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Law Reform and the Judiciary's Role

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LAW REFORM AND THE JUDICIARY'S ROLE

By EMMETT M. HALL*

The subject upon which I was invited to deal with, "Law Reform and the Judiciary's Role" is, I am sure, an intriguing one to all students of the law, to law teachers and to academics generally. I must confess to a certain apprehension in speaking to you today. I run the risk that because I happen to be a judge of the Supreme Court of Canada, whatever I say may be interpreted or understood to reflect the thinking of the Court. I have no right to speak for the Court — no one judge has that right — and what I say is personal to me alone. Please be good enough to accord me this freedom.

In preparation for today, I did considerable reading and very little of what I say can be called "original". There is a considerable volume of literature on the subject and I have drawn in particular on my friends Roger Traynor, retired Chief Justice of California, Dr. Mark MacGuigan, M.P., Mr. Justice Laskin and others; a species of plagiarism if you will, but excellent source material.

The subject is one on which opinions may be somewhat fixed. I don't expect to change anyone's opinion, not to the extent in any event as happened in a case some time ago when a woman was called for jury duty and she refused to serve because she said she did not believe in capital punishment. Trying to persuade her, the judge explained: "This is merely a civil case in which a wife is suing her husband because she gave him $1,000 to make the down payment for her on a mink coat and he lost the money in a poker game." "I will serve" she said, "I could be wrong about capital punishment."

Judges may be said to be men who think well of themselves. This was illustrated when Queen Victoria was to attend the opening of the Royal Courts of Justice in 1882. Lord Selborne, the Lord Chancellor, called a meeting of the judges at which the draft of an address to the Queen was being prepared. As submitted, it contained the phrase: "Your Majesty's

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Judges are deeply sensible of their own many shortcomings . . ." He got no further. Jessel, M. R. took strong objection, saying, "I am not conscious of 'many shortcomings' and if I were I should not be fit to sit on the bench." Following a heated exchange, Bowen L. J. suggested a characteristic compromise: "Instead of saying that we are 'deeply sensible of our many shortcomings', why not say that we are 'deeply sensible of the many shortcomings of each other' "?

We judges are sensible of the shortcomings of each other and of our own. It cannot be otherwise. We are reminded of our limitations from time to time by articles in various reviews and elsewhere — so we remain humble to that degree.

In any discussion of reform in Canada by the judiciary, it has to be recognized at the outset that the Canadian situation differs from that of the United States, with its constitutional guarantees, and from that of the United Kingdom where the highest judicial body, the House of Lords, is also a legislative body with Parliament at Westminster answerable only to the electorate for its actions. There is no one in Canada with the power to say as Lord Gardiner did in his capacity as Lord Chancellor on July 26, 1966:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the future development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.[1]

That was a policy statement much the same as the Judicial Committee of the Privy Council had made on occasions in judgments in less dramatic form based on the premise that the Committee was not in law a court but merely advised the Sovereign. A careful reading of Lord Gardiner's statement will show that he was not discarding precedent very substantially but was opening the door somewhat to a less rigid application of the binding effect of precedent.

In a reference to Lord Gardiner's statement in terms of its effect in Canada, Dr. Mark MacGuigan, M.P. has said: "The end of *stare decisis* in its rigid form in Canada is more revolutionary in appearance than in reality, for in large part, both in Canada and in England it has been a protective screen behind which judges legislated in silence and in secrecy."

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[1] Vol. 276, *Parliamentary Debates-House of Lords 1966-67*, at 677.

Any discussion of the role of the Judiciary in law reform necessarily involves a consideration of the use of *stare decisis*. The view a judge takes of *stare decisis* will colour and condition that judge's opinion on the right and obligation to follow precedent or to depart from precedent in any given circumstances or, put another way, to attempt reform or to leave that function to the Legislature.

No one suggests that decided cases ought not to be studied and great consideration given to their persuasive value. There is a fundamental difference between being influenced or persuaded by the reasoning and logic of a prior decision and being bound to follow that decision as a matter of law. In the latter situation it is not the intellectual force of the decision which persuades or even compels acceptance, but it is the rule of law that says the decision must be followed even if repugnant, outdated, or just plainly wrong.

The discussion must also recognize the hierarchy of judicial authority within any given jurisdiction. So in Canada we must be aware of the Courts of Appeal or Appellate Divisions in each of the provinces and territories and of the jurisdiction of the Supreme Court of Canada as the final Court of Appeal for all of Canada in civil and criminal matters. This necessarily involves us in a discussion of what respect one provincial court of appeal should have for the judgments of the other provincial Courts of Appeal and also the extent to which trial courts are or should be bound to follow: (a) the decisions of their own appellate court; and (b) the decisions of appeal courts of other provinces.

The limitations of time available today make anything like a complete review of the subject an impossibility so I must of necessity deal specifically with the role of the Supreme Court of Canada as the apex of the judicial hierarchy in Canada, leaving it to you to apply *mutatis mutandis* what I may say to the trial and appeal courts at the provincial level.

Shortly after 1949 when the Supreme Court of Canada became the final Court of Appeal, the Court began to move away from a rigid application of *stare decisis*.

