JUDGES AS LEGISLATORS: NOT WHETHER BUT HOW

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Although judicial legislation has always been an important feature of the legal system, it is not often acknowledged publicly. This has meant that the proper limits of the process, and the means by which it can be carried out most effectively, have not received due attention from legal writers. This article addresses those questions. It examines the reasons judges make laws, the reasons for their reluctance to admit publicly that they do so, the formal and functional constraints that should govern their law-making, and some procedures by which the process may be assisted and improved.

I. INTRODUCTION

Many years ago there was an eccentric professor of psychology at what is now the University of Winnipeg but was then a very small, very proper, church-affiliated institution known as United College, who was noted for dramatic opening statements whenever he spoke in public. He is alleged to have begun one presentation, on child psychology to a staid audience of parents, with the words: "I masturbate. You masturbate. We all masturbate."

The topic of this article, like that which the psychology professor chose to discuss, is one that those who are involved (judges and lawyers in this case) often deny, and generally don't like to talk about in public. Yet everyone familiar with the legal system is as conscious of the existence and importance of judicial legislation as most people are of the subject about which the professor spoke. If examples were thought necessary, they could be provided in abundance: the 1966 public statement by the House of Lords that it would no longer be bound by its own precedents;[1] the Supreme Court of Canada's ruling in *R.* v. *Big M Drug Mart Ltd.*[2] that Lord's Day legislation infringes freedom of religion, though it had previously decided to the contrary[3]; the same Court's earlier decision that non-pecuniary damages should be restricted to a maximum of $100,000[4]; the decision of the Alberta Supreme Court, Appellate Division, that telephone harassment constitutes private nuisance[5]; the ruling of Mr. Justice Henry of the Ontario High Court of Justice that there is an actionable tort of "appropriation of personality"[6]; and so on. Lawyers and judges do not require exhaustive documentation of judicial law-making; most of them participate in it on a regular basis. A judge addressing the topic of this article to his or her colleagues would encounter little dissent (though perhaps some uneasiness) by commencing in the manner of the psychology professor: "I legislate. You legislate. We all legislate."

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1. [1966] 3 All E.R. 77. *See*: A. Paterson, *The Law Lords* (1982) 146, *ff.*
2. (1985) 18 D.L.R. (4th) 321 (S.C.C.).
3. *Robertson & Rosetanni* v. *The Queen* (1964) 41 D.L.R. (2d) 485 (S.C.C.).
4. *Andrews* v. *Grand & Toy Ltd.* (1978) 83 D.L.R. (3d) 452 (S.C.C.). The ceiling was expressed in 1978 dollars, of course.
5. *Motherwell* v. *Motherwell* (1977) 73 D.L.R. (3d) 62 (Alta. S.C., App. D.).
6. *Athans* v. *Canadian Adventure Camps Ltd.* (1978) 80 D.L.R. (3d) 583 (Ont. H.C.).

The purpose of the article is to discuss not whether, but how: the *manner* in which judicial legislation is carried out — the appropriate extent and the appropriate means. It will assist that discussion, however, to consider, initially, the reasons for judicial legislation and for the reluctance of judges and lawyers to admit its existence.

II. WHY JUDGES MAKE LAW

A. SOMEONE HAS TO

Someone has to. There is a huge and growing need for amendment, elaboration, and supplement of existing laws to meet the needs of an expanding and ever more complex Canadian society, and of changes brought to that society by technological innovation and shifting economic and political forces. Legal changes necessitated by the photocopy machine, the video recorder, and the home computer are far reaching, for example. Even more so is the impact on family law and related fields of the birth control pill and the sexual revolution it spawned. New business practices constantly call for new laws or modifications of old ones. Political unrest in various parts of the world, and concomitant population migrations, give rise, directly or indirectly, to a vast array of legal problems, ranging from measures to deal with terrorism and pirating to improved immigration laws and human rights protection for those who flee to Canada. The re-awakening of ancestoral pride by our native population gives rise to a plethora of complicated legal questions related to aboriginal rights. And, of course, the adoption of the Canadian Charter of Rights and Freedoms has opened for re-examination a breathtaking number of laws, and of both legal and governmental practices.

The reforms made necessary by these constantly shifting winds of social, political, and technological change vary greatly in form and scope. While some call for radical root-and-branch surgery, many others involve only minor modifications. No single institution is appropriate to carry out all the reforms required.

B. LEGISLATORS CAN'T DO IT ALL

The elected legislators have a leadership role to play, but they cannot realistically cope with more than a few of the most important, direction setting reforms. There are at least four reasons why legislators can do no more. First, there is simply not enough time to do more. Law reform by statute is normally an extremely time-consuming process. Even before a bill is introduced, a huge amount of preparatory work is required on the part of departmental officials, consultants, drafting staff, and members of the Cabinet or a Cabinet committee. Once it appears on the order paper, it requires the attention of all members of the legislative body, in theory, and of a large number of them in practice. The Opposition may find it necessary to have the proposal studied by a committee of its own. And the three-stage legislative examination of the bill can be very lengthy.

