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JUDGING, POLITICS, AND WHY THEY MUST BE KEPT SEPARATE

In "Achilles Shield", American scholar Philip Bobbitt argues that the world has just emerged from a century long mega-war – a war that encompasses the First World War, the Second World War and the Cold War. This great war was fought over a single issue: what form of government should nation states have – fascist; communist; or parliamentary democracy under the rule of law?

With the fall of the Soviet Union and the end of the Cold War, it became clear the victor was parliamentary democracy under the Rule of Law, says Bobbitt. To be sure, remnants of the opposing communist and fascist forms of government remained. To be sure, aspects of the struggle continue, despite Francis Fukoyama's proclamation of the "End of History." But the issue that dominated the world for the past century – the battle between communism, fascism and Parliamentary democracy – has faded from the contemporary horizon. Even countries that lack Parliamentary democracy do not reject it as a goal. And everywhere, nation states invoke the rule of law as the foundation of legitimacy for the exercise of state power.

Canada fought its war over its form of government in the Rebellions in Upper and Lower Canada of the 1830s. Under the leadership of Baldwin and LaFontaine, the emerging country set its face against rule by edict and privilege. The result, to make a long story short, was the founding of the country in 1867, based on the principles of Parliamentary democracy and the rule of law.

Which brings me to my subject, politics and the law; cast in terms of function, the role of judges in a constitutional democracy. If Bobbitt is right that Parliamentary democracy founded on the rule of law is the triumphant form of modern governance, we need to be clear on the role that the law and judges should play in it.

I want to begin with two ideas. First, Parliamentary democracy is not the same as simple majoritarianism. Second, judges are not politicians; rather they play a vital and distinct role in our democracy. Let's look at each of these ideas in turn.

First, Parliamentary democracy and majoritarianism. The Parliamentary system of government that emerged from the great war of the 20th Century is not simple

majoritarianism. To be sure, the ultimate guarantors of legitimacy are free elections and the power of the people to change governments. But this power is grounded in the law – the law of the constitution. It is this that confers legitimacy on the state's exercise of its power.

The law not only supports the electoral process; it delimits the power of those elected to office. In the federal democracy we call Canada, it does this in two ways. First, it says what government can do what things. The federal government can legislate and act only within its powers under s. 91 of the *British North America Act*; the Provinces likewise only within their power under s. 92. Second, since 1982, all governments, federal and provincial, must act within the precepts of the *Charter of Rights and Freedoms*, which guarantees to each Canadian their fundamental rights and freedoms, subject only to such reasonable limits as are demonstrably justified in a free and democratic society.

And so it is wrong to suggest, as some do, that anything that limits what the elected majority might wish to do – including judges – is anti-democratic. This notion that Parliamentary democracy resides only in majority rule is both false and dangerous. It is false because, as we have seen, the power of elected officers is necessarily limited by the law in a constitutional democracy. And it is dangerous. It offers no protection against the tyranny of the majority and it overlooks the need to accommodate and validate minoritarian views essential to long-term democratic stability. As Professor Heath bluntly stated in his recent Mannion Lecture, it is not for majorities alone to decide whether it is appropriate to discriminate against minorities. In a pluralistic constitutional democracy, majorities are not permitted to impose their moral values, their conception of the good life, at the expense of those who do not control political life. Each Canadian is a member of a minority, in one sense or another. Each of us can see, from that perspective, that democratic rule is not the same as majority rule.

In Canadian democracy, it is the rule of law that has traditionally provided the necessary limits on stark majoritarianism. It is the rule of law that ensures that elected representatives do not exceed or abuse their powers. And it is the law that protects minorities and permits the accommodations essential to long-term stability. Judges are a necessary part of ensuring that the rule of law fulfills these vital functions.

This takes me to the second idea. Judges are not politicians, but play a distinctive and unique role in the Canadian constitutional democracy. To make a Parliamentary system under the rule of law work, we need neutral, independent arbiters. We need independent arbiters to settle issues relating to the electoral process. We need independent arbiters to determine, when conflicts arise, what falls to the federal government under s. 91 and what falls to the Provinces under s. 92 of the *British North America Act*. And we need independent arbiters to adjudicate citizens' claims that the government has unjustifiedly violated their *Charter* rights. In a nutshell, a state that accepts that executive and legislative power must be exercised in accordance with the Constitution – a fundamental tenet of

modern Parliamentary democracy – requires institutions to decide when those powers are exceeded. These institutions are the courts. Reflecting this basic imperative, the Constitution of Canada, like that of most modern states, guarantees the fundamental independence of the courts and the men and women who occupy their benches.

