THE FUNCTION OF THE LAW*

BORA LASKIN**

Your Honour, Mr. Chancellor, Mr. President, Mr. Chief Justice, Mr. Premier, Dean Fridman, Members of the Board, Members of the Senate, Members of the Bench, Ladies and Gentlemen:

I am thrice honoured this afternoon; first by the conferment of a degree which makes me a member of a vast and respected university community; second, by being presented for the degree by a friend and co-worker, Chief Justice Bruce Smith; and, third, by being associated in this Convocation ceremony with two distinguished friends, Lord Diplock and Professor Wilbur Bowker. It is they and not I who run any risk in this association, because of the privilege accorded me to address this assembly. I commit them, however, only to a sincere expression of appreciation to the Senate of the University of Alberta for admitting us to the fellowship of the University. They stand absolved of any complicity in what I am now about to say.

Professor Bowker's contribution to the prestige of the Faculty of Law has been enormous, both by reason of his own devotion, his teaching and his scholarship, and by reason of his professional concern for maintaining a cordial relationship with the Bench and Bar of this province concurrently with assertion of the Faculty's unity with an independent university.

Lord Diplock, a career judge, now a member of Great Britain's highest court, has on more than one occasion generously shared his learning and his wit with the Bench and Bar of Canada; and the University of Alberta speaks for all of us in recognizing the distinction of my fellow graduand. Although the decisions of the court which he graces are no longer compelling here by reason of authority, they are still influential by the authority of reason.

I am not going to utter a single word of protest against the flattering terms of the citation that the Chief Justice delivered. Any judge of the Supreme Court of Canada would count it an unforgettable day in his life when the head of a provincial appellate court finds him praiseworthy, and proclaims it publicly. I scotch any notion that the Chief Justice had an ulterior motive. If I must find an explanation that does not compromise his reputation for candour and truth, it lies in the tradition of hospitality that is a particular hallmark of this part of Canada.

I am grateful to the Senate of the University of Alberta for giving a judge an opportunity to face members of the public elsewhere than in a courtroom and otherwise than in black robes. It is the institutional fate of a judge to dwell in considerable isolation. The nature of our work demands it, and that scarce commodity "time" commands it. Indeed, now that professors of law, no less than members of the Bar, are busy in the market place, serving on commissions, acting as consultants, doing labour-management arbitration, engaged in various

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field studies, only the judges seem to be left to guard the ivory tower. Perhaps we should put in a take-over bid for the new Law and Legal Research Building whose formal opening we are celebrating.

For myself, particularly, an occasion to return to a university, and to a university law school, is truly a homecoming. It is a homecoming in a personal as well as in an institutional sense, because I renew friendships, some of a quarter century standing, with notable teachers who have served and are serving this university's Faculty of Law; one of them, Professor Alex Smith, is, I am happy to say, on this platform.

Too much of my life has been spent in academe to have that large part of it submerged by a mere seven years as a judge. You do me great honour, therefore, in allowing me to have my academic roots watered and nourished by exposure to this community of the intellect.

There are two complementary ways to salute the completion and formal opening of an educational edifice. One is to treat the building as the realization of a hope or ambition; the other is to regard it as the beginning of a fresh adventure. I am certain I surprise no one, least of all myself, in saying that it is the fresh adventure that I would emphasize. When the educational facility is a building for teaching, study and research in law, it is well to remind ourselves of the ideal of our democratic system that the temple of the law can only retain public devotion if it is at the same time a mirror of justice.

As a judge who was once a law professor, or as a one-time law professor who has become a judge, I share the conviction that so many other judges and law professors avow, that, important as it is to know what the law is, it is at least equally important to know what the law is for. The distinction that I draw is between a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that sees it as purposive, related to our social and economic conditions, and serving ends that express the character of our organized society.

This is not an easy prescription, especially at a time of social upheaval and of re-examination of many of our social premises. At the best or most tranquil of times, the law's pace tends to be slower than society's march. Law is generally responsive and not anticipatory; and this comports with a pragmatism that looks for the development of a consensus as a foundation for legal innovation. Where the courts are concerned, they, unlike the Legislature, cannot initiate, but must wait for litigation to unfold before they can make new law; and such litigation may be long in coming.

This is one answer that I would give to those who may be impatient with or critical of a seeming failure of our courts to come to grips with urgent problems of social conflict. There is another answer which, in my opinion, touches fundamental issues in the relations of courts and the public, and in the relations of courts and legislatures. I sense that there are public expectations about the capacity of the judicial system to solve social problems that the system cannot meet. I suspect, although in all honesty I do not know, that the reason for looking to the courts may be because of the failure of other social institutions to remedy alleged social ills. If that be the case, it is a compliment to the judicial establishment which it may be churlish to reject. At the

same time, the public must be made aware of the limitations of adjudication. Unless the Legislature provides the framework for supervising public regulatory policies, as, for example, in municipal planning and zoning, the courts can deal, generally speaking, only with individual controversies, with complaints by A against B. They can deal with the nuisance of pollution as between neighbours but cannot prescribe a clean environment for the public benefit unless there is some constitutional or legislative basis for the prescription.

Our system of representative, responsible government lays upon the legislatures, and the executives that guide the legislatures, and not upon the courts, the duty to regulate or spend for the public welfare. Comparisons ought not to be too freely or too easily made with the United States. The involvement of its courts, and especially of the Supreme Court, in the formulation of social policy is a product of two factors; first, the constitutional imperatives of the American Bill of Rights; and, second, even more important, the fact that there are found in many American municipalities and in other governmental units, by-laws and regulations that provide the fodder upon which judicial action is sustained. Although Canadian constitutional imperatives do not provide in any way as broad a legal base for judicial supervision of governmental policy, even in the limited area of supervision that exists, there has been little occasion to exercise that power because the Canadian record in the matter of discriminatory legislation of the kind that has attracted the strictures of the Supreme Court of the United States has been relatively clean.