Second, politicians do not have the incentive to undertake law reform on a large scale. Their primary concerns are governmental and political, and it is understandable that most of their energies are directed to those matters

rather than to apolitical law-making. The law reform measures that do get legislative attention tend to be those with significant political overtones. The great bulk of needed law reform does not fall into that category.

The shortcomings of legislators as law reformers may be illustrated by a few examples. At the same time the Supreme Court of Canada "legislated" so decisively on the question of a monetary ceiling for non-pecuniary losses in the famous "damages trilogy," it declined to do so in regard to another matter: the award of periodic payments of damages compensating periodic losses.[7] While leaving no doubt that it saw an urgent need for a periodic payment scheme, the Court chose to draw that need to the attention of Canada's elected legislators rather than to reform the law itself. That was in 1978, but no Canadian legislature has yet considered any such reform, and the prospect of periodic payments is as remote as ever. Several years ago Manitoba's Minister responsible for the environment, who had granted an operating permit to a rather noisome feed lot, became annoyed when neighbours subsequently succeeded in a nuisance action against the operator of the lot. Rather than suggesting that the decision, which was legally doubtful, be appealed, the Minister persuaded his Government colleagues to pass a statute abolishing the common law of nuisance altogether for odours emanating from businesses.[8] That rip in Manitoba's legal fabric remains today, though there has been a recent recommendation by the Law Reform Commission that it be mended. The same government, which had been delaying the introduction of a planned general revision of its Human Rights Act for several years on the ground that legislative time has not been available, suddenly announced that it would enact a special statute prohibiting a company owned by one of its own Crown corporations violating the Human Rights Act in its operations abroad.[9] The proposal was a response to a current political embarrassment which could probably have been dealt with as effectively, and more swiftly, by a word in the ear of the Crown corporation's management.

Examples of this kind, which could be multiplied by anyone who has toiled for long in the law reform vineyards, do not deny the primacy of the legislators' responsibility for reform. They do show, however, that political considerations often complicate and sometimes frustrate the process.

Third, legislators, as a group, lack the legal expertise, and adequate access to such expertise, to carry out sophisticated and consistent ongoing law reform. It is true that many of them are lawyers, but few of them have the experience or time to be well versed in the details of the many small fields of law that require amendment from time to time. It is also true that at least legislators on the governmental side have access to qualified research and drafting staffs, but the constant clamour for governmental financial restraint ensures that those staffs are not even sufficient to keep up to the normal drafting demands of government, without regard to systematic legislative reform.

7. N. 4 above at 458.

8. Nuisance Act, C.C.S.M., c. N120. The decision which prompted the legislation was *Lisoway v. Springfield Hog Ranch*, Man. Q.B., per Wilson J., Nov. 24, 1975, unreported, 24 Nov. 1975, (Man. Q.B.), per Wilson J.

9. Winnipeg Free Press, Aug. 11, 1986.

Finally, there is one vital area of law — constitutional law — where the legislatures have no role to play at all. This is an especially important consideration now that the Canadian Charter of Rights and Freedoms has constitutionalized so many individual rights and freedoms. The demanding task of putting legal flesh on the Charter's bones is the sole responsibility of judicial law-makers.

While it is probable that the legislative process could be improved in ways that would make it a more effective vehicle for legal change, it would be utterly unrealistic to expect that the elected representatives of the people can ever be directly involved in more than a fraction of the constant updating the legal system requires. At best, the legislators will provide a lead — by enacting major new pieces of legislation that suggest a general policy direction to which other participants in the law reform process should be sensitive; and a safeguard against judicial error — by standing ready to intervene in cases where they believe the judges have gone wrong.

C. ADMINISTRATIVE AGENCIES HAVE A RESTRICTED ROLE

Law reform by regulation or other administrative edict can be important, but it cannot be counted on to perform more than a small portion of the overall task. The process is, generally speaking, more expeditious than law-making by legislatures, and in some areas administrators can bring an expertise to the subject that elected legislators cannot. The limitations are severe, however. Time and resources are as scarce for administrators as they are for legislators; the range of their jurisdiction is narrowly confined by the terms of their enabling statute; and they are, for the most part, reluctant to act without having been given instructions on the matter in question by the elected politicians. The great bulk of the "lawyers law" that needs day-to-day revision lies outside the concern of administrative agencies.

