

# The judicial role in a democratic state

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Like their British  
colleagues,  
American judges  
tended to wrap their  
mandate  
protectively around  
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becoming activist  
only to keep  
government from  
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traditions and rights  
of vested interests.

Let me start this article about the judicial role in a democratic society by offering a theory of what democracy is. For me, the components of democracy are most starkly revealed in comparison to its antonym—totalitarianism. What democratic societies promote—and repressive ones do not—are the rights of their citizens and their participation in decision making about the rules by which they will be governed. Democracy promotes choice, voice, and access to rights. Totalitarianism promotes none of those.

The effectiveness of the rules or rule makers any given democracy generates may vary, but their defining similarities will be a commitment to rights and to participation.

And so it is somewhat ironic to find that in Canada today, the debate about the judicial role has, to a vocal extent, come to centre on the vigour with which courts are protecting rights, and the expanded participation we have promoted to those rights. The sources of this debate are the *Charter of Rights and Freedoms* and the institution responsible for implementing it—the judiciary.

The criticism appears to be that rights should be distributed by legislatures, not courts, and that the enforcement of the Charter by courts has therefore resulted in judicial trespass on legislative supremacy, resulting in an impairment of democratic governance.

## TOO MUCH DEMOCRACY?

What is for me odd about this criticism, aside from its underlying—and historically erroneous—premise that judicial institutions do not form an integral part of the democratic framework, is that it is, at its core, a complaint that the Charter has created too many rights for too many people. But since rights and participation define democracies, does the criticism not come down to the proposi-

tion that we have too much democracy and too many institutions available to enforce it? As England, Israel, and the European Community also embrace a legislated commitment to an overriding *Bill of Rights*, it strikes me that Canada's decision to constitutionalize rights, placing them at the apex of the system, should be a source of great pride in our democratic compliance, not a source of cranky agitation.

I would have thought that in a democracy, the majority would applaud no less enthusiastically the possibility that its rights would be vigorously protected by the judiciary, as that their opinions

would be seriously taken into account by legislators.

In fact, statistics repeatedly confirm that most Canadians—that majority whose interests are consistently invoked in arguments against judicial intervention, while expressing wariness or even outright disapproval over a particular result in a given case—do in fact remain committed to the Charter as a defining democratic instrument.

What I would like to do, therefore, is try to show why and how democracy is enhanced, not cauterized, by a judiciary effectively fulfilling its Charter mandate, and how democratic values are strengthened not only by a strong legislature, but also by a strong judiciary so that together a mutually respectful and independent partnership on behalf of the public's right to justice is maintained.

## LOOKING TO THE SOUTH

Let me start the analysis with a familiar proposition uttered by a well-known figure: “[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.” This exhortation to the judiciary to defend the people from legislative acts not in conformity with the constitution were not spoken by a Charter believer—or even a Charter agnostic. They were spoken over 200 years ago by Alexander Hamilton, one of the framers of the American constitution. These words, articulated to confirm that the wishes of the majority, as expressed through elected governments, are subject to the demands of the constitution, are at the very core of the democratic commitment to judicial independence and constitutional supremacy.

And what was there in the American constitution that made its framers so determined to keep its judicial reach

beyond the grasp of the state? The protection of rights, the culmination of a historical evolution that started with the Magna Carta, wandered through the war with the Stuart Kings, found expression in the Act of Settlement and denial in the execution of Sir Thomas More, and ultimately escaped full-panoplied from the bizarre brow of King George III. The framers had experienced the ignobility of noble rule, and were determined to create a new polity in which the government derived its moral authority from the will of the people and its parameters from the constitution. Governments were constrained from encroaching on the constitutive rights of its citizens, but if they did, there was an independent judiciary to keep those rights safe.

The institutional arrangements at the heart of this new, American democracy, therefore, provided that the will of the people as reflected in their elected representatives was subject to the will of the constitution, as reflected in the decisions of an independent judiciary.