I would not have it, or have you believe, that I see the courts as dependent entirely on prior legislative action before serving contemporary social interests. There are areas of the law that have been uniquely the product of evolutionary adjudication, and in which standards fixed in individual cases have wider social and economic implications. Safety standards in machinery and equipment have been influenced by court decisions in particular cases; hazardous products, dangerous to user or consumer, have been the subject of admonitory decisions imposing substantial damages for injuries resulting from their use. Other examples abound in the law of contract and in the law of property.

However we view the pace of the law, or our ultimate dependence primarily upon the Legislature to respond to social needs or social demands, there are basic values in our society which are essential to orderly and peaceful change and to the very climate of responsiveness of the political authorities that we look to the law to assure. In this area the courts have played a historic and courageous role. Chief among these values which our law has promoted and which our courts have protected, both against private and public invasion, are the political liberties of utterance, oral and written, assembly and association, conscience and religion. Our society is anchored as well on openness of our courts and of our legislative assemblies underpinned by a universal franchise, on fair procedure before adjudicative agencies, be they courts or other tribunals, which, at least, means a right to be heard or to make representations before being condemned criminally or made liable civilly. In the administration of our criminal law, special protections have developed for an accused such as the rule against forced

confessions, the presumption of innocence, and the privilege against self-crimination. These values are not absolutes, but a heavy burden lies on any legislative assembly or court to justify any attenuation of them. The Canadian Bill of Rights, operative on the federal level, has given special sanctity to these values, short of constitutional entrenchment.

Those that I have mentioned are values of long standing. They have provided a shield for free elections, indeed for representative government, and for peaceful, orderly shifts in governmental power. They stand, accordingly, on a basis of reasonableness, which precludes resort to intimidation, whether it be by threatening speech or by aggressive physical confrontation.

The dilemma of democracy is an old one, that of giving full play to its values while maintaining the stability and integrity of its institutions, especially legislatures and courts, through which those values are monitored. The dilemma has been sharpened over the past two decades by the concurrence of new social claims for the political and legal systems of the country to satisfy and of an aggressive assertiveness of organized groups in support of those claims. There is danger to our society if the merits of particular social demands, about which people may differ, come to be determined by the size of demonstrations mounted in their support. We turn our backs on reason and rational discussion and uncoerced choice, upon which our political system rests, when the realization of a group demand is sought through mass confrontation. Even granting the desirability of the social end for which organized pressure is brought to bear, can we ignore the character of the means through which it is pursued? Should we not remind ourselves continually that we live by the means?

What I have just said relates to one horn of the democratic dilemma; I intend it as a caution against the abuse of liberty and not as a justification for the abuse of authority. I engage here the other horn of the dilemma in recognizing that it is not a sufficient answer to a claim of unswerving and uncritical support of our legal institutions to say merely that the law protects free speech but not threatening ultimatum, that it protects peaceful demonstration but not physical obstruction, that it distinguishes between persuasion and physical intimidation, between exhortation and incitement to violence. The fact is that these distinctions are not easy to draw; and if there is to be confidence in the law under which they must be made, there must be confidence not only in the integrity but also in the social awareness of those who promulgate and those who minister the law; and there must be confidence that the ministrations are motivated by a commitment to the liberties of which I spoke, albeit they are pushed to the limit of the law.

It is the crossing of that limit, where it is self-evident or where it is established by proof, that should be a matter of general concern and, indeed, general reprobation. Those in authority, whether in a university, in a municipality, in a province or in the country as a whole, are undoubtedly under a duty to receive petitions for redress of grievances put forward by the petitioners; they are not under any duty to submit to exercise of force through which redress for grievances may be demanded. Still less should they be objects of invasion to compel reconsideration of claims or demands that have been rejected.

I do not, in what I have said, seek to discourage persistence. Those to whom our society appears blemished should be free of fear that their protests will be punished. But the price of that freedom must be the same for all of us. We cannot have a selective policy that would permit some causes supported by some groups to be pursued by intimidation or by force, and others that would have to depend for their realization on rational argument and peaceful persuasion. If the ballot-box, and the supports provided by a free press and by peaceful assemblies or meetings, should seem to some or many of us to be too slow a means of achieving social betterment, is disruption and intimidation, and its likely successor, terrorism, to be preferred?

The answer must certainly be "no" if there is to be any continuing assurance of civility in our social relationships. We do not face in Canada situations that exist elsewhere where the government itself has cast the law and the protections of the law aside, or where it has come to power by force. Impatience or dissatisfaction in Canada with social and economic policy or with the law and its administration, gives no rational ground to think in terms of such an alternative.

For most of us there is light, and we must strive to have it for all. Within the framework of our fundamental values, there is considerable room for passion in expressing social concern about injustice and inequity, and for communicating and manifesting that concern to those in the seats of authority. I recall that when I was a law student I heard an eminent counsel say to a judge whose interest in the proceedings was obviously lagging, "My Lord, you are paid to listen". It is a proposition worthy of the notice of all who are in the public service, whether in legislative assembly, government department or court; it is a necessary correlative to give substance to the right of petition.

I hope that the new Law and Legal Research Building of this university will also be a listening post, sensitive to catch the moods of the people of this province, indeed of this country; that those who inhabit the building will find outside it as well as inside it abundant stimulus for their work; but that they will continue, in this new building as in the old, to bring independent judgment into the service that they give.