D. LAW REFORM AGENCIES PLAY ONLY A SUPPORTING ROLE

Although there was optimism expressed in many quarters during the era when law reform commissions sprang into existence in most Canadian jurisdictions that they would bring about an orderly process for continuous revision of lawyers' law, that expectation has not been realized.[10] This is attributable, in part, to the limited resources which governments have been willing to make available to their law reform agencies. The basic reason, however, is the fact that law reform commissions do not change laws; they merely recommend change to the legislators. This means that however thorough and sophisticated a commission's proposals for reform might be they are at the mercy of the slow and politically skewed legislative process discussed above.

10. *See, for example*: M. Kerr, "Law Reform in Changing Times" (1980) 96 L.Q.R. 515; S. Cretney, "The Politics of Law Reform — A View From the Inside" (1985) 48 M.L.R. 493; P. M. North, "Law Reform: Processes & Problems" (1985) 101 L.Q.R. 338.

E. THIS LEAVES THE JUDGES

This leaves the judges. Legal reforms that are beyond the capacity or inclination of the other institutions must be accomplished by the courts or by no one.

This is not to say that judges are legislators only by default. Even apart from law-making under the Charter, there are certain types of reform for which judges are inherently very well suited. Much of the law they administer, particularly on the civil side, was created by judges in the first place. Many of those laws lend themselves to revision by the same gradual situation-by-situation evolution that brought them into existence. Judges trained in both of Canada's major legal traditions know (despite what they may sometimes say) that they are not expected to be automatons. If they did not anticipate playing a creative role, both as agents of justice and as cultivators of the jurisprudential garden, many of our most talented lawyers would probably refuse to accept judicial appointments.

In some respects, the judicial process is well designed to carry out small-scale law reform. Time constraints are not as serious as those faced by elected legislators, and the political dimension is absent. The questions that arise tend to be relatively small and manageable, and, because they involve "lawyers' law" they are often matters about which the judge possesses some initial expertise and is able, through familiar research, to acquire more. The adversarial process provides a means by which the judge can be assisted by thorough evidence and argument on both sides of the question.

There are also significant weaknesses in the process, from a law reform point of view, however. Sometimes there are more than two sides to the story, and forceful presentation of the opposing views of the adversaries who appear before the judge may divert his or her attention from other equally important, but unrepresented, considerations. It may also be the case that the issue placed before the judge is only a small part of a much larger problem or complex of problems, and that the solution determined by the judge, who may not be able to see the forest for the trees, may not be suitable in the larger perspective. An aspect of the latter difficulty is the fact that law reform carried out through the judicial process sometimes suffers for taking account of only lawyers' points of view. There is always a risk of professional inbreeding when law reform is entrusted exclusively to those who have been trained in the law, and share the discipline's many preconceptions.

III. RELUCTANCE TO ACKNOWLEDGE JUDICIAL LEGISLATION

The legal community doesn't like to admit that judges are lawmakers, at least not in public. Why not? There appear to be several inter-related reasons.

The most extreme rationale is that if members of the public became aware that unelected judges were making laws, they might insist on introducing democracy to the process by requiring judges to be elected to office. In view of the example of American State courts, that possibility cannot be totally rejected. The risk seems extremely remote, however. The

threats which the electoral system imposes to judicial independence are well known, and it is highly unlikely that any Canadian government aware of the American experience would seriously entertain the creation of an elected judiciary. It is also probable that any attempt to institute such a system in Canada would be held to be unconstitutional. This would certainly be the case with respect to judges of the superior, district, and county courts, who are required by section 96 of the Constitution Act, 1867 to be appointed by the Governor General. (In the case of Superior Court judges, section 99, which bestows tenure during good behaviour, would present a second constitutional obstacle.) With respect to inferior courts of criminal jurisdiction, section 11(d) of the Canadian Charter of Rights and Freedoms, which calls for "an independent and impartial tribunal", might well be construed to provide comparable protection, and it is possible that sections 7 and 15 construed in light of the preambular reference to "rule of law", might be invoked in the case of inferior courts of civil jurisdiction. In short, the likelihood that judicial elections would ever materialize in Canada is negligible.

Nevertheless, say the advocates of silence, if the extent of judicial law-making should become common knowledge judges and courts would find themselves the targets of public criticism, much of it intemperate and ill-informed. Their decisions would be savaged by the media as thoroughly as those of elected politicians. I think this concern is exaggerated. Courts and judges are the subject of much public criticism already, without unduly detrimental consequences. While it may be true that a more forthright acknowledgement of the courts' law-making capacity would invite greater scrutiny and criticism of the policy assumptions employed in carrying out the task, it does not follow that the scrutiny would be hurtful. Public criticism may result in the detection of bias or error, and this is desirable. To reverse the old adage, justice must not only be seen to be done — it must also be done.

