

THE JUDICIARY - LAW INTERPRETERS OR LAW-MAKERS

Mr. Justice Brian Dickson

“What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both”.¹

It should not be hard to guess the speaker of these words: Lord Denning, Master of the Rolls, without a doubt the most controversial member of the judiciary this century. His position in the great debate “Do Judges Make the Law or Do They Merely Declare It” is unambiguous. He is the most unabashed advocate of “judicial creativity” - otherwise known as “naked usurpation of the legislative function.”²

The debate is an old one and, in England at least, shows no signs of diminishing in vigour or pertinence. Lord Denning flies his colours proudly; he used the above quotation as the preface to his recent book *The Discipline of Law*.³ The same year Lord Devlin published *The Judge*, as an antidote, one might surmise, to Lord Denning:

In recent years a number of pens have been put to paper to criticize the English judiciary for its torpidity. What is needed today, it is said, is a dynamic, or at least an activist, judiciary, ready and willing to develop the law to fit the changing times.⁴

Lord Devlin makes it “plain” that he “is firmly opposed to judicial creativity or dynamism” as he defines it. “Social justice guides the law-maker: The law guides the judge. Judges are not concerned with social justice, or rather they need not be more concerned with it than a good citizen should be; they are not professionally concerned. It might be dangerous if they were. They might not administer the law fairly if they were constantly questioning its justice or agitating their minds about its improvement.”⁵ Lord Denning, in ringing language, has characterized the debate as one between the “timorous souls” and the “bold spirits.”

He can perhaps be forgiven the note of triumph with which he cites this decision; vindication is the reward which longevity provides to one who is ahead of his time. His dissent in *Candler v. Crane, Christmas & Co.* of course became the *Hedley Byrne v. Heller* principle.⁷

For many reasons, the lines of the debate are more distinctly drawn in England than in Canada and the United States. The real issue in Canada is not whether judges do or should make law. It is, as I pointed out in *Harrison v. Carswell*, defining the limits of judicial law-making:

The duty of the court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a

* Of the Supreme Court of Canada. Text of an address delivered to the mid-winter meeting of the Manitoba Bar Association. The author acknowledges the valuable research assistance of his Law Clerk, Me. Cally Jordan, in the preparation of this paper.

1. *Packer v. Packer*, [1954] 15 at 76, per Denning L.J..

2. *Magor and St. Mellons Rural District Council v. Newport Corporation*, [1951] 2 All E.R. 839 (H.L.) per Lord Simonds.

3. (London, 1979).

4. (Oxford, 1979), 1.

5. *Id.* at 8.

6. *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164.

7. *Hedley Byrne v. Heller*, [1963] 2 All E.R. 575 (H.L.).

moment doubt the power of the court to act creatively - it has done so on countless occasions; But manifestly one must ask - what are the limits of the judicial function?⁸

It is a complex and difficult question and one which is of particular concern to members of the Supreme Court of Canada. Since the doctrine of *stare decisis* has fallen into desuetude at the level of final appeal, the question has become more pressing. As Chief Justice Laskin commented several years ago:

A final court which is prepared to overrule its own precedents puts itself, institutionally, into a partnership albeit a junior one, with the legislature.⁹

And yet, as judges, we are all sensitive to accusations of "judicial legislation". I still react with a guilty start, although I am convinced that in many instances such allegations are based on what I consider a basic misapprehension of the function of the judiciary.

Part of the difficulty lies in the term itself: "judicial legislation". Our political system is based upon the concept of the division of powers between the judiciary, executive and the legislature. The judiciary adjudicates and the legislature legislates. There is no quarrel with this. But the existence of judge-made law is not necessarily a prohibited incursion into the exclusive domain of the legislature. The "law" which judges make should not be confused with the "laws" which issue from Parliament. The civilian jurists with their genius for systemization speak, correctly in my view, in terms of "sources" of law. Statute law is a "source" of law; custom may be a "source" of law; and in our legal system, judicial decisions are a "source" of law. Some sources are more important or more authoritative than others, so that custom, for example, is of relatively little significance.

