democratic participation; liberty of religion and expression; the guarantee of equality regardless of gender, race or age. The trend to the constitutionalisation of human rights increasingly implicates the courts in a broad range of social policy issues. The bills of rights guarantee to each person certain fundamental rights. When legislation or governmental action offend these guaranteed rights, people go to the courts for a ruling that the law or conduct is unconstitutional. And the courts, which were formerly compelled to accept Parliament's decree as the last word, now are obliged, if it violates the constitutional code of rights, to declare the law or action illegal. The nature of these guarantees, most particularly guarantees of equality, freedom of speech and freedom of religion, is such that the courts are, whether they like it or not, required to give judgments on matters of social policy.

Another factor in the new social policy role of judges cited by scholars is the perceived inability or unwillingness of legislative bodies to deal with pressing social issues. Much has been written of this in the United States, where the division of powers between the legislative bodies and the executive has at times led to legislative paralysis. In Canada, we have encountered the same problem: some issues, like abortion and euthanasia, are too controversial for Parliament to take on. The result has been that the courts are asked to resolve these issues. Whatever the reasons, it seems clear that, as Lamer C.J. recently put it, the agenda of courts in the years to come

is gong to take on an increasingly social face.⁸ Gone are the days when judges could spend their days musing on the principles of contract, tort and criminal law. Their field includes these, but much more as well.

The necessary concomitant of the increasing insistence on human rights and the new social face of the law is an independent judiciary, ready and able to review a wide range of government action. While the legislative and executive branches of government have an important role to play in supporting human rights, the difficult burden of interpreting the rights and maintaining them even in the face of governmental intransigence if need be rests on the shoulders of the courts.

The new task which judges have been assigned is not easy. There is a very real question whether courts, which lack the resources for gathering and collating information and opinion available to the legislatures, are the best institutions to decide complex social policy questions. But that question is increasingly moot. The reality, at least in my country, is that judges are being required to decide these questions, no matter how difficult it may be. Lamer C.J. characterised the difficulty judges face in deciding issues of social policy as follows:

"I sometimes think of these sorts of cases as being somewhat like a spider's web. If you pull on one strand of the web, the entire structure moves, but not necessarily all in the same direction . . . The implications are widespread and, at times, hard to foresee."

Not only are the problems difficult, they may tax existing procedures. In Canada the *Charter* has "stretched [our traditional adversary system] beyond its limits . . ." We may find "our traditional adversary proceedings poorly designed . . ." to deal with cases where the issue is not the dispute between the parties, so much as the validity of legislation. Indeed, as the Chief Justice points out, "quite often there are really two cases going on at the same time. There is a bi-polar dispute between the immediate parties, but, within it, there is a *Charter* issue that is polycentric. One can get in the way of the other."⁹ How can we as judges foresee which strand of the complex web we should pull, or what the consequences of pulling it may be? Trained in the cases, schooled in precedent, how are we to make the difficult choices these policy questions pose? Many days I have cause to recall what a young counsel once said to me when I, as a trial judge, ventured a critique of his argument. "Well, my lady," he replied, "there are pros and cons for it and pros and cons against it."

⁸ Lamer C.J., *The Alexander Thane Lecture in Law*, Charlottetown, Prince Edward Island, March, 1993.

⁹ *Supra*, n. 8 at p. 11.

Confronted in this, the modern age, with difficult problems of social policy, we turn to those who claim to know: the experts. We live in the age of the expert, it has been said. We in Canada like to think of this fixation with experts as American in origin, but in truth it affects us all. As one writer put it recently: "Americans have always found something irresistible in expertise, with its promise of insight, its lure of efficiency, its scientific rigour. In an era of specialisation, Americans have placed special faith in experts claiming insight into issues ranging from health care to toilet training."¹⁰ Experts are useful; indeed they are often essential. They provide us with great assistance and we could not do our job without them. But we must be careful not to let the experts usurp the task of judging, a task which, no matter how difficult the question, remains ours from first to last. And we must preserve a dose of healthy scepticism. Whether the issue be race relations or health care, "we should be wary of those who claim to possess the keys for unlocking the complexity of social problems and the mystery of human experience."¹¹ It is salutary to remember that for every expert, there is one on the other side. I will never forget the words of that renowned American litigator, Archibald Cox, who at a meeting in which speaker after speaker called for more sophisticated evidence to assist the courts in deciding the difficult issues facing courts under the newly adopted *Charter*, gave us this advice: At the end of the day, after all the Brandeis briefs have been read and put aside, there is no substitute for the judge, alone in his library, with his books and his thoughts.