On the other hand, a court's consistency and impartiality are likely to become evident over time if it functions continuously in the full light of public surveillance, and that is also a good thing. Another advantage of public criticism of judicial law-making is that it provides a partial offset for the exaggerated emphasis that judicial law reform sometimes places on lawyerly values. It offers an opportunity for the expression of possibly countervailing societal values, and alerts the legislature to the need, if one exists, to review the judicial legislation in a broader context.

Some opponents of full disclosure are worried that intense public scrutiny and criticism of the judiciary will breed disrespect for the institution that will in turn conduce to disobedience of the law. Both of the assumptions implicit in that assertion (that criticism leads to loss of respect, and that loss of respect leads to disobedience) are open to doubt. The second assumption, though frequently voiced, is particularly dubious in this context, since most judicial law reform involves minor fine-tuning of the system rather than the establishment of new obligations that anyone is called upon to obey. Even if the courts were to do something as major as, for example, permitting damage awards to be paid by periodic reviewable installments, public obedience would not be a factor. In any event, public criticism need not lead to disrespect, as the careers of such "public" judges

as Lord Denning,[11] Lewis St. George Stubbs,[12] Jules Deschênes,[13] Thomas Berger,[14] and Jack Sissons,[15] demonstrate. It is probable that more disrespect among the public is generated by the hypocrisy of simultaneously denying and exercising a law-making power than by acknowledging openly that judges have a certain legislative role to play, and informing those who are affected about the factors that are taken into account in the process.

Another reason for the court's reluctance to admit their law-making role may be the wish not to be called upon to perform it too frequently. Since consistency and relative certainty are important to law, judges understandably wish to restrict their legislative endeavours to situations where existing law is manifestly incomplete or unsatisfactory. They do not want to encourage lawyers' attempts to set aside every legal provision their clients find inconvenient. There are, moreover, major constraints on the ability of judges to legislate. They are all bound (subject to constitutional considerations) by the principle of legislative supremacy, and lower courts are substantially constrained by the rules of precedent. Even more important, the judges' law-making powers are subject to the limitations which derive from the accepted division of labour among the judicial, legislative, and administrative arms of government in a "free and democratic society". Rather than attempting to explain all these often very subtle restrictions on their legislative powers, some judges may find it easier to deny a law-making role altogether. When they do so, however, it becomes difficult to justify the occasions when judicial law reform is called for. It would, I submit, be wiser to be frank from the outset about both their legislative capacity and its many formal and conventional limitations.

Offsetting all the arguments for being discreet about judicial creativity is the fact that when law-making is done clandestinely there is not an adequate opportunity by those who have an interest in the matter to ensure that all relevant factors are addressed. I find Lord Denning's discussion in *Spartan Steel and Alloys Ltd.* v. *Martin and Co. Ltd.*[16] of the reasons for denying compensation for economic losses flowing to third parties from the negligent damaging of a public power source to be unpersuasive, but the fact that he was willing to articulate the "policy" reasons that underlay his decision makes it possible for me and others who disagree with the decision to explain why we find it wrong, and for another court or a legislature to reconsider the question with the advantage of access to all the factors a fine judge considered relevant. The refusal of Mr. Justice Ritchie, on behalf of a majority of the Supreme Court of Canada, in *Rivtow Marine Ltd.* v. *Washington Ironworks et. al.*[17] to "follow the sometimes winding paths leading to the formulation of a 'policy decision'" when considering a

11. *See*: J. L. Jowell & J. P. W. B. McAuslan (Eds.), *Lord Denning: The Judge & the Law* (1984).
12. *See*: Dale Gibson and Lee Gibson, *Substantial Justice: Law & Lawyers in Manitoba, 1670-1970* (1972) 258, *ff.*; L. St. G. Stubbs, *A Majority of One* (1983).
13. *See*: Jules Deschênes, *The Sword & the Scales*, (1979).
14. *See*: T. R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (1981).
15. *See*: J. S. Sissons, *Judge of the Far North* (1968).
16. [1972] 3 All E.R. 557 (C.A.).
17. (1973) 40 D.L.R. (3d) 530 at 547 (S.C.C.).

similar matter, is in my opinion one of the reasons that the law relating to recovery for economic losses in Canada remains so confused.

IV. LIMITS OF JUDICIAL LAW-MAKING

A. FORMAL CONSTRAINTS

The law-making power of judges is seriously restricted by two fundamental principles of our legal system: legislative supremacy, and *stare decisis*.

Except in constitutional matters, the legislators have the last word: *legislative supremacy*. If politicians have chosen to enact a law in statutory form in unambiguous language, the courts have no power to interfere, however ill-advised they may regard the provision. If the Parliament of Canada or a provincial legislature disapproves of some judicial ruling or judicial reform, they may override the judiciary by legislation. When the British Government was ordered by the House of Lords to pay a vast sum of compensation for destroying a large oil refinery as a defense measure in World War II, it responded by causing Parliament to pass legislation abrogating the effect of the decision.[18] The only restraints on this power of legislative override are those created by the constitution and by the difficulty of expressing legislation in absolutely unequivocal language.