There have been historical examples of true "judicial legislation". In pre-revolutionary France the Courts of Appeal, the "Parlements" were given the power to enact regulations. This was a straight delegation of the legislative power of the King to the courts, a power which was used by the Parlements to challenge the authority of the King himself. For their excesses and abuse of power the Parlements incurred the wrath of the population and were almost immediately dissolved at the time of the French Revolution. The courts which took their place under the revolutionary government were totally subjugated to the legislature. Not only were they denied all power to make regulations, even the interpretation of laws was placed beyond them. An address by the court to the legislature was required in order to interpret a law.¹⁰ A vestige of the revolutionaries' distrust of the judiciary remains to this day in article 5 of the French *Civil Code*:

Judges are forbidden to pronounce by way of a general and rule-making disposition on the cases submitted to them.

Some eminent common law judges would adopt the very same position.

The civilian hostility to judge-made law is readily explained by history. The origins and nature of the Common Law, however, do not offer such an easy explanation for the existence of this same hostility.

8. [1976] 2 S.C.R. 200 at 218.

9. "The Institutional Character of the Judge" [1972], 7 *Israel L.R.* 329 at 341.

10. See J.P. Dawson, *The Oracles of the Law* (1968) 375 ff.

The Common Law is, by definition, judge-made law. "The Common Law ... is inarticulate until it is expressed in a judgement ... where the Common Law governs, the judge in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision".¹¹ Before the conquest, as in other Germanic tribal societies, custom was the main source of law. It was transformed by the King's courts into the common law. There was, as such, no legislation as we know it today. Inspired by little other than healthy regard for the King's peace and his royal purse, Common Law courts initially ventured jurisdiction over a limited range of legal matters. That original jurisdiction was enhanced by measure. The juridical system expanded its province to accommodate new demands for remedies at law. The courts expressed creativity by first advancing, then consolidating, new concepts of law. Thus, the strands of the Common Law were woven case by case in the courts of the day. In time that body of law supported a full complement of legal principles, given shape and cohesion by the application of like principles in alike circumstances, by an observance of precedent. Lord Wright chose an apt analogy in speaking of the evolution of our law:

(The judge proceeded) ... from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea ...¹²

Though perhaps the courts took small and carefully measured steps the distance covered by principles of law was not insignificant. The strength of the Common Law, then as now, resides in its resilience, its undoubted capacity for robust growth. Throughout history, principles were devised and concepts forged anew to meet the host of ongoing demands advanced by litigants who pursued remedies not yet recognized and challenged the inadequacies of rule and procedure.

If historically judges did make law how did they, according to many eminent judges and commentators, lose this ability? L. Jaffe in a provocative study published in 1969 quotes Lord Upjohn as saying that "as a judge he felt that certainty in the law was of paramount importance and he saw his duty to be to declare the law as it is; he deprecated judicial legislation."¹³ "Judicial legislation" as I have attempted to point out above, is a misnomer for judge-made law. The Irony is that those who deprecate judge-made law revere the great judges of the past who made it: Coke, Bacon, Holt, Mansfield, Blackburn, Willes. As Lord Devlin points out, the ancient powers of the judge to make law have never formally been abrogated: "We could if we would but we think better not" says Lord Devlin.¹⁴

Why should judges think it better not? As in any other field of human endeavour there is a pendulum of innovation and consolidation, action and reaction.

"There are two principles", says Whitehead, "inherent in the very nature of things, recurring in some particular embodiments whatever field we explore - the spirit of change, and the spirit of conservation. There can be nothing real without both. Mere change without conservation is a passage from nothing to nothing. Its final integration yields mere transient

11. *Supra n. 4*, at 77.

12. Lord Wright. "The Study of Law" (1938) 34 *L.Q.R.* 185 at 186.

13. L. Jaffe, "Is the Great Judge Obsolete?" (Oxford, 1969) 28.

14. *Supra n. 4*, at 6.

non-entity. Mere conservation without change cannot conserve. For after all, there is a flux of circumstance, and the freshness of being evaporates under mere repetition'. If life feels the tug of these opposing tendencies, so also must the law which is to prescribe the rule of life. We are told at times that change must be the work of statute, and that the function of the judicial process is one of conservation merely. But this is historically untrue, and were it true, would be unfortunate. Violent breaks with the past must come, indeed, from legislation, but manifold are the occasions when advance or retrogression is within the competence of judges as their competence has been determined by practice and tradition.¹⁵

The emergence of a strict doctrine of *stare decisis* towards the end of the nineteenth century marked the onset of the pre-eminence of the view that a judge's function is merely a declaratory one. It found expression in the 1898 case *London Street Tramways Co. Ltd. v. London County Council*.¹⁶ Once a principle of law had been declared in a decision it was immutable. Those who had made it (or "found it" as they would prefer to term the process) could not change it. The judges forged their own shackles. Some, like Lord Campbell, sought the justification of the rule in a principle verging on that of papal infallibility! The law existed, and always had existed, in some Platonic ideal world and, upon his appointment to the bench, the scales fell from a judge's eyes enabling him to see and declare the "law". Lord Halsbury much more pragmatically based the rule on public policy, the interest of society in the finality of litigation.

