

**Remarks of the Right Hon. Beverley McLachlin, P.C.
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DEMOCRACY, THE RULE OF LAW AND JUDICIAL ACTIVISM

Tonight I am going to talk about three things: democracy; the rule of law; and so-called judicial activism.

Why, we may ask, is the juxtaposition of these three subjects interesting to us?

Democracy is uncontroversial. So is the rule of law. What makes them interesting is a tension – real or perceived – between them. That tension is manifested – so the charge goes – in the power exercised by judges which is said to be undemocratic.

I would like to examine with you the relationship between these three ideas; democracy, the rule of law; and the role of judges. I will argue that far from being in tension with democracy, the rule of law is its foundation and support. I will also argue that judges play a key role in our democratic governance. While we must be attentive to the different functions of the executive, the legislative and the judicial in our democracy, my conclusion is that the current state of affairs is fundamentally healthy.

The view that the rule of law is in tension with democracy and that judges are the enemies of democracy rests in assumptions we make sometimes unthinkingly, about democracy, the rule of law and the judiciary. It is my task tonight to question those assumptions.

1. Models of Democracy

First, what do we mean by “democracy”? There are in fact many different visions and versions of democracy. I will focus on Canada’s variety as inherited from England, the world’s oldest uninterrupted democracy, with a side-glance at democracy in the United States, the world’s most powerful democracy.

People who have trouble with the role of judges in democracy typically see democracy solely in terms of capturing the desire of the citizens. In this picture, democracy is what the people want, at any given moment. Because it is too cumbersome to hold snap-shot plebiscites on every issue, we have to content ourselves with electing delegates to the Legislature or to Parliament every four or five years. The assumption is that they will carry out the will of those who elected them, regardless of their personal views. On this view of democracy, courts become suspect. When courts rule that a law made by these representatives is unconstitutional, this is seen as interfering with the peoples’ will and hence undemocratic.

I do not wish to be taken as criticizing this view of democracy, or suggesting that it is invalid. But I wish to make the factual point that it does not describe the democracy we have historically known in Canada, nor what has historically been known in the UK or US.

Democracy as we know it is a more complex affair in which different institutions – including courts and court-like bodies – play different and complementary roles. More specifically, democracy as we know it is both deliberative and rule-bound. Let me explain what I mean by this.

In our democracy, the dominant and usually final voice is that of our elected legislators in Parliament and the provincial legislatures. These representatives, while they often act in accordance with the views and interests of their constituents, are not bound to slavishly vote in accordance with what the majority of them think on a particular issue. In fact, as occurred in the Canadian vote to abolish the death penalty, they may vote contrary to these views. They can weigh what their colleagues and the opposition say in debate and vote accordingly. Or less nobly, they may simply vote the party line. The point is to bring the country's diverse interests and views and values to Parliament and there to deliberate on them. The goal, in the political science phase, is “deliberative democracy”.

As Phillip Pettit puts it:

“It is now widely accepted as an ideal that democracy should be as deliberative as possible. Democracy should not involve a tussle between different interest groups or lobbies in which the numbers matter more than the arguments. And it should not be a system in which the only arguments that matter are those that voters conduct in an attempt to determine where their private or sectional advantage lies. Democracy, it is said, should promote public deliberation among citizens and authorities as to what is best for society as a whole and should elicit decision-making on that basis.”¹

In the democracy we have inherited and still practice in this country, this deliberation takes place within a set of rules, which emerge from our Constitution. Hence we call it constitutional democracy.

2. The Rule of Law

This brings us to the second concept in tonight’s trilogy – the Rule of Law. As with democracy, there are different conceptions of the rule of law. Most basically, the rule of law means two things. First, that laws must be set out in advance so that people can govern themselves accordingly. Second, and most important for our purposes tonight, that all power must be exercised accordingly to law. To put the matter differently, it means that those who hold power agree to abide by rules laid out in advance.

¹ P. Pettit, “Depoliticizing Democracy”, ASSOCIATIONS 7 (1), 2003, 23-36, at p. 23.

A. A Democracy Bound by Rules

In that sense, there is an essential difference between rule of law and rule by law. Countries with no real claim to democracy may have rule by law. One person – or a select group of people – may make the law according to their whim. They may do so arbitrarily, or without announcing the laws beforehand, meting out sanctions when people fail to obey. Rule of law is different. Rule of law means that all exercise of power – whether by the Prime Minister and executive, the elected members of Parliament, or by the most minor functionary – must be authorized by and fall within the bounds prescribed by the law.

