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TOWARDS JUDICIAL ACCOUNTABILITY — ARE THE EXCUSES GETTING LAMER?

Allan C. Hutchinson*

Chief Justice Lamer leaves no doubt about his intentions. The title gives it all away — “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change”. His paper is an encomium for conservative values. If there were any lingering doubts, the fact that the only legal theorist that he calls in aid of his thesis is A.V. Dicey clinches it: whatever his historical reputation, Dicey’s contemporary standing is as a quaint apologist for an undemocratic and elitist form of politics. In his defence of the Rule of Law and judicial independence, the Chief Justice wants to ensure that recent changes in the constitutional and political landscape “do not place the critically important constitutional value of judicial independence at risk.”¹ For him, the Rule of Law and judicial independence are the glue that holds together the fragile democratic compact between citizens and the state. Because “the primary obligation of the judiciary is not to the majority of the electors but to the law”, the need for judicial independence is paramount and “the notion of accountability is fundamentally inconsistent with [its] maintenance”.² All in all, it is a rousing affirmation of traditional values in the name of constitutional necessity — judges are most independent when they are least accountable.

I maintain that this thesis is not only wrong, but dangerous. In this short comment, I intend to challenge the Chief Justice’s defence of judicial independence or, at least, a his particular version of it. I will do this by looking at his discussion of judicial education and judicial discipline. However, let me be clear from the beginning — I am not against judicial independence, far from it. My contention is that there is a need for a robust practice of judicial independence, but that Lamer’s account misses the mark by a long shot. Indeed, his insistence that judicial independence is antithetical to increased judicial accountability is wrong-headed; it smacks of special pleading by judges for judges. On the contrary, I maintain that, once there is a richer and more informed understanding of what judicial independence demands, the best way to achieve it is through a vigorous increase in the types of various procedures — compulsory education and lay participation in judicial discipline, for example — available to effect judicial accountability. If there is to be a serious respect for and public confidence in judicial independence, it will be with more and not less judicial accountability.

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¹A. Lamer, “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996) 45 U.N.B.L.J. 3 at 12.

²*ibid.* at 13.

I

The development of judicial training and continuing education programmes – what the Chief Justice calls “social context education”³ – is of recent vintage. The hope of many of its proponents is not to indoctrinate the judiciary with a set of politically correct values. At their best, such programmes will open judicial minds, not close them; the aim is to encourage critical thinking rather than to peddle official orthodoxy. Indeed, Lamer himself notes that judicial education “is designed to make judges both more aware of and better able to respond to the many social, cultural, economic and other differences that exist in the highly pluralistic society in which we perform our important duties.”⁴ However, he argues that, if such initiatives are to be mandatory for all judges and to be designed by non-judges, they “must be vigorously resisted” because they would be “counterproductive” and “would threaten judicial independence in a fundamental way.”⁵ Apart from the difficulties of enforcing mandatory attendance by judges, the Chief Justice maintains that any dependence on outside bodies will impair the judiciary’s independence and, “more importantly, this lack of independence will almost certainly have an adverse effect on the perception, if not the reality, of the judiciary’s impartiality.”⁶

My contention is that, far from impairing the perception and/or reality of judicial impartiality, such mandatory and external programmes will actually enhance it. The Chief Justice has the argument completely the wrong way round. Without a vigorous, compulsory and continuing series of educational initiatives, the judiciary is in grave danger not only of losing touch with a changing political and social reality, but also of fuelling the perception and the reality that judges are not to be entrusted with the great powers (and responsibilities) that they presently possess. Lamer’s implicit invocation of a besieged and mismaligned judiciary that struggles to mete out justice in an impartial and non-partisan way is distorted. While judicial indiscretions are not so few and so trivial as Lamer urges nor are the workings of the Judicial Council as efficient, it is the deeper and less obvious ideological orientation of the judges that is the cause for critical concern and the object of civic improvement. Contrary to Lamer’s views, the problem is not that the presently independent judge will fall captive to the agenda of certain pressure groups. They already and always have done. Rather, it is the rarely acknowledged and often unappreciated fact that the judiciary shares a social outlook and political affinity with the established interests of the status quo. This general orientation is all the more effective because it comes in the trappings of the objective and the

³*Ibid.* at 17.