While the principle of legislative supremacy hobbles judicial law-making in one sense, it frees it in another sense. Knowing that the elected representatives always have the power to "correct" judicial legislation that they regard as mistaken or undesirable, the courts should feel no compunction about being creative.

Lower courts are bound by the principle of *stare decisis* to follow, to some extent, the precedents established by higher courts within the same judicial hierarchy. Although the principle is highly elastic, and most lawyers and judges can find ways of getting around many uncomfortable precedents, this is, nevertheless, a significant constraint. Trial courts do not have the authority to correct their courts of appeal or the Supreme Court of Canada on what they regard as erroneous principles of law. Even if they avoid applying the law in question to the case before them, it will usually be by means of "distinguishing", or some other technique that avoids a frontal attack on the higher court's ruling. While this may do justice in the individual case, and may have the effect of shrinking the ambit of an undesirable decision, the process does not always serve the interest of long-term law reform very well. If the grounds chosen for distinguishing the precedent decision are narrowly technical and irrational, as they sometimes are, the result may be positively detrimental. In *Best* v. *Samuel Fox*,[19] for example, the common law rule that a husband could sue for tortious injury to his wife which deprived him of her consortium, though regarded by the House of Lords as an obsolete remnant of a bygone age, was held, nevertheless, to be too well entrenched in precedent to be

18. *Burmah Oil* v. *Lord Advocate* [1964] 2 All E.R. 348 (H.L.). For a comment on the ensuing legislation see: (1965) 28 M.L.R. 524. For similar Canadian legislation see: *An Act Respecting The K.V.P. Company Limited*, S.O. 1950, c. 33.

19. *Best* v. *Samuel Fox* [1952] A.C. 716 (H.L.).

judicially abolished; yet capable of being "distinguished" and denied to wives who found themselves in a similar situation. As that case, being a decision of the British House of Lords, demonstrated, there was a time when even courts of last resort regarded themselves as bound by their own precedents. Fortunately, both the House of Lords and the Supreme Court of Canada now take a different view of their freedom from precedent.[20]

Does the fact that only courts of last resort are free from the fetters of precedent mean that lower level courts should eschew the law-making function? No. Lower courts stand in a similar relation to the Supreme Court of Canada as that court stands to the Parliament of Canada and provincial legislatures: they may ultimately be over-ruled, but until they are they should exercise their full responsibilities to the best of their abilities. The nine judges of the Supreme Court of Canada are overworked, and cannot conceivably deal with more than a small fraction of the judicial law reform Canada requires. Even the issues concerning which leave to appeal is sought are severely limited by the cost considerations and other practical factors that deter litigants from proceeding. Intermediate courts of appeal are in a somewhat similar situation. To the extent that the formal rules of precedent permit, therefore, both trial courts and intermediate courts of appeal must be prepared to exercise their legislative powers where appropriate, knowing that if they go astray their decisions can be corrected by higher judicial authority, as well as by the politicians.

There are several purposes to be served by full participation of lower level tribunals in the process of judicial law-making. Even a trial level decision may be so persuasive that it is widely accepted and followed without the need for review by higher authority. This appears to be the case, for example, with Mr. Justice Krever's well-known ruling in *Demarco* v. *Ungaro* [21] that Canadian barristers are not immune from legal liability for professional negligence. If appealed, the lower level decision provides the appellate court with a helpful "first draft", which it can analyze carefully in light of counsel's arguments, pro and con, and accept, modify, or reject. It is highly unlikely that the House of Lords' epochal decision about strict liability in *Rylands* v. *Fletcher* would have been made without the benefit of Mr. Justice Blackburn's splendid judgment in the Exchequer Chamber.[22] Whether or not appealed, well-reasoned law-making decisions at the lower levels serve the important function of stimulating debate within the legal community — and sometimes the broader community — which can directly and indirectly inform the ultimate decision on the issue by higher authority. The discussion of such difficult questions as whether the Charter binds the private sector, and whether it permits those whose rights would be affected by otherwise valid legislation to be exempted from the legislation, has, for example, been enriched by the judgment of Mr. Justice Rowbotham in *R.* v. *Lerke* [23] and that of the Ontario Court of

20. Re House of Lords, see note 1 above. Re Supreme Court of Canada, see: G. Bale, "Casting Off the Mooring Ropes of Binding Precedent" (1980) 58 *Can. Bar Rev.* 255; *Vetrovec* v. *The Queen* (1982) 136 D.L.R. (3d) 89 (S.C.C.), per Dickson J. at 105.

21. (1979) 95 D.L.R. (3d) 385 (Ont. H.C.J.).