In concrete terms, there are a number of consequences that flow from this. First, in order to be legitimate, the exercise of power must find its source in a valid legal rule – in a law passed by our democratically elected Parliament or one of the legislatures and falling within that body's constitutional sphere of power. Second, rules must be general and universal, with one law for all. Universality also protects equality and restrains discrimination. Third, the law must safeguard the fundamental rights and freedoms recognized by our constitution, bearing in mind that these rights and freedoms are themselves subject to limitation for collective social goals where justified. And fourth, there must be an independent institution that ensures that those who exercise power do so in accordance with the rules. In our democracy, that institution is the independent judiciary. I will return to that later.

B. A Constitutional Democracy

In a constitutional democracy, some of those rules which constrain the exercise of power are found in a Constitution. The Legislatures and Parliament are free to pass what laws they choose – but only so long as they stay within the bounds the Constitution sets for them. In Canada, these constitutional limits are of two types. The first set of limits is concerned with the division of powers between the federal government and the provincial governments. These limits have defined our nation at its inception in 1867. They mark the boundaries of legislative action.

The second set of limits was adopted in 1982. These are the limits imposed by the *Charter of Rights and Freedoms*, which guarantees the fundamental rights of all Canadians. Legislation and executive action must conform to the *Charter*.

It is at this point that the argument that democracy is in tension with the rule of law comes to the fore. Constitutional rules, particularly those found in the *Charter*, it is said, may prevent elected officials from voting laws in accordance with the wishes and values of their constituents. Why should the will of the people be thwarted in this way? Why should elected officials be constrained in their efforts to give effect to the will of the people? Isn't there a conflict between the rule of law and democratic rule?

I believe that there is no such conflict, but before I explain why this is so, I must say two things. The first point – which may not persuade but nevertheless must be made – is that the power of elected representatives has suffered limits for quite some time now. Limits imposed by the *Constitution* are nothing new. Parliament has never been able to vote laws on a host of subjects assigned to the provinces and vice versa. In the 1930s, for example, Premier Aberhart of Alberta attempted to reform the banking system in the name of the people who had elected his government. No matter how much those people wanted him and his elected representatives to do this, the government of Alberta could not, simply because banking is a power that belongs to the federal Parliament, not the provincial legislatures.

But, it is said, the limits imposed by the *Charter* are different, because no government can enact laws contrary to its provisions. If a provincial law is invalidated as beyond provincial powers, the people can turn to their elected representatives in the Federal Parliament. By contrast, it is argued, when a law is invalidated for non-compliance with the *Charter*, there is no recourse. Again, there is a simple, although perhaps unsatisfying, answer. Under the notwithstanding clause found in s. 33 of the Constitution, Parliament and the legislatures can override almost all *Charter* provisions except those that guarantee fundamental democratic rights, mobility rights, and linguistic rights.

This said, let me return to the question I asked earlier, somewhat rhetorically: Why is it a good idea for elected representatives to limit their own power in this way? How do constitutional constraints fit with democracy? This brings us to the most important point. The

reason why liberal nations enact constitutional bills of rights – and most have done so – is that the bills are seen as fundamentally contributing to democracy and supporting democracy as we understand it.

Guarantees of rights like the *Charter* contribute to democratic governance in three ways.

First, they protect individual citizens against abuse and excess of power. This is as true for democracies as for other forms of government. It was the reason for *Magna Carta* in 1215. This was also the reason for the US Bill of Rights. Constitutional rights guarantees provide safeguards against the tyranny of the majority and the tyranny of the elite.

In a second and related way, Bills of Rights contribute to democracy by protecting and giving voice to the interests of minority groups within a democracy and hence contribute to all views getting heard in the dialogue of deliberative democracy. In this way, rights guarantees contribute to stability. The fact is, we live in a diverse multi-cultural society, containing a host of different views and voices. For an effective and stable democracy in which all participants feel they have a stake and a voice, it is necessary to find ways for minorities to bring what they have to offer to the table. Deliberative democracy in a diverse multi-cultural society is all about balance between the collective interest and individual desires.

The third contribution that the Constitution, generally, and Bills of Rights, in particular make is to protect the long-term values upon which our nation is founded against short-term

expediency – values like democracy, freedom of expression, freedom of association, freedom of religion, liberty and protection against arbitrary detention, and equality. History teaches us, sadly, that these values may be unduly trammelled for short-term or popular goals. Their protection in a Bill of Rights like the *Charter* does not mean they will not be challenged – they can be and are. It does not mean they will not be attenuated - again, they can be and are. It means that they must be brought into the balance – into the dialogue of democratic deliberation - and that, one may argue, is a good thing for democracy.