⁴*Ibid.*

⁵*Ibid.*

⁶*Ibid.* at 18.

obvious. It is the taken-for-granted partial ground on which they take their impartial stands.

While the vast majority of judges perform a difficult task with integrity and in good faith, they fail to accept that their independence is only one kind of dependence on a necessarily political (but not politically necessary) set of values and assumptions. Sharing a similar frame of reference, judges are not obliged to confront or question it in their working environment. Unfortunately, lawyers tend to pander to judges, not upbraid them for their failings. Also, unfortunately, so do many academics. In any other context, law professors would not accept such weak or self-serving arguments. Put at its crudest, the largely male, white, Christian, middle-aged and propertied judiciary tend to resist or reject any progressive view that challenges too squarely the shibboleths of a moderate conservatism. They are long on lip-service to the formal virtues of equality, but short on commitment to their substantive application. This is understandable, yet not justifiable as a non-political posture. It is to the Chief Justice's credit that he makes that conservative commitment clear and open.

In Lamer's lament, there is a discernible nostalgia for an older and better practice of republican politics in which lawyers played a less controversial and more professional part. Sad to report, it is not only too late, but it has never been possible for judges to fulfil their responsibilities in a neutral or non-political way: law is simply politics in more sophisticated garb. More than that, neutrality is not even a desirable or healthy ideal in a society which aspires to be truly democratic. Black-robed pro-consuls have no place in modern politics. Of course, the democratic status of judges has always been suspect. The fragility of their legitimacy arises not so much from their exercise of power, but more from the nagging doubts about the warrant under which they wield it. Lawyers must claim to speak and act in a voice other than their own; they must justify themselves by reference to an authority beyond themselves – the law. As the Chief Justice puts it, “[t]he primary obligation of the judiciary is not to the majority of the electors but to the law”.⁷ Yet, the fact is that we can never simply ‘apply the law’ because the question of the relevant and precise law and what applying it entails remains irresolvably contestable. Once it is conceded – as it must be – that law does not lend itself to formulaic application or robotic predictability, the matter of judgment and values rears its inconvenient head. Law does not speak for itself, it has to be spoken for by judges.

If independence or neutrality is to mean anything, it must mean a recognition of one's own predispositions and a constant willingness to re-interrogate them. The only difference between judges with politics and those without is that the former know what their politics are. The Chief Justice's refusal to even

⁷*Ibid.* at 13.

acknowledge that 'applying the law' is a contested and fraught practice is disappointing. Of course, judges must be above the day-to-day shenanigans of partisan politics, but it is mistaken to insist that they must be or even can be completely free of ideological predispositions and political values. It is more intellectually honest and more politically astute to accept that judges make their decisions because of, and not in spite of, their values and perspectives. Legal rules and principles are not unimportant nor are they irrelevant to any decision made, but they are never determinative in their own right and are never outside the play of political power. Accordingly, the identity and social vision of the judge is crucial. Insofar as we continue to turn to courts on issues of social justice, it is vital that more attention be paid to the ideological make-up of judges and that the myths of judicial objectivity and neutrality be exploded. There is no place to which judges may escape to make impersonal and strongly detached judgments – especially not the illusory ground of *Law* itself.

Continuing education and public criticism are the lifeblood of a healthy democratic society. Without such spurs, the polity's servants begin to think and act as though they are its masters. Like Lamer, they become tempted to portray themselves and their judicial colleagues as the misunderstood defenders of the constitutional faith and the reluctant saviours of an ungrateful public. The Chief Justice misses the whole point of the drive to make the judicial crystal palace more transparent to public scrutiny and more accountable to popular expectations. To resist comment and education in the name of judicial independence and wisdom is a very dubious ploy. Far from making the case against judicial education, Lamer's speech is the best evidence of the pressing need for continuing legal education. It is essential that judges be obliged to undergo further and continuing education. In an important sense, they have already been brain-washed by their formal legal training and their informal education of a life in the law. The best that occasional seminars can hope to do is to counter-act the worst excesses of that enduring process.