Most judges are occupied with resolving disputes between citizens or applying the criminal law. Their work, for the most part, attracts little notice. However, when judges decide issues concerning the constitutional powers of the state, attention is sure to follow. The adoption of the *Charter of Rights and Freedoms* in 1982 has greatly increased the number of such cases. The recognition of same-sex marriage, the existence and scope of aboriginal rights, the legality of assisted suicide, the constitutionality of the offence of possession of pornography, and the appropriate sentence for "mercy killing" – these are but a few of the charged issues that our judges have been obliged to tackle in the two decades since the *Charter* was adopted.

The judges' task is to decide these issues fairly and impartially in a non-partisan fashion, on the basis of the law, the materials, and the pleadings before them. This is a legal task; indeed, it is judging of the highest level. In discharging this task, judges are not all-powerful. In a constitutional democracy, all power is by definition limited. This applies to judges as much as to legislators. What limits judges in their constitutional role as interpreters of law, are the traditions of the law, supported by a host of rules, written and unwritten: the rule that courts must be open to the public; the rule that judges must give reasons for their decisions; the principle that all judicial decisions must be appealable, at least to one other court and in cases of national importance, on to the Supreme Court of Canada; and the need for deference to Parliament and the legislatures on matters of social choice and expenditure of funds.

Viewed from the outside, deciding *Charter* cases may seem like a political task. The decisions often touch social and political issues. They have the potential to affect great numbers of people. And they invoke choices – the same choices that we think of Parliament as being empowered to make.

And so we hear the suggestion, by now the standard stock of some editorial pages, that judges have ventured outside their proper territory – the uncontroversial territory of resolving quotidian disputes – and waded deep into political waters. Moreover, the charge goes, this is improper and impractical. It is improper because highly contentious issues should be decided by elected politicians, not by politically unaccountable judges. And it is impractical because judges, in their ivory towers, are ill-placed to take and respond to the pulse of the nation. These suggestions crystallize into two themes. First, judges are more and more acting as legislators. Second, we should therefore rethink the way in which they are appointed. Commentaries over the decision of the Court of Appeal of Ontario on the

question of same-sex marriages pick up the first theme, while the impending nomination of a new judge to the Supreme Court of Canada will doubtless reactivate the second one.

Let us turn first to the charge that judges are usurping the legislative power of Parliament and the legislatures. To put it simply, it displays a misunderstanding of what judges do. The reality comes down to this: Parliament and the legislatures are the supreme arbitrators of the social course of the nation, subject only to the constraints imposed by the constitution and its traditions. The courts, by contrast, are the interpreters of the law and the constitution. Drafting, debating, and passing laws are essentially political activities. Interpreting the laws and the constitution are essentially legal activities.

The purposes of the two functions are different. The aim of the legislative role of drafting, debating and passing laws is to create the laws that will best serve the people, in the collective and negotiated wisdom of the elected legislators. The aim of the judicial role, by contrast, is to interpret the laws that our common law tradition and the legislators have put in place. This activity of interpretation breaks down into various sub-activities: assigning meaning where it is unclear; applying the law to complex fact situations; harmonizing laws that may appear to be at cross-purposes or yield different results when applied to the same situation; and finally, determining whether challenged laws are constitutional, that is, whether they fall within the powers of the legislature that passed them.

All this is high-level, specialized, intellectual work. Contrary to popular myth, judges do not pluck meanings from the air according to their political stripe. The image of the judicial cowboy riding amok through the carefully planted legislative garden is just that, an image – and a distorted one at that. The judge is more like a gardener, shaping and nurturing plants so that they grow as intended, occasionally pulling out a weed that offends the plan on which the garden is based. Unlike politicians, judges do not have agendas. They take the laws and the cases as they find them, and apply their interpretative skills to them as the constitution requires.

To accomplish this task, judges must be independent of other social institutions, including the legislative and executive branches of government. Judges cannot discharge their interpretative role impartially if they are captives of a particular constituency, be it a corporation, an interest group, a political party, or the elected representatives of Parliament. The concept of judicial independence, fundamental to our constitution, rests on this essential separation between judges and politicians, be they the elected politicians of Parliament or the unelected politicians of causes and interest groups.

This brings us to the second theme - that we should rethink the manner in which judges are appointed. The independent, apolitical nature of the judicial role suggests that it would be misguided to appoint judges in a manner that gives more weight to partisan politics. In this debate, the most important question should always be the following: what

kind of judges do we want? To me, the *sole* concern should be to appoint individuals who embody the most valuable judicial qualities of impartiality, empathy and wisdom. From where I sit, the current judiciary in Canada meets the highest standards in this respect. A reform of our appointments process would certainly be welcome if it enabled us to improve on this excellent record. That is the standard against which proposals for reform must be assessed. Most would agree that in terms of product, the present process seems to work well. Why, one might ask, fix the system if it isn't broken? Or to borrow a figure of speech I recently ran across – "Why open up that Pandora's box when you don't know what kind of Trojan horse might come out of it?"