In the final analysis, courts charged with responsibility for deciding difficult social questions must acquire, to quote Lamer C.J. yet again, "a whole new range of skills."¹² We must learn to deal intelligently with questions of social policy, to identify the kinds of social fact evidence and expert evidence which the particular problem requires, and to use it wisely. All this, of course, must be premised on "a deep understanding of the most fundamental principles of the law; an understanding which is broad enough to relate to a wide variety of disciplines."

Changes in the way judges discharge their duties

The changing role of judges, and in particular their greater involvement with social policy, will have an important effect on the way judges work. The simple fact is that judicial decisions on such questions matter more, and to more people. A contract action matters, but mainly to the parties involved. A criminal conviction has broader

¹⁰ Sykes, "How the Experts Failed in Waco", *Globe and Mail* (Toronto), April 22, 1993, p. A19.

¹¹ *Supra*, n. 10.

¹² *Supra*, n. 8 at p. 8.

scope, particularly where the crime is one affecting the security of the public, but still, the person mainly interested is likely to be the accused. Decisions on social policy issues may affect thousands if not millions of people who may have had nothing to do with the lawsuit. This results in an expectation, indeed a demand, from the public as a whole or from important interest groups within the public, that the judge has properly considered all the factors relevant to his decision and its consequences. It leads to the attitude of critical scrutiny of the judiciary mentioned earlier.

The nature of the questions they decide, and the public expectation that they will decide them fairly and well, place new demands on judges. It no longer suffices to be a competent legal scholar and a fair arbiter. To perform their modern role well, judges must be sensitive to a broad range of social concerns. They must possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions. The ivory tower no longer suffices as the residence of choice for judges. The new role of judges in social policy also demands new efforts of objectivity. Often the judge will have strong personal views on the questions which a judge is asked to decide: questions like abortion, capital punishment or euthanasia. But the task of judging is not accomplished simply by plugging one's personal views into the legal equation. The judge must strive for objectivity. This requires an act of imagination. And it requires an attitude of "active humility", which enables the judge to set aside preconceptions and prejudices and look at the issue afresh in the light of the evidence and submissions.¹³ The judge must seek to see and appreciate the point of view of each of the protagonists. She must struggle to enunciate the values at issue. Then she must attempt to strike the balance between the conflicting values which most closely conforms to justice as society, taken as a whole, sees it. It is impossible to eliminate the judge's personal views. But by a conscious act of considering the other side of the matter, the judge can attain a level of detachment which enables him or her to make decisions which are in the broader interests of society. In the end, the judge can know no other master than the law, in its most objective sense. As Sir Robert Megarry put it:

"The judge's duty is one of obedience to the law and to his judicial conscience. He must do not what he wants to do but what he ought to do."¹⁴

¹³ Webber, "Choosing our Judges: Canada's Courts Need Diversity, Openness", *The Citizen* (Ottawa), September 5, 1990, p. A11.

¹⁴ (1983) 13 Man. L.J. 189 at p. 190.

Changes in the process: the administration of justice

The new demands on judges in the modern Commonwealth will bring changes in the processes by which cases are heard and judicial decisions are rendered. Not only is the scope of the issues which courts are being asked to decide expanding rapidly, but more and more people are coming to court. Moreover, they are demanding justice which is not only right, but justice which is prompt and efficient.

This places great pressure on the process. Finding dates for trials and appeals is becoming more difficult all over the world. There never seem to be enough judges. And after a case is heard, courts sometimes find themselves ill-equipped, in terms of staff and resources, to produce the judgment in a prompt and efficient manner. As a consequence of these pressures, court management has become a hot topic. In the United States, a number of organisations devoted to the subject have been established. Conferences abound. Journals are printed. The same developments can be expected, although perhaps on a reduced scale, in Commonwealth countries as court systems struggle to keep up with the demands on them.