Requiring public officials to attend seminars on violence against women or racism cannot be construed, as many judges seem to do, as a campaign of political correctness. At their best, criticism and education can combine to prod a reluctant judiciary to bring out for scrutiny their basic operating assumptions and to evaluate them in light of the demands of a society that professes to be democratic and egalitarian in its practices and aspirations. With the privilege of power comes the duty of responsibility. When judges refuse to participate in such programs, it is time to re-consider their appropriateness to remain in office – a closed mind is next to a bigoted one. When such illiberal attitudes are championed by the Chief Justice of Canada, it is an occasion for profound regret, especially when it is done in the false name of democratic necessity.

II

In his defence of judicial independence, the other matter on which the Chief Justice concentrates is lay participation in the disciplinary process for judicial misconduct. After sketching the present process in which complaints against judges are heard and resolved almost entirely by other judges, he is at pains to emphasize the seriousness of such inquiries and how important it is to deal with complaints in a public and effective manner. Nevertheless, the Chief Justice draws the line at lay participation in such proceedings. He finds “unpersuasive” the argument that the inclusion of laypersons “will improve the quality of the decisions made” by enhancing the “visibility” of the process and “thereby increas[ing] public confidence that the complaints are being dealt with properly.”⁸ For him, the present openness of hearings, the opportunity for public comment and the possibility of legislative action are more than adequate to meet the demands for judicial accountability. Indeed, he goes so far as to claim that “lay participation in the process would be little more than window-dressing.”⁹

At the heart of his defence of the status quo and his rejection of lay participation is, of course, an assertion that such reforms would imperil judicial independence. Arguing that the inclusion of laypersons and other related matters “would be unsound as a matter of constitutional principle”, the Chief Justice contends that it will also “run the risk of inhibiting at least some judges from making the unpopular rulings that all of us are required to make from time to time [and] place at risk the sense of independence of mind that is critically important to a judiciary in a society based on the rule of law.”¹⁰ This defence bears all the hallmarks of the same misplaced optimism and unconvincing arguments that the Chief Justice used to resist the extension of judicial education. In particular, he elides entirely the controversial issue of whether so-called constitutional principle is ascertainable apart from its judicial elaboration: he assumes the very matter that his arguments are intended to demonstrate. However, his resort to judicial independence to stem further judicial accountability in the form of lay participation illuminates further the constrained and partial notion of ‘judicial independence’ on which Lamer relies.

There are at least two problems with this stance – one formal and the other substantive. The more formal objection is that, even if the Chief Justice was right (and I do not think that he is) in his assessment that lay participation “will [not] improve the quality of the decisions made”,¹¹ there is ample reason to encourage

⁸*Ibid.* at 15.

⁹*Ibid.* at 16.

¹⁰*Ibid.* at 16-17.

¹¹*Ibid.* at 15.

such involvement as a matter of “public confidence”.¹² While it is true that various methods already exist – public hearings, written reasons, etc. – to ensure that judicial discipline is not meted out behind closed doors and without explanation, these innovations are not beyond improvement or increase. Moreover, the introduction of lay participation will only improve the extent to which the disciplinary process is seen to be open and will enhance “public confidence that the complaints are being dealt with properly.”¹³ If Lamer is genuinely concerned with the legitimacy, felt and real, of the judicial discipline process, he need not be worried that a requirement of lay participation will jeopardize the process’ perceived efficacy or acceptability. On the contrary, lay participation can only help to make good on the democratic deficit that an independent and unaccountable judiciary inevitably creates. Indeed, even if, as the Chief Justice dismissively suggests, “lay participation in the process would be little more than window-dressing”,¹⁴ it is no bad thing for that.