There are many good arguments which may be advanced in favour of the principle of *stare decisis*: It promotes "certainty, predictability, reliability, equality, uniformity, convenience".¹⁷

The principle, however, has two major flaws. "Law must be stable and yet it cannot stand still."¹⁸ Give a moment's thought to the changes in our world since 1898: automobiles to airplanes to space ships. Technology has radically altered the context within which the law operates. Can copyright law remain the same after the invention of the photocopy machine?

Secondly, judges are not infallible and the doctrine of *stare decisis* can serve to perpetuate a bad rule.

It allows the law to become a petrified forest of erroneous notions. Jonathan Swift in an oft-quoted passage in *Gulliver's Travels* has Gulliver splenetically say: 'It is a maxim among ... lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of *precedents*, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly'.¹⁹

In 1966 the vices of the rule overcame its virtues and the House of Lords issued its famous Practice Statement. Six short sentences:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some

15. B. Cardozo, *The Paradoxes of Legal Science* (1928) 7 - 8.

16. [1898] A.C. 375 (H.L.).

17. Hahlo, *The South African Legal System* (1968), 215.

18. Roscoe Pound, *Interpretations of Legal History* (1923), at 1.

19. *Supra* n. 17, at 215.

degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The announcement is not intended to affect the use of precedent elsewhere than in this House.²⁰

A year later in *Binus v. The Queen*, Cartwright J. confirmed the power of the Supreme Court of Canada to depart from a previous decision:

I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam*, and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons.²¹

The principle of *stare decisis* still applies vertically of course; decisions of the Supreme Court of Canada are still "binding" on the courts below. I would hope however that the precedents are not applied as blindly as they have been in the past. A version of the doctrine of *stare decisis* is of course found everywhere, in practice if not in theory, even in the civil law jurisdictions which adamantly maintain that there is no doctrine of precedent applicable to decisions of their judiciary. A judge of first instance, in say, Montpellier, who perversely refuses to follow a recent ruling of the Cour de Cassation will merely find himself consistently and invariably overruled. So the doctrine of precedent is with us still and for good reason.

Lord Devlin for his part denies that he has ever felt the "tyranny of precedent":

It is a tie, certainly, but so is the rope that mountaineers use so that each gives strength and support to the others. The proper handling of precedent is part of judicial craftsmanship; the judge must learn how to use it and in particular how to identify the rare occasions when it is necessary to say that what judges have put together they can also put asunder.²²

A simplistic view of the theory of the division of powers has obscured the fact that the judiciary and the legislature are partners in the law-making process. The distinction between the judge and the legislator has been over-defined. Judges do, and must, posit rules of general applicability, the supposed preserve of the legislature. On the other hand, legislatures do pass legislation determining the rights and status of an individual, supposedly a function of the judiciary. The judiciary and the legislature both make law - but it is not the same kind of law nor is it made for the same purposes. The primary function of the judge is to decide the case before him, to "*trancher le litige*" - cut through the issue. He deals with a concrete issue and has the benefit of seeing the practical implications and repercussions of a rule of law on individual members of society. The legislature, on the other hand, is dealing with issues at a

20. [1966] 3 All E.R. 77 (H.L.) *per* Lord Gardiner.

21. [1967] S.C.R. 594, at 601.

22. *Supra* n. 3, at 201.

certain level of abstraction, and cannot exhaustively provide for every mutation possible. There are some areas of the law where legislative action is infinitely superior to judicial action, for example in corporate and commercial law. Those directly affected by the legislation are in close and constant communication with the legislator. They form a powerful lobby group. The law is continually being amended and updated. In Ontario, for example, there have been major revisions of both securities law and companies law in the last ten years. But the legislative process can be a slow and cumbersome one and many areas of the law which badly need reform may simply be low priority, not politically profitable. The legislative process should not be idealized out of all proportion. It is certainly not the solution to every troubled area of the law.