Terms of office: appointment, discipline and removal of judges

As a consequence of their changing role and the increasing importance of the matters which they decide, the appointment and governance of judges is coming under increasing scrutiny. The appointment of judges has always been of great interest to lawyers, who enjoy or suffer directly, as the case may be, the effects of a good or bad judicial appointment. But lately, the public has become involved in the debate. The appointment of judges has become a matter of some controversy in Canada. This applies particularly to appointments to the highest court, the Supreme Court of Canada. The concern arises from the fact that the judges of this court are called upon to decide matters of great importance, not only to the litigants, but to the country as a whole. Democratic government, it is said, requires at a minimum that the appointment of judges deciding these questions be subject to review by a commission or Parliamentary committee. Such a process, it is suggested, would ensure that the judges appointed are not only competent legal scholars, but that they are sensitive to the values and tensions at work in society. Additionally, it is widely accepted that the court should be representative of a cross-section of Canadian society. This means that it should include women and people from varied social and ethnic backgrounds. It is no longer acceptable to have a bench composed entirely of ageing white males.

The same sorts of pressure may in the future lead to changes in

judicial discipline and removal. We in Canada have established a system in which complaints are reviewed by a committee of judges under the aegis of the Canadian Judicial Council. If the matter is found to warrant further consideration, it may be referred to Council and ultimately to a hearing which has the power to recommend impeachment proceedings. Some people think the public should be represented in the process. Everyone agrees that we must ensure that the judges who sit on the courts of the modern Commonwealth must be persons of the highest competence and integrity. Nothing less will do, given the gravity of their role. On the methods by which this goal may be attained, there is less unanimity. For example, Parliamentary hearings on nominations to the Supreme Court, akin to the Senate hearings on nominations to the Supreme Court of the United States, risk the politicisation of the appointment process, something which has largely been avoided in Canada up till now, and, some suggest, might deter qualified candidates who prize their privacy from standing for office. At the same time, it is questionable if the well-rehearsed questions and answers really shed much light on the suitability of the candidate to sit as a judge. Another possibility is a commission system, such as that used in Israel. The commission, made up of nominees from the legislature, the bar, and the judiciary selects new judges. This has the advantage of allowing a wide spectrum of input as well as depoliticising the process. Whatever the process chosen, one thing seems clear. The demand for some democratisation of the judicial appointment process and some share in the judicial disciplinary process is unlikely to abate in the near future. The task of finding mechanisms which will accomplish this end while preserving the independence of the judiciary and the ability to attract and maintain the best candidates is not an easy one.

The relationship of judges to the public

The new role of judges in modern Commonwealth society will change the traditional relationship between judges and the public. Judges have traditionally held themselves aloof from the public. They have lived in quiet isolation. They have deliberately severed ties with old friends and acquaintances, the better to assure their independence. Save for exceptional circumstances, they have refused to talk to the press. And they have generally declined to speak out in public on anything other than the dull business of the legal process, and then only with great circumspection.

In the modern era, judges face new expectations. The public that pays the judges and takes its cases before them, increasingly takes the views that it is entitled to know who these people are. The result is a debate in my country on the subject of judges speaking in public. It is

accepted by all that judges should not comment on matters which may come before them. There also seems to be general acceptance that it would be unseemly for a judge to respond publicly to criticism. But there the consensus stops. Some judges, particularly Chief Justices responsible for the administration of the courts, find it necessary from time to time to speak out on matters of concern to the justice system. Others would advocate freedom to speak out even where there is no necessity, arguing that there is much to gain from improving public understanding of the task judges face and how they go about it, and little danger, provided the judge stays away from controversial litigable issues. Still others think it unwise to speak other than through their judgments, save for special occasions, as when a judge is newly appointed or elevated. Different judges situate themselves in different places on the spectrum of opinion on the subject of judges pronouncing in public. What seems clear is that wherever a judge places himself, the entire spectrum has shifted significantly toward some degree of intercourse between the judiciary and the public as a consequence of the new and more important role courts play in our society.

Conclusion

Judging is not what it used to be. Judges are more important now; judges are more criticised. And judges face more difficult tasks than they ever have before faced in the history of the Commonwealth. If judges are to meet these challenges they must be educated, competent and engaged. They must be prepared to work hard. But all this will be to little avail if the one quality which has always been required of a judge, independence, is forgotten. In discharging its new role, the modern judiciary must fall back on the source of strength it has drawn upon over the centuries—its institutional and individual independence. It is this independence, coupled with integrity, which has made the judiciary the important institution that it is. And on the broader political plain, it is this independence that guarantees respect for human rights and the rule of law in the countries which we as judges serve, and hence the advancement of all our peoples. The task facing judges in the modern Commonwealth is not an easy one. But it is one of critical importance. If we fail, the rule of law will fail. It is as simple as that.

BEVERLEY McLACHLIN.*

* A Justice of the Supreme Court of Canada.