22. (1868) L.R. 3 H.L. 330 (H.L.); (1866) 1 Ex. 265 at 277, *ff.* (Ex. Ch.).

23. (1984) 11 D.L.R. (4th) 185 (Alta. Q.B.); *affd.* on other grounds: (1986) 25 D.L.R. (4th) 403 (Alta. C.A.).

Appeal in *R.* v. *Videoflicks Ltd.*[24] Even a dissenting opinion, such as that of Denning L. J. in *Candler* v. *Crane Christmas & Co.*[25] on the subject of negligent mis-statements, can sometimes provide the fuel for future reform. A unique contribution that trial courts make to judicial law reform is to gather the expert evidence that is often crucial to an understanding of both the need for and the impact of a particular proposed reform.

B. FUNCTIONAL CONSTRAINTS

In addition to the formal constraints of legislative supremacy and stare decisis are a number of conventional limitations on judicial law-making that derive from an understanding of the most efficacious division of governmental functions in a democracy like Canada. These conventional or functional constraints are much more difficult to describe and apply than the formal restrictions. They vary from one situation to another, from one era to another, and, to some extent, from one court to another. It is here that it first becomes obvious that judicial law-making is an "art".

In attempting to identify the functional factors that constrain the courts' power to make laws, it will be helpful to bear in mind both the reasons for which judges make and modify laws in the first place, and the reasons for their reluctance to acknowledge that function.

The *root principle*, from which most of the others stem, is that courts should not attempt to legislate on matters that can be more appropriately dealt with by the legislature or some other agency, and are realistically likely to be dealt with by the legislature or other agency.

The first group of corollaries springing from that root principle relate to the *substantive nature* of the proposed reform. To be appropriate for judicial legislation, the matter must be a question of "lawyers' law". This means that the reform must be capable of implementation by the courts, must not necessitate the creation of a complex administrative bureaucracy, and must not require the allocation of major public funding. It does *not* mean that considerations of social policy should be absent from the determination; such considerations must be taken into account in all intelligent law reform, judicial or legislative. Those fields of law which are still indebted to a common law inheritance, or, in Quebec, are embodied in the Civil Code, would certainly qualify as "lawyers' law", but as Professor Calabresi has pointed out, there is also a growing need for courts to take responsibility for the ongoing nurture of much statute-based law.[26]

Another group of corollories concern *process*. To be appropriate for judicial legislation a question must be such that judicial techniques will be sufficient to ensure that all relevant factors and points of view are taken into account and fairly weighed before a determination is made. If the interests of the parties to the litigation and those who can reasonably be expected to intervene do not exhaust the major interests that would be affected by a change in the law, the appropriateness of judicial legislation is doubtful. If, as in the unsuccessful attempt to have the courts outlaw

24. (1984) 14 D.L.R. (4th) 10 (Ont. C.A.).

25. [1951] 2 K.B. 164, at 174 (C.A.). The Denning dissent was eventually adopted by the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller* [1964] A.C. 465 (H.L.).

26. G. Calabresi, *A Common Law For The Age of Statutes* (1982).

Cruise missile testing in Canada, a decision requires consideration of imponderable or secret factors that do not lend themselves to presentation and testing through the judicial process, the same conclusion is indicated.[27]

One must also consider the *Peripheral consequences* of undertaking the proposed reform when deciding on the appropriateness of judicial action. Would the change proposed, because of its highly controversial nature, immerse the court in more criticism, as an institution, than the legal improvement is worth? Judicial legislation relating to some aspects of obscenity or abortion might fall into that category, for instance. Another very significant factor is the impact of the proposed change on the immediate parties to the litigation. If one of the parties to the action has a legitimate "reliance interest" by reason of having depended upon the previous law as a basis for his or her conduct, it might be unfair to change the law immediately. Fairness could well depend upon how much prior warning the parties and their advisors had, though obiter dicta and other means, that a change was in the wind.[28]

Finally, it is important to determine the *likelihood of action being taken by the legislature* or other law-making agency to deal with the reform in question. If the prospect of legislative reform is good, the courts should bide their time. If, however, the legislative branch has had ample opportunity to consider the question, and has not done so (as is now the case, nine years after the damages trilogy, with respect to periodic payment of tort damages) the courts should be willing to take the initiative themselves.