On the contrary, judicial law-making, may be a spur to a lazy or indifferent legislature. The judiciary and the legislature do not exist in splendid isolation one from the other. They interact. Mrs. Murdoch, on her own, did not have sufficient clout to bring about a major reform in Alberta family law. *Murdoch v. Murdoch*,²³ did. Judicial law-making one step removed.

But once the legislature has acted in an area at the instigation of the judiciary, do judges suddenly lose their claim to law-making authority in the area? I am firmly of the belief that they do not, but there is a price to pay for such a belief. Judges, in general, remain sensitive to allegations of "judicial legislation", whether justified or not. Was "judicial activism" warranted in the recent case of *Pettkus v. Becker*?²⁴ Some of my brethren clearly felt it was not. *The Family Law Reform Act, 1978*²⁵ had effected an extensive reform of family law in Ontario after the stop gap measures of *The Family Law Reform Act, 1975*.²⁶ The presumption of equal sharing of family assets which applies between married persons was not extended in the legislation to common law spouses. I found that a remedy existed (and always had existed) in Equity for the division of property between unmarried individuals: the constructive trust. "Palm tree justice" and "judicial legislation" said my brother Martland. But as I took care to point out in my judgment "the Court is not here creating a presumption of equal shares ... the fact there is no statutory regime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances."²⁷ Was I declaring the law as it has always existed or was I making law? Irrespective of the answer, my firm conviction is that I was fulfilling the duty of a judge to decide the case before him or her in a "reasoned way from principled decision and established concepts."²⁸

One must also I think, in a discussion such as this, have in mind the very important change effected in the jurisdiction of the Supreme Court of Canada with the enactment of section 41(1) of the *Supreme Court Act* in 1975. I will read it:

23. [1975] S.C.R. 423.

24. [1980] 2 S.C.R. 834.

25. S.O. 1978, c. 2.

26. S.O. 1975, c. 41.

27. *Supra* n. 24, at 851.

28. *Supra* n. 8, at 82.

41(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment is accordingly granted by the Supreme Court.²⁹

Implicit in this is recognition of the role of the Court as developer of the law. The emphasis is on legal development rather than the resolution of disputes between litigants or the correction of error in the lower courts. Leave is to be granted or not granted depending upon whether the issue raised is one of public importance, not merely of importance to the litigants. In the resolution of the legal problem presented the Court may well have to give meaning to the words of a statute or adapt the law to meet changing social conditions and, in that limited sense, perform a law-making function.

CONCLUSION

Judges do make law but, unlike the legislature, in a system which recognizes the doctrine of parliamentary sovereignty, their law-making power is a limited one.

[A] judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.³⁰

Paul Weiler in his study of the Supreme Court of Canada *In The Last Resort* says that judges should make law but not too much. Professor Jaffe advises that they do it surreptitiously:

The fact is that a judiciary, whether reactionary or radical, can do much more to work its will by *ad hoc* manipulation. Such activity is difficult to detect and eludes the criticism and confrontation made possible by overt law-making.³¹

Ad hoc manipulation was perhaps necessary during the reign of *stare decisis* and the domination of the doctrine of binding precedent. "This case is distinguishable on its facts" or "this case must be confined to its facts" achieved the ends of justice in the individual case and served to advance the law. Hesitancy at outright overruling of patently bad law still prevails. But the courts in correcting past mistakes or disencumbering the law of the incoherent accretions of centuries of judicial statements, are doing the job for which they are best suited:

Unless a judge believes that judicial action will discourage legislative reform, it is a question whether a present good should be sacrificed for the indefinite and uncertain prospect of superior parliamentary action.³²

29. S.C. 1974-75-76, Vol. 1, c. 18, s. 5.

30. B. Cardozo, *The Nature of the Judicial Process* (1921), at 141.

31. *Supra* n. 13, at 15.

32. *Id.*, at 29.

I return to the question before us, namely *The Judiciary - Law Interpreters or Law Makers?* Provided the phrase “law-makers” is understood to mean “law developers” I would answer the question by saying that the judiciary are both interpreters and, in the limited sense I have indicated, makers of law. The role of the judiciary is not political nor executive nor administrative. It is adjudicative, but there is of necessity an element of law development in the work.