In subjecting the exercise of their power to constitutional constraints, decision-makers in a democracy recognize the significance of these long-term values, and the risk that they might be otherwise forgotten in the pursuit of short-term, political goals. These long-term values are the values on which a country is founded – the commonly shared commitments and values that Dworkin calls the “community’s constitutional morality”. These values are reflected in the country’s Constitution and historic practices.

In Canada, the values are found in the BNA Act 1867 and the Constitution Act 1982 which introduced the *Charter of Rights and Freedoms*. But the written constitution is only the most apparent expression of our constitutional morality. Underlying the written Constitution are the fundamental principles and assumptions derived from our historical experience. The Supreme Court identified four such values in the Secession Reference²: the democratic principle; the federal principle; constitutionalism and the rule of law; and respect for minorities.

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

These are the principles which all Canadians share – the principles upon which our country is based – our “common law”. In them we find the common reference points by which we work out the short-term differences that divide us.

Our common commitment to these values is vital to our continuance as a nation. Let us make no mistake: in our complex multi-cultural society, we have short-term differences and we always will have on a host of issues. And let us make no mistake: if we are to continue to live together in peace and harmony we must have a viable way of working these differences out. It is not good enough to silence diversity, or to ignore it. We must listen to it and take it into account in the decision-making processes of deliberative democracy if we are to continue to live together successfully.

In short, there is no conflict between the rule of law and democracy. Constitutional constraints support rather than detract from Canadian democracy in the three ways I have discussed. They permits minority and unpopular views to be taken into account. They promote long-term societal stability. And they help to ensure that the country remains true to the long-term values upon which it is built.

3. The Role of Judges

A. Independent Arbiters as Complementary Institutions

So far I have described a particular form of democracy, founded on the rule of law and constrained by constitutional values and principles. I have suggested that there are good reasons for elected representatives to subject their own powers to such constraints. Parliamentarians strive to enact laws that fully comply with these constitutional constraints, and to give effect to our long-term values. Indeed, decision-making by elected representatives, who reflect the diverse views held throughout the country, is the most important way in which Canadians work out their differences. Essential and effective as it is, the decision-making processes of elected representatives alone are not enough. Every once in a while, these processes may give primacy to short-term goals over long-term values. They may not consistently afford an effective voice to less powerful individuals and groups. And they may eventually give primacy to particular elites. As Pettit concludes:

“...individuals or groupings who believe that power is not being exercised in the common interest – not being guided by public reasons – must be in a position to challenge a government decision, arguing with some prospect of success that it is not well supported by public reasons in the community and should therefore be amended or rejected.”³

³ P. Pettit, *supra* note 1, at p.33.

So we need more. We need complementary institutions. We need independent arbiters. Indeed, it is essential to a system of constitutional democracy that there be an institution that decides whether those who hold power are playing by the rules that they set for themselves, an institution that decides when a controversial decision or action is within or outside the bounds of the Constitution . In Canada, judges perform that role.

This brings us to the third aspect of our subject tonight, the role of the Courts and the judges in democracy. What is the role of the Courts?

As we all know, the most fundamental task of the courts is to decide disputes between citizens and between citizens and their governments. In the democratic constitutional context these disputes concern the division of powers, and the individual's relationship to the state. Can the federal government make me register my firearms? Who can vote? Are government family benefits payable to same-sex couple? When can the government lock me up and when must it tell my family or let me see a lawyer? Is the state obliged to provide basic welfare or specific medical benefits?

These are but a sampling of the kind of issues that have been and continue to make their way before the courts. The process generally gets started by a citizen who comes forward and says: "I have an issue" . Sometimes it gets started by a government that comes forward and says: "We have a question". It may be a question about a law, or about an executive act of government, or about the ambit of individual rights vis-à-vis the state.

Is this undemocratic? On the contrary, I would argue that it is highly democratic. The citizen is given a voice in governance, a role to play, however humble. And the citizen is given a process, a means of seeking redress. At the end of the day, even if she loses, she can say, “I had my day in court; this is a democracy.”

Such initiatives proceed through various stages. There is a trial. Sometimes there is an appeal. On very important issues, the case may go to the Supreme Court of Canada. Other individuals, groups, Attorneys General, and government agencies join in as interveners, sometimes supporting, sometimes opposing the initial decision. There follows a reasoned, peaceful debate about the pros and cons of the issue. The academics write about it. The press reports it. People discuss it. A conversation gets going. The court makes the ruling. Often the court supports the government’s view. Sometimes it doesn’t. Where it doesn’t the government changes the practice or alters the law – taking into account the debates that have gone on and the views that have emerged along the way.