Some might contend that legislative silence can be as meaningful in this regard as legislative enactment. If a legislature has had a problem drawn to its attention, and has declined to do anything about it, it might be argued that it should be deemed to have made a decision confirming the status quo, and that the courts should respect that decision. Given the crowded nature of the legislators' agendas and the profusion of political distractions, that is a highly unrealistic attitude. Even in situations where a proposed reform can be shown to have been brought to the attention of a legislative body, through the report of a law reform commission or royal commission, for example, or perhaps even through the introduction and defeat of a private member's bill, I would submit that refusal to enact the reform should no more be seen as a decision about the merits of reform than a refusal of leave to appeal by the Supreme Court of Canada should be seen as a decision on the merits of the issue sought to be appealed. There are simply too many non-substantive reasons for failing to act to justify attributing the failure to substantive reasons. Even a statement by a representative of the government in power disagreeing with the substance of the proposed reform should not be conclusive, since every legislature is animated by many minds. In short, courts would be unwise to anticipate an exercise of legislative supremacy. If a legal change appears to be needed, and is otherwise appropriate for judicial action, I submit that the courts

27. *Operation Dismantle Inc.* v. *R.* (1985) 18 D.L.R. (4th) 481 (S.C.C.).

28. *See*: M. Friedland, "Prospective & Retrospective Judicial Law-making" (1974) 24 *V.T.L.J.* 170; A.G.L. Nicol, "Prospective Overruling — A New Device in English Courts?" (1976) 39 M.L.R. 542.

should act on their own best judgment and leave to the legislators the decision to exercise their supremacy if they disagree with the judges' actions.

Are the functional constraints on judicial law-making the same in the case of constitutional law as in the case of other fields? For the most part, the governing principles are the same. However, because alternate means of constitutional law-making are so much more limited (being restricted to formal constitutional amendment) the situations in which judicial legislation is appropriate will be much more frequent. It should be remembered that the amending formula established by the Constitution Act, 1982,[29] is much more rigid than that which previously prevailed; consequently, a refusal by the courts to provide a necessary amendment or elaboration of constitutional law may well mean that the amendment or elaboration will never be made.

In the constitutional field, as in other areas of contemplated judicial law-making, the courts would be unwise to attempt to anticipate the politicians. Although a court might fear that a particular ruling under the Canadian Charter of Rights and Freedoms, for example, might goad the legislators into employing section 33 of the Charter to override the ruling, it should nevertheless proceed in accordance with its understanding of the meaning of the Charter, and let the politicians do what they will.

C. NO CONSTRAINTS ON COMMENTARY

Courts are not altogether helpless when faced with what they regard as insurmountable constraints on their legislative powers in matters where they deem reform to be essential. They can, if they choose, draw attention by way of obiter dicta commentary to the need for legislative action. Reference has already been made to the Supreme Court of Canada's call for a statutory scheme of reviewable damage awards. The Court made a similar, though milder, plea, in *LaPierre* v. *A.G. Quebec*,[30] for legislative establishment of a principle of no-fault compensation for the victims of governmental actions taken for the benefit of the community generally.

Although sometimes successful, such judicial prods seldom cause politicians to spring into immediate action. It took many years for the parliamentarians to get around to abolishing the anomalous rules relating to negligent deprivation of consortium about which the House of Lords complained in *Best* v. *Fox*, and both periodic damage awards and no-fault liability for governmental acts seem as far from realization as they were before the Supreme Court of Canada spoke. Therefore, while judges who feel constrained to reject a legislative role should be encouraged to make obiter dicta recommendations to the legislators, they should be aware that their recommendations to the legislators are not very likely to be acted upon. Knowing that, they may reconsider their own inability to act. It is important that they at least realize that in such circumstances their refusal to legislate becomes, in effect, an act of legislation perpetuating the status quo. This is not to deny that courts must respect the real constraints on

29. Constitution Act, 1982, Part V.

30. (1985) 16 D.L.R. (4th) 554 at 576 (S.C.C.).

their law-making powers. But it is important that judges should realize when considering the extent of the limitations on their powers, that if they have an option at all they cannot escape being "activists" — either by deed by by default.

V. HELPING THE COURTS TO LEGISLATE

In situations where courts decide that it is appropriate for them to exercise a law-making function, they should be equipped to carry out that function as effectively as possible. This calls for a liberal use of some of their procedural and other resources, as well, perhaps, as the development of some new procedures and approaches.

A. STANDING

When laws are changed, many diverse, and sometimes unexpected, interests are affected. Those who are responsible for the change must be alive to these ramifications. Since the interests in question are best understood and explained by those who are affected themselves, it is desirable that courts involved in reform of the law permit the representatives of affected interests to participate in the litigation. Most Canadian courts, at least those of civil jurisdiction, are empowered to permit such participation, whether as party, intervenor, or amicus curiae. For the most part, however, the procedural rules that grant this power do so in discretionary terms. There are many examples, especially in the constitutional context, of generous exercise of this discretion.[31] There have been, on the other hand, some disturbing recent instances of courts refusing to allow important interests to be represented in cases involving novel matters.[32]

Judges are not, for the most part, the initiators of legal ideas. Most judicial innovations are conceived in barristers' craniums (often after intercourse with academic publications). Procedural practices which deprive the courts of exposure to the ideas of counsel representing all significant points of view with respect to a proposed legal change create a risk of ill-advised reform. To minimize this risk, the rules of standing should be generous, both as to their terms and as to their application.