However, I do not believe that lay participation in disciplinary proceedings will be mere “window-dressing” or that it “will [not] improve the quality of the decisions made.” The second and more substantive problem with Lamer’s case against lay participation is that it fails to appreciate the significant contribution that public involvement can make. Insofar as such participation was reduced to “little more than window-dressing,” it would be attributable as much to the fault of the cliquish habits of the judiciary as to any failing or inability on the part of lay participants. Judges fail to realize that their view of the world is simply one among many. With an almost aristocratic mien, many assume that no one else could really understand the proper workings of the judicial world or mind. This, of course, is nonsense. Indeed, it might well be that laypersons would actually bring some genuine insight and new perspectives into the judicial and broader legal communities. It would serve to break the circle of professional and insular attitudes that encourages judges to hold on to the conceit that they not only know what is best, but do so as a matter of natural and non-partial commonsense. Again, such non-professional involvement is not a threat to judicial independence, but an insurance against allegations that judicial independence is nothing more than institutional protection for judges’ dependent view of what amounts to independence. As such, the objective of lay participation is not to undermine judicial independence, but to allow judges to understand and gain a less parochial view of their own activities and sensibilities.

¹²*Ibid.*

¹³*Ibid.*

¹⁴*Ibid.* at 16.

III

As Lamer opines, “[j]udicial independence is not an end in itself.”¹⁵ However, one could be forgiven for thinking that the overall force of the Chief Justice’s lecture is to cultivate the contrary opinion that it was – that judicial independence exists for the independent benefit of the judiciary. The Chief Justice leaves the distinct and intended impression that the judges are and ought to remain the best and only guarantors of their institutional independence. Like doctors, judges insist that judges know best what is good for judges and, by implication, the polity at large. For the Chief Justice, continuing education initiatives (or, at least, their compulsory imposition) and lay participation are ephemeral fads that need to be resisted in the name of eternal verities – “Core Values in Times of Change.” Indeed, Lamer chastises his critics by reminding them that “[w]e would do well to bear... in mind [that Canada has succeeded, where many countries have not, in entrenching within its legal system both the rule of law and judicial independence] when, because of changes within our own society, we see these [truly foundational] values threatened... that we must all work hard to preserve intact.”¹⁶

As I hope will be obvious, I believe that such efforts and energies are misplaced. Far from being a worthy call to constitutional arms, the Chief Justice’s passionate plea is borne of complacency; some might even say hubris. Without an appropriate and effective set of checks and balances, judicial independence can easily come to resemble licence – self-serving arguments to justify the exercise of enormous power without constraint or accountability. Judges would not countenance or accept such weak arguments on behalf of independence and against accountability from any other profession or group in society. We should not so indulge judges, especially when it is claimed in the name of democracy or “core values”. If the Rule of Law is to mean anything in a truly democratic society, it must be used as a principled objection to *all* efforts to accrue and insulate official power from democratic scrutiny and legitimate control. It most definitely ought not to be used to shield efforts by judges and lawyers to render themselves beyond the reach of democratic appraisal and accountability. Democracy is ill-served when the theory of the Rule of Law is converted into the practice of the rule of lawyers.

The old saw of Lord Acton is made ever more pertinent by the Chief Justice’s plea for a less accountable judiciary – *all power corrupts and absolute power corrupts absolutely*. Without some robust and realistic popular involvement in judicial education and discipline, the suggestion might arise and receive credence that the judiciary do have something to hide and that there is indeed something

¹⁵*Ibid.* at 7.

¹⁶*Ibid.* at 18.

rotten in the judicial state of Denmark. To respond to such suggestions with righteous indignation, as some judges might be tempted to do, only serves to underline the need for more and not less public participation in the organization of the judicial process. As the Chief Justice is wont to remind Canadians, justice should not only be done, but be seen to be done: this is surely one of the core values of all "core values." Unfortunately, if the Chief Justice has his way, justice would most certainly be less seen to be done and, even more troubling, it might actually be less done.