What I have been describing is a process of discussion. It is a messy process. It takes time and money. But it is a democratic process. It is a way of getting important ideas into the democratic debate. It is a peaceful way of working out the myriad accommodations that allow the members of our complex multi-religious multi-cultural society to live together in harmony.

So far, I have described the particular form of democracy that is embodied in our Constitution, and the significance of the principle of the Rule of Law in Canada. I have also

tried to show that a Charter or Bill of Rights does not undermine democracy, but rather contributes to democratic governance in multi-faceted ways. Finally, I have suggested that impartial arbiters are necessary, and that their presence contributes to the process of democratic and peaceful resolution of our differences. I think it is fair to say that these ideas are not overly controversial.

B. The Charge of Judicial Activism

But, it is said, the model has gone off the rails recently. Over the past few months, there has been a lot of talk about judges and their role in Canadian public life. Much of that talk has not been favourable. Some say that judges are not simply acting as arbiters, applying the Constitution and making sure that decision-makers abide by the rules. Some critics suggest that judges have too much power. Some say that judges are now deciding issues that should not be decided by them, but by our elected representatives. Some even say that judges have hijacked our democratic institutions. Let me turn in closing to that more controversial question.

Debating the role of judges within our democratic state is important and legitimate. I don't mean to suggest for a second that it is inappropriate to be critical of the decisions made by judges in Canada, or to express strong sentiments about the respective roles of judges and legislative assemblies. It is a sign of health of our democratic institutions that citizens of Canada can freely express their opinion on these issues.

Nevertheless it is crucial that this public debate on the current state of our democratic institutions rest on the soundest of foundations, and that the realities of our constitutional regime be addressed for what they truly are. I'd like to give expression to some of those realities, lest they be misunderstood or misrepresented. I want to make three statements about the role of judges in Canada, and I hope that they can help Canadians formulate their own views about the contribution of judges to our life together as citizens.

The first statement is this: Giving effect to the Constitution is not a simple matter. Before judges can apply it, they must give meaning to it. This may sound surprising, so let me explain what I mean.

Like many of you, I read a few months ago that seven in ten Canadians agree it should be up to Parliament and Provincial Legislatures, not the courts, to make laws in Canada. I'm surprised that the proportion is not higher. Indeed, the basic allocation of responsibilities between elected representatives and the judges is that the former adopt legislation that implements our collective aspirations, while the latter interpret and apply it when they are asked to do so. This is a simple, straightforward idea. Some critics of the courts have relied on this basic idea to challenge what they see as "judicial activism". Judges, they say, should not manipulate the Constitution to thwart the will of elected representatives. They should apply the law and the Constitution, not make it.

This simple idea needs to be qualified, because in many ways, judges do more than *apply* laws within our legal system. First, judges were making law long before the *Charter*; incremental law-making is firmly rooted in the common law tradition. Second, in the constitutional area, judges are required by the Canadian Constitution to strike down any law that is unconstitutional. Obviously, this is a role that takes them well beyond the ordinary application of laws enacted by legislative assemblies, but it is still tantamount to the application of law - only, in this case, the law that is being applied is the Constitution. What does this application of the Constitution entail?

In truth, the words of the Constitution did not, and could not, anticipate everything. Some provisions, such as section 15 which guarantees the right to equality, are explicitly open-ended. They call on judges to go beyond the written text as part of their mandate. Under section 15, for instance, the prohibition of discrimination explicitly goes beyond the list of grounds identified by politicians when the Charter was enacted in 1982, to cover other, unwritten but analogous grounds of discrimination. Judges are thus called upon to fill the gap, and those unwritten portions of the Constitution, to be identified by judges, are part and parcel of the Constitution. Likewise, judges must give precise and clear meaning to text that by necessity is framed in terms of broad principles rather than explicit and narrow rules. As long as law is expressed through the inherently imprecise medium of human language, judges will be required to give meaning to legal text. There is quite some distance between this process of interpretation, which is an ordinary and inevitable dimension of judicial decision-making, and the suggestion that judges have expanded the scope of their power by reading the Constitution

in fanciful ways, inventing new rights along the way, writing into the Constitution words that are not there, and were not intended to be there.