B. EVIDENCE

Effective judicial legislation requires more than good advocacy. It also requires that the court in question be exposed to reliable evidence concerning the need for the proposed change and the effect that it can be expected to have. Law is designed to serve the entire community, not just lawyers and judges; so the evidence which the courts should consider should be drawn, in substantial measure, from those who do not necessarily share the legal profession's pre-suppositions. The courts should

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31. *Eg.*: *Operation Dismantle Inc.* v. *R.* note 27 above. *See*, generally, D. Gibson, *The Law of the Charter: General Principles* (1986) 264, *ff.*

32. Eg.: *Gay Alliance Toward Equality* v. *Vancouver Sun* (1978) 92 D.L.R. (3d) 417 (S.C.C.).

be open to the evidence of a wide range of experts from the social sciences and other relevant disciplines.[33]

On occasion, evidence of relevant public opinion polls may also be helpful. Although my suggestion on a previous occasion that such evidence might be used in connection with section 24(2) of the Canadian Charter of Rights and Freedoms has been criticized by Mr. Justice LeDain, I remain persuaded that if employed carefully, with due regard for their many limitations, public opinion polls constitute a useful resource for judges charged with decisionmaking that is supposed to respond to community needs and reflect community values.[34]

C. THE PROBLEM OF THE BOTTLE NECK

Even if it is agreed that, as submitted above, a large part of judicial law-making must be carried out by the trial courts and intermediate courts of appeal, a crucial task remains for the Supreme Court of Canada. The Court has been hard-pressed to keep up to the work load in recent years, and the advent of the Canadian Charter of Rights and Freedoms has opened a vast new area for the Court to supervise. While the Court has handled its public law responsibilities very well, generally speaking, in the last decade, and has made a splendid beginning on the job of Charter interpretation, private law has been all but abandoned. Successive reviews in the Supreme Court Law Review of the Court's tort decisions, for example, have consistently deplored both the paucity and, in too many cases, the ineptness of such rulings.[35] The Court simply does not have the time to deal adequately with the many private law issues that require attention and also maintain its enviable standard of performance in the public law field. The most recent Supreme Court Law Review commentary, by the present writer, suggests that the problem will not be remedied until the Supreme Court of Canada is increased sufficiently in size to permit multiple bancs, which can divide the labour and thereby give private law more than perfunctory attention.[36] The Court has a constitutional mandate, under section 101 of the Constitution Act 1867, to operate as a "general court of appeal for Canada". It is not fulfilling that mandate satisfactorily with respect to private law at the moment, and this failure leaves the ship of judicial law reform in Canada without a reliable rudder.

D. SUPPORT SERVICES

Most courts lack the research staffs necessary to support extensive judicial law reform. The Supreme Court of Canada and some other courts do have access to skilled research staff, but most judges have to rely upon

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33. *See*: Y.L.J. Fricot, "Evidentiary Issues in Charter Challenges" (1984) 16 *Ottawa L. Rev.* 565; J.G. Richards and G.J. Smith, "Applying the Charter" (1983) 4 Advocates' Quarterly 129, at 142; J.M. Picker, "Evidence of Inequality" in L. Smith (Ed.), *Righting the Balance: Canada's New Equality Rights* (1986) 275.

34. *See*: D. Gibson, *The Law of the Charter: General Principles*, note 31 above, 237 *ff.* Mr. Justice Le Dain's dictum will be found in *R.* v. *Therens* (1985) 18 D.L.R. (4th) 655 at 687-8.

35. D. Gibson, "Developments in Tort Law: The 1983-4 Term", (1985) 7 *Sup. Ct. L. Rev.* 387; L. Klar, "Developments in Tort Law: The 1982-3 Term" (1984) 6 *Sup. Ct. L. Rev.* 309-10.

36. D. Gibson, "Developments in Tort Law: The 1984-85 Term" (1986) 8 *Sup. Ct. L.R.* (forthcoming).

the presentations of counsel, supplemented by such personal research as they can find time for. Fully satisfactory judicial legislation calls for much improved support services for the bulk of Canadian courts.

Thought should also be given to another possiblity. Law Reform Commissions, which have the requisite research expertise, too often employ that expertise in the preparation of reports and proposals addressed to legislators who lack the time or interest to deal with them properly. It might be a much more productive use of Law Reform Commission talents and energies to prepare more proposals designed to be implemented by the courts, rather than by the legislatures. Once we bring ourselves to the point of acknowledging that essential law reform takes place in two arenas — legislative and judicial — it makes sense that the law reform research profession should be servicing both arenas.