Notwithstanding the formulization and constitutionalization of these democratic aspirations in the United States, however, it cannot be said that the actual implementation met with universal enthusiasm. The elites who debated their way to a *Bill of Rights* were far more comfortable as drafters than they were, once elected to government office, as recipients of their own rhetoric. When John Marshall, the first Chief Justice of the American Supreme Court, rendered his dramatic judgment in *Marbury v. Madison* in 1803, boldly asserting the court's right to invalidate unconstitutional legislation, he started the first act of what has turned out to be a very long-running play whose opening words are "to defer or not to defer, that is question."

Ironically, it would be many years in the United States before these judicial muscles were again so strenuously flexed as to knock out legislative action, but when they were, as they routinely were earlier in the 20th century, the flexing was not to protect people's rights,

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but to protect business and the public purse from redistributive social welfare legislation designed to assist those who needed assistance. Like their British colleagues, American judges tended to wrap their mandate protectively around the status quo, becoming activist only to keep government from encroaching on the traditions and rights of vested interests. As a result, until the mid-fifties, segregation, McCarthyism, and the internment of Japanese Americans did not receive judicial rebuke; the same could not be said, however, for women's advancement, minimum wage laws, or many of the measures introduced to confront the economic nightmare that was the Depression. Activism, today a verbal missile routinely deployed against a judiciary with an expansive view of rights, was once the proud hallmark of a judiciary determined to restrict them. Hence, the futility of labels. But more of that later.

The democratic era that started with the American constitution witnessed a relationship between the judiciary and the *Bill of Rights* that cannot be described as being anything closer than polite until halfway through this century. But with the 1954 decision in *Brown v. Board of Education* banning segregation in American schools, the relationship turned intense. Shaken by the unimaginably devastating consequences of intolerance in World War II, and

shamed by the indifference that permitted the Holocaust's horrifying tenure, the Western world revisited the role of rights, and uttered the international *mea culpa* found in the *Universal Declaration of Human Rights*. The domestic response in the United States was slower, and did not flower until the pollution emitted from the House Un-American Activities Committee had evaporated. But blossom it did, with the American judiciary and government taking turns at the head of the rights parade until, more recently, partisan ideology has merged sufficiently with the judicial appointment process to seemingly make rights protection less of a preoccupation.

This background helps us to understand that while constitutional mandates rarely change, governments, judges, and attitudes do. The ebbing and flowing, the critical scrutiny, and the inherent relational tensions are inevitable. They are a function both of perspective and of political will, each of which will likely vary with time and with the times.

## THE CHARTER ERA

Why does this matter now, when we are supposed to be looking forward to millennial goals rather than backward to romanticized history? It matters because we seem to be trapped at the mo-

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ment in a conversational whirlpool about judges and constitutions and rights—a conversation in which loaded phrases are perpetually spun and important concepts are conveniently disregarded. The most basic of the central concepts we need back in the conversation is that democracy is not—and never was—just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, *notwithstanding* the wishes of the majority. It is this second, crucial aspect of democratic values that has been submerged by the swirling discourse.

Which brings us to Canada. I think it is fair to say that until 1981, when the Charter was donated to the *British North America Act* by the federal government, no one ever accused the Canadian judiciary of aggressive rights protection. In fact, many of us reared on the constitutional diet of division-of-powers jurisprudence, looked wistfully at the wide selection on the constitutional menu available to American judges. With rare exceptions, the Canadian Supreme Court not only shared the apparent inhibitions of its American and British counterparts about welcoming rights into the judicial fold, but also remained reluctant at least a generation longer. By the time I graduated from law school in 1970, the perception was that the Supreme Court was the place that decided constitutional issues such as whether “persons” in the *British North America Act* included women and whether egg marketing boards were a provincial or a federal undertaking.

Then, in 1978, just before we got a Charter, the Supreme Court in *Rathwell v. Rathwell* reversed a decision it had made only 5 years earlier in *Murdoch v. Murdoch*, thereby rewriting the archaic matrimonial property regime we had been subject to for over 100 years. No longer equitable, said the court. Time to adjust to a new appreciation about the role played by husbands and wives in a marriage. Time, in short, to create a new

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social contract. The public cheered. The media cheered. Within months, practically every province had amended its family property laws accordingly.