Still, the debate is out there. So let's look at models that differ from the present Canadian system. As background, let's begin with the present process. At present, almost all judges, federal and provincial, now pass through a complicated process that involves filing an application, being approved by an independent committee that includes lay people, and a thorough vetting by the Department of Justice that includes consultation with Law societies, professional colleagues, and members of the public. The final appointment, while political in the sense it is made by politically elected members, reflects merit rather than adherence to a particular political point of view. Judges of the Supreme Court of Canada need not go through this process. Yet since most are elevated from lower court benches, as time passes almost all will have been through the process. The process of consultation for Supreme Court judges is lengthy and serious. Appointments have historically been made on merit. Of none of the present incumbents on the Court, can it be said that they were appointed for their political views.

What then are the alternatives? What about the election of judges? Many American states elect their judges. Yet many have stopped doing so and others have blunted the problems of the electoral system by introducing systems whereby once elected, a competent judge can remain in office without having to stand for re-election. All of this suggests that the system may have problems. The fundamental problem is how a judge elected on a particular platform due to particular things can be, and be seen to be, impartial. In such a system, political and social pressures inevitably sully the image of judges and justice. Images of judges running campaigns in which they hand out doughnuts and gasoline coupons, buy drinks for voters or speak at political rallies may seem far-fetched; yet they occur in the United States. The election of judges translates into the need to develop an electoral platform, to make promises, to solicit funds, and to respond to the pressure of various interest groups. Elected judges owe, or at least can be seen to owe, their position to particular segments of the community. American judicial colleagues have confessed to me that it is virtually impossible, with elections pending, to avoid thinking about how this or that decision may impact on one's chances of re-election. No matter how one sets one's mind against the thought, it comes ricocheting back. It's a little like resolving not to think about your mother.

In a word, the judge in an electoral system inevitably becomes a politician. One may gain accountability, but one loses judicial impartiality. Anyone contemplating this method of choosing judges must ask: are the costs of such systematic mingling of the political and the judicial too high? In my view, they are. I cannot think of a better way to breed popular distrust of judicial institutions. Even the Americans – many at least – don't like it. As Justice Sandra Day O'Connor of the United States Supreme Court dryly observed in a recent decision: "Minnesota has chosen to select its judges through contested popular elections. If the state has a problem with judicial impartiality, it is largely one the state brought on itself by continuing the practice of popularly electing judges".

Others have argued in favour of a less flamboyant form of political accountability, the vetting of judges by elected representatives. Again, the best known model is American, where federal judiciary is appointed subject to Senate approval. Candidates for judicial office are questioned on their background and leanings. Who is presented as a candidate and who succeeds is often closely tied to the candidate's actual or perceived politics. One speaks of Republican nominees and Democratic nominees, and a majority of Americans, we are told, say they cast their vote in Presidential Elections taking into account the manner in which each presidential candidate is likely to use his power of appointment. When the President's party does not control the Senate, appointments are held up. But of greater concern is the increasing political tone of the process. More and more Senators demand political answers from judicial candidates, instead of focusing on their legal learning, their wisdom and their impartiality. Just last week the New York Times reported that interest groups on the left and the right are even now engaged in massive fundraising and research in anticipation of the retirement of two justices of the Supreme Court. Television campaigns have been launched, underlining the importance of appointing a person with the appropriate political views. And all this before any retirement has been announced.

People can and do debate how well this system works. Despite its many drawbacks, viewed historically, it has served Americans well. American Judges have proved their independence over and over again, frequently confounding the expectations of those who appointed them. Yet the current pitch of the partisan politics surrounding the process of appointment of federal judges in the United States cannot help but give rise to misgivings, if not about how judges rule in individual cases, about whether they and the courts on which they sit will be <u>perceived</u> as impartial.

These are not the only models for appointing judges. In many European countries, members of Constitutional Courts are appointed on a special majority vote of the legislative assembly, often from a slate prepared in whole or part by the judiciary. The process seems to work well within these traditions, although nominations can be the object of political trading or held up absent agreement. Other countries, like South Africa, appoint justices of their highest court on the recommendation of a Judicial Services Commission. The commissions typically hold hearings, often public but usually not televised. At the end of the process,

they present one or more candidates to the government for appointment. This process too has critics. A distinguished South African Barrister, Sir Sidney Kentridge, warns that, in that country's experience, public hearings, however courteously conducted, are problematic:

> That judges should be called on to defend their judgments, even in committee, is not only distasteful but is, surely, incompatible with the independence of the judiciary. It cannot be justified by words like "transparency" or "accountability".[1]

The method a country chooses to appoint its judges is essentially a political matter and judges, the record shows, will respect that choice, whatever it be. However, from my vantage point, let me urge that whatever changes we make, we avoid politicizing the judiciary and eschew the seductive yet pernicious tendency to merge the judicial and political roles.