When a law is struck down by a court, it is an unfortunate and momentous event. Judges are conscious of its significance. They consider it with great care, weighing the respect that is owed to popular will against the fundamental values expressed in the Constitution. They act with deference to Parliament's choices on social programs, on where to draw the line between conflicting rights, and on matters that may involve public expenditure. And when they find that a statute violates fundamental rights, they choose the least intrusive remedies. Courts are also required by law to declare invalid the *smallest portion* of the statute possible. Under article 52 of the Constitution, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, *to the extent of the inconsistency*, of no force or effect." In other words, judges must find ways to give effect to the law wherever possible. Where the court is satisfied that this is what the legislator would have done, it may read a statute in such a way as to avoid a conflict with the Charter and the Constitution. Some have said that this is tantamount to rewriting the law, that judges should not be doing this. But to strike down a law entirely may in fact be to work much greater changes in the law than reading it in a manner that is consistent with fundamental rights. The aim in each case is to fashion the remedy which will bring the law into harmony with the Constitution and preserve the legislators' intent to the greatest degree possible.

In summary, applying the Constitution, and the law more generally, is not a simple, straightforward task. The task of judges requires them to interpret and give meaning to the Constitution. But they must go about this task – and I believe they do – with appropriate reserve and respect for the pre-eminent role of Parliament and the legislature.

Let me turn to the second statement regarding the power of judges in our constitutional democracy. The second statement is this: Judges do not exercise this power of their own initiative.

I said earlier that judges have the duty and the power to strike down legislation that is unconstitutional. I must add that it is a power that they can only exercise when they are asked to do so. Citizens who think a law violates their constitutional rights can challenge it in court. Governments can also ask courts to review the constitutional validity of an Act, or ask that the courts address a particular constitutional question, as has happened recently in the matter of same-sex marriages. But no judge can take it upon himself or herself to evaluate the constitutional validity of a piece of legislation.

It is in this context that one must assess the claim that judges are becoming more and more activist, occupying the ground abandoned by legislative assemblies, or hijacking democratic debate. Judges deal with cases as they appear before them. They do not and cannot pursue an agenda for social reform. The initiative lies elsewhere.

As evidence that the Supreme Court of Canada, at least, is becoming more and more activist, the Fraser Institute has pointed out that claimants have been successful in more than 60% of the Charter challenges before the Court this year. It is true that this is the highest rate of success in a decade. But it is also true that half of these cases involve not challenges to legislation, but claims against government actors for unconstitutional activity, such as abusive police action. When considering challenges to legislation resting on constitutional grounds, claimants were successful in only one out of three cases. That proportion is consistent with the average for the past decade. The Supreme Court of Canada is not becoming more or less “activist”. Rather, it is dealing with the important challenges that are presented before it, in the order in which they appear. There will be more in some year, less in others. In the Fall Term of 2003, only four out of thirty one cases involve constitutional challenges. There may be many more in the next term. Those that are meritorious will be successful. Others will not. It is pointless to look for trends. There are none.

Let me turn in closing to the final, and perhaps most important statement. I have said that judges are required by the Constitution to strike down legislation which violates constitutional rights, and I have explained that judges have no initiative in this respect. The third statement is this: In performing this important and difficult task, judges are required by the most fundamental principles of our legal tradition to remain independent and impartial. Judges are not beholden to any particular interest or political party, much less to the prime minister who may have appointed them. Judges have personal opinions and values, of course, but the very

essence of their professional life is to consciously set aside those preferences, and to decide according to the law and nothing else.

It is neither disingenuous nor naive to believe, as I do, that judges in Canada take this imperative most seriously. The continued confidence of the public that judges are acting independently and impartially, and are not slaves of the rich and the powerful, is one of the most precious assets of a democratic state. The suggestion that judges ever disregard their obligation to rule in accordance with the law, that they decide on the basis of their subjective preference, undermines this confidence, and should not be made lightly. The suggestion that judges are pawns in elaborate political games or serve the aims of one side or the other of the political spectrum is equally destructive, and equally false.

CONCLUSION

Where then do we arrive at the end of our exploration of democracy, the rule of law and judicial activism?

It seems to me the following may be said:

1. Democracy is more complex than is sometimes thought; it is a system in which elected legislatures, whose role is primary, are complemented by other institutions, including the courts. The courts are part of this democratic structure, not its enemy.

2. The Rule of Law requires that all power be exercised in accordance with the Constitution. It is the role of the courts, when called upon, to rule whether power – even the power held by Parliament and the legislatures – has been exercised legally. In this way the rule of law is preserved and minority voices allowed to enter the dialogue of deliberative democracy.

3. Finally, on the charge of judicial activism, the reality of our democracy is that while courts must act with great deference and respect for the legislative and executive branches, it is in the nature of our democracy, that from time to time, when called on by citizens to judge and when principle so dictates, they can and must declare legislation or executive acts to be unconstitutional.

They can and must, not only apply the law, but interpret it. We should neither fear this nor condemn this. We must rather be vigilant to maintain the strength of all the branches of democracy – legislative, executive, and judicial.