Then we got the *Charter of Rights and Freedoms*. To the constitution’s division of powers, it added rights: civil rights, like the freedoms of religion, association, and expression; the right to counsel; and the right to security of the person. And human rights, like equality, linguistic rights, aboriginal rights, and multiculturalism. What Canada got with the Charter was a dramatic package of guaranteed rights, subject only to those reasonable limits that were demonstrably justified in a free and democratic society, a package assembled by the legislature, which in turn—it bears repeating—assigned to the courts the duty to decide whether its laws, policies, or practices met the constitutional standards set out in the Charter.

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cheered. Even the media cheered. It was clear that the sixties and seventies had generated a public thirst for rights protection, and *Charter* adjudication in the Supreme Court in the eighties was beginning to quench that thirst.

## THE NEW INHIBITORS

With the arrival of the nineties, a few abrupt voices were heard to challenge the Supreme Court, voices in large part belonging to those whose psychological security or territorial hegemony were at risk from the Charter’s reach. As the decade advanced, so did the courage and insistence of these “new inhibitors”—most of whom appeared to congregate at one end of the ideological spectrum. While their articulated target was the Supreme Court of Canada, their real target was the way the Charter was transforming their traditional expectations and entitlements.

They made their arguments skillfully. In essence, they turned the good news of constitutionalized rights—the mark of a secure and mature democracy—into the bad news of judicial autocracy—the mark of a debilitated and devalued legislature. They called minorities seeking the right to be free from discrimination “special interest groups” seeking to

jump the queue. They called efforts to reverse discrimination “reverse discrimination.” They pretended that concepts or words in the Charter like freedom, equality, and justice had no pre-existing political aspect and bemoaned the politicization of the judiciary. They trumpeted the rights of the majority and ignored the fact that minorities are people who want rights too. They said courts should only interpret, not make law, thereby ignoring the entire history of common law. They called advocates for equality, human rights, and the Charter “biased,” and defenders of the status quo “impartial.” They urged the courts to defer to legislation, unless, ironically, they disagreed with the legislation. They said judges are not accountable because they are not elected, yet held them to negative account for every expanded right. They claimed a monopoly on truth, frequently used invectives to assert it, then accused their detractors of personalizing the debate.

The essence of their message was that there was an anti-democratic, socially hazardous turbulence in the air, most notably during judicial flights. And while it is a message that has every right to be heard, it is not the whole story. The whole story is that the Charter does not represent heterodoxy about democracy, but rather its finest manifestation. People elect legislators who enact the laws they think the majority of their constituents want them to enact, and appoint judges who are expected to be independent from those legislators and impartial in determining whether the legislature’s actions meet constitutional standards. When legislatures elected by majorities enact laws like the Charter, the majority is presumed to agree with that legislature’s decision to entrench rights and extend a constitutionally guaranteed invitation to the courts to intervene when legislative conduct is not demonstrably justified in a democratic society.

## THE JUDICIAL MANDATE

In enforcing the Charter, therefore, the courts are not trespassing on legislative

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authority, they are fulfilling their assigned democratic duty to prevent legislative trespass on constitutional rights.

While all branches of government are responsible for the delivery of justice, they respond to different imperatives. Legislators, our elected proxies, consult constituents, fellow parliamentarians, and available research until the public’s opinions are sufficiently digestible to be swallowed by a parliamentary majority. And if they cannot be made sufficiently palatable, they are starved for want of political nourishment.

This is the dilemma all legislators face—they are elected to implement the public will, the public will is often difficult to ascertain or implement, and they are therefore left to implement only those constituency concerns that can survive the gauntlet of the prevailing partisan ideology. At the end of any given parliamentary session, many public concerns lay scattered of necessity on the cutting room floor, awaiting either wider public endorsement or a newly elected partisan ideology.

The judiciary has a different relationship with the public. It is accountable less to the public’s opinions and more to the public interest. It discharges that accountability by being principled, independent, and impartial. Of all the public institutions responsible for delivering justice, the judiciary is the only one for whom justice is the exclusive mandate. This means that while legislatures respond of necessity of the urgings of the public, however we define

it, judges, on the other hand, serve only justice. As Lillian Hellman once said: “I will not cut my conscience to fit this year’s fashions.” This means that the occasional judgment will collide with some public expectations, which will, inevitably, create controversy. But judgments that are controversial are not thereby illegitimate or undemocratic; they are, in fact, democracy at work.