We do not need yet another political institution supplementing the political judgments of the House of Commons, the Senate and the Provincial legislatures. We do not need Liberal judges or Reform judges or Conservative judges or NDP judges or Bloc Québecois judges, voting their particular party lines. We need true judges, independent, impartial and courageous, to settle our differences wisely and to perform the vital constitutional function of determining the boundaries of the exercise of state power.

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[1] Sir Sidney Kentridge, "The Highest Court: Selecting the Judges", 62 Cam. L.J., 55 at p. 71.

The Respective Roles of Parliament and the Courts

I have suggested that it is a mistake to think that judges are usurping legislative power, and have argued that we should continue in our tradition of appointing the best and wisest jurists we can find, on the basis of merit not political allegiance, trusting them to interpret the law and decide the issues impartially on the law and the submissions before them.

Should we be concerned that judges thus appointed will usurp the position of Parliament and the Legislatures? I would argue not. Rather, we should see judges as part of a larger process by which we resolve social issues and work out accommodations – the process we call democracy. The process is a complex one in which the legislatures and the courts play independent but complementary roles.

Recently, in a talk to the American Trial Lawyers Association, Justice Stephen Breyer of the United States Supreme Court spoke of the American experience as a series of conversations, and discussed the role of the Supreme Court in the process by which the law develops and adapts to changing realities.[2] He stated:

> "[P]eople all the time talk about democracy. Does democracy work in the United States of America? And I have to say in my particular seat on the Court, my impression day after day is it works a lot better than many give us credit for . . . . We have a system . . . . It's very complex, but we all know it. It's called what I think of as a kind of conversation . . . . We start to talk. Who starts to talk? Well, professors. They're always first. Second, different groups, people interested in civil liberties, people who are manufacturers, people who are studying the issues in the academy. Where do they talk? In articles, in specialized journals, in newspaper articles in the paper and at meetings . . . . [W]hat are the people talking about. . .? They are talking about details. They are talking about how to improve this, how to improve that . . . And eventually the legislature gets into the act and they respond to the newspapers and they respond to testimony and counter-testimony, and perhaps there's an agency that will begin to have a rule and then Congress and fifty states legislatures will step in. I'm describing a mess, but I'm also describing a conversation and I'm also describing how eventually public policy in the United States gets made and remade and remade again. . . . [W]e are part of a very complex process, and I call that the democratic process. . . .

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[2] *The Bulletin*, Spring 2003 issue, pp. 37-38.

Turning to the role of the Court, Justice Breyer concluded:

> "[I]t seems to me an awfully large number of people in the United States . . . think that the Supreme Court of the United States makes a lot of decisions about how people should behave and what's good for them. That's not what we think we do. We think we are interpreting a document that sets up a framework for government. What kind of a government? The kind of a government that I've just described . . . It is the kind of government where people who benefit from basic freedom, who have a degree of equality and have democratic political institutions, will themselves make the community decisions that are necessary for people living together in harmony in the United States. In other words, it's not us, it's not the judges, it's not the courts; it's them, the people. And our job is to make certain that that framework is secure. . . ."

The vision of the law Justice Breyer articulates sees the law as the collaborative creation of the nation's citizens. It is not an external process, imposed on the citizens from outside. It is their law, made by them and for them in a complex, sometimes messy process of debate and discussion. Finality is essential in human affairs, so from time to time we impose closure and articulate what the law is through our legislative and judicial processes. But the larger societal process continues, permitting accommodation of the many minorities of which our society is composed and allowing for adjustment of the law to meet changing circumstances, values and needs. In this process, judges play a vital role.

Conclusion

Allow me to close with a story, which I heard some years ago. It is said that, one day, Lord Hailsham of Marylebone, Lord Chancellor of England, was "proceeding with characteristic majesty and in all his finery through the Palace of Westminster when he encountered a group of tourists". As he passed them, he saw a friend across the hall, whose name was Neil. "Neil!", he shouted. The tourists all fell to their knees.

Judges no longer attract the sort of automatic deference Lord Hailsham once commanded. Nor do we expect it. We have an important role to play in maintaining Canadian Parliamentary democracy. Parliament and the provincial legislatures remain the dominant players in shaping our society and responding to its needs -- a creative and pro-active role. But judges, when called upon, stand ready to answer the difficult questions on the constitutional limits of the exercise of power and the multiple accommodations so essential to the continued stability of our country. If judges are to discharge this role, judges must not become politicians, nor can they be made politically accountable. The continued good governance of Canada demands no less.