What of the role of public opinion? Should judges really transcend these views as they discharge their duties? Probably. Should they be aware of them anyway? Certainly. But first, we have to think about what public opinion really means and why it does not guide the courts the way it does legislatures.

Society is horizontal and it is vertical, and it is practically impossible to know at which point a consensus emerges. Until we know who the public is and how it forms opinions, courts deciding cases are entitled to regard public opinion as largely the responsibility of the legislature. This does not mean that courts are oblivious to what they perceive the public’s opinions to be, but it means that they cannot abdicate their responsibility to decide the particular case before them because of their perception of public opinion. Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable. In framing its

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opinions, the public is not expected to weigh all relevant information or to be impartial. The same cannot be said of judges.

This defence of constitutional rights does not mean that there are no outstanding issues. There are several to discuss: public information about who judges are and how they are appointed; the interrelationship between courts and legislatures, including the reminder that the notwithstanding clause gives legislatures the final say; when to read in corrective words to effect constitutional compliance and when to leave corrective compliance to the legislature; the tension between those who think the rights stage is overpopulated and those who are in the wings waiting to join the cast; whether labels such as progressive, conservative, activist, restraint, or politicization really contribute to a thoughtful analysis of judicial behaviour; whether the search for consensus is replacing compassion and courage as the defining justice objective and, as a corollary, whether the proposition that entitlement should be a matter of timing can ever be consistent with the fact that rights are guaranteed now.

All of these, and more, are issues we are and should be talking about. It is an important conversation, and one I hope we will keep constructive, rigorous, and continuous.

## CONCLUSION

The play *Art*, by Yasmina Reza, is about three close male friends and what happens to their relationship when one of them, Serge, spends \$200,000 on a painting. The painting is white, with fine white diagonal lines. Serge's oldest friend Marc is astonished by the purchase. He sees nothing of merit in it, and is offended by Serge's devotion to what seems to him to be a ridiculous purchase. The third friend, Yvan, does not understand the painting but neither does he mind it, thereby annoying Marc. The relationship among the three men unravels over the meaning and worth of the painting, and

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each of them stakes his pride to his point of view. They are simply unable to persuade one another of the value of their respective opinions.

On the tensest evening in the course of this dispute, Yvan's solipsistic hysteria over his pending wedding distracts Serge and Marc from their animosity toward each other and unites them in laughter at Yvan's hyperbolic behaviour. The tension is broken when Serge suddenly throws Marc a blue felt pen and invites him to draw on the painting. Marc cautiously approaches the painting, and slowly draws a little skier with a woolly hat along one of the diagonal white lines. Yvan is stunned; Serge and Marc survey the painting calmly, then decide to go for dinner.

Serge's act in permitting Marc to deface the painting proved to Marc that Serge considered their friendship to be more important than the painting, and the two friends recommitted themselves to rebuilding their relationship with a "trial period." Together, they wash the skier off the painting and then, as the play ends, Marc stands in front of the picture, willing to see it differently now that its significance is in perspective for him. Here are his closing words as he stares at the white canvas:

*Under the white clouds, the snow is falling.*

*You can't see the white clouds, or the snow.*

*Or the cold, or the white glow of the earth.*

*A solitary man glides downhill on his skis.*

*The snow is falling.*

*It falls until the man disappears back into*

*the landscape.*

*My friend Serge, who's one of my oldest friends,*

*has bought a painting.*

*It's a canvas about five foot by four.*

*It represents a man who moves across a space*

*and disappears.*

That new white canvas is the Charter. Different people see different things in it and approach it in different ways: some with devoted passion, some with passionate antipathy, and some with benign curiosity. The acquisition of the Charter is sufficiently recent that we are still going through a "trial period" and building understanding. We will have to learn to see first and then define, rather than the other way around, but we will probably, as we learn to listen and be open to one another's perspective, emerge from the transition with confidence that our decision to acquire the Charter was justified.

In my view, we have added a magnificent acquisition to our democratic gallery. Audiences will continue to debate it for generations, but I have no doubt that time and experience will only increase our appreciation. ❁