Before 1950 the Supreme Court of Canada was bound to follow the decisions of the Judicial Committee of the Privy Council though that august body was not so bound. *Vide Robins* v. *National Trust Company*.[2]

However, Rinfret C.J.C. in *Re Storgoff*,[3] in dissent, held that the abolition of appeals to the Privy Council abrogated the binding authority of House of Lords and Privy Council decisions in the criminal law area.

With respect to the binding effect of its own decisions, the Supreme Court of Canada had in 1909 laid down a stringent rule of *stare decisis* in *Stuart* v. *Bank of Montreal*.[4]

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[2] [1927] A.C. 515, [1927] 2 D.L.R. 97.

[3] [1945] S.C.R. 526, [1945] 3 D.L.R. 673, 84 C.C.C.1.

[4] (1909), 41 S.C.R. 516.

Mr. Justice Duff said: "Considerations of public convenience too obvious to require statement . . . make it our duty to apply (*stare decisis*) . . . to the decisions of this Court."[5]

Mr. Justice Anglin said: "Whether it be regarded as final or intermediate, . . . the attitude of this court towards its previous decisions upon questions of law should, in my opinion, be the same."[6]

Fleming v. *Atkinson*[7] is a turning point in the aftermath of the abolition of appeals to the Privy Council.

Then in *R.* v. *George*[8] Cartwright J. (dissenting) said of *stare decisis* in the Supreme Court:

> I do not propose to enter on the question, which since 1949 has been raised from time to time by authors, whether this Court now that it has become the final Court of Appeal for Canada is, as in the case of the House of Lords, bound by its own previous decisions on questions of law, or whether, as in the case of the Judicial Committee or the Supreme Court of the United States, it is free under certain circumstances to reconsider them.[9]

Less than a year after *George,* Cartwright J., delivering the judgment of himself, Ritchie and Spence J.J. said in *Binus* v. *The Queen.*[10]

> I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam,* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons.[11]

The attitude of the Supreme Court toward the treatment of its decisions in provincial courts has been unambiguously stated by Rinfret C.J.C. speaking for the Court in *Woods Manufacturing Co.* v. *The King.*[12]

> Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come from either this Court or from the Judicial Committee.[13]

The last mentioned quote represented the holding of Davey J.A. in *A. G. of Canada* v. *Nykorak.*[14]

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[5] *Id.* at 535.

[6] *Id.* at 548.

[7] [1959] S.C.R. 513, 18 D.L.R. (2d) 81.

[8] [1966] S.C.R. 267, 55 D.L.R. (2d) 386.

[9] *Id.* at 278, 55 D.L.R. (2d) 386 at 395.

[10] [1967] S.C.R. 594, 2 C.R.N.S. 118.

[11] *Id.* at 601, 2 C.R.N.S. at 119.

[12] [1951] S.C.R. 504, [1951] 2 D.L.R. 465.

[13] *Id.* at 515, [1951] 2 D.L.R. 465 at 475.

[14] (1961) 28 D.L.R. (2d) 485.

It is pertinent also to recall Rand J.'s statement in *Reference re The Farm Products Marketing Act*,[15] where he said:

> The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitable presents.[16]

when dealing specifically with the *British North America Act*.

So much for *stare decisis*. It is not now open to question that the Supreme Court of Canada is not now bound rigidly by this doctrine and the way is open to depart from previous decisions. The real issue is the advisability of so doing and the extent to which it should be done. The way is open: should it be used? This brings us to an academic or philosophical consideration of the question.

Although it is clothed in terms to reflect the current vogue, I am not unaware that the question—the role of the judiciary in law reform—is one of the oldest, most controversial and most fundamental ones about the judicial process. But it is appropriate in an era in which all systems are tested and all assumptions are challenged that we continue to struggle with this question, which indeed is never answered for all times.

The question could be variously phrased: do judges make law or merely apply it, should judges pursue a policy of judicial activism, which of course can be either a liberal or conservative posture, or should they pursue a policy of judicial restraint? Is judicial law-making legislative usurpation, or put most simply, what is the function of the judiciary in a modern democratic state? However phrased, the question is likely to test the symbolic strength of our notion of "government of laws and not men" and all the evocations which that phrase raises.

It is often said: legislative power is vested in Parliament, judicial power is vested in the courts; it is for the legislature to make law, it is for the courts to say what the law is, the verb "is" assuming the law's prior existence. Well, of course, it is incorrect to so pose the question if one expects to engage in an intelligent discussion of the court's function. It is wrong because the question assumes that legislative power is the antithesis of judicial power when in reality those words cannot be defined with enough precision to make them in all cases, or even perhaps in a majority of cases, distinguishable. By simply labelling processes and then repeating the labels we do not make a clear separation between those processes. I would suggest that there is

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[15] [1957] S.C.R. 198, 7 D.L.R. (2d) 257.

[16] *Id.* at 212-3, 7 D.L.R. (2d) 257 at 271-2.

most often only a difference of degree but not of kind between making the law and applying it.

Admitting then we are not discussing absolutes, but only a vague concept about the methods used by an institution to reach a decision, I am surprised at the seriousness of the debate that still erupts between scholars and practitioners over not only whether judges should contribute to the evolution of law but also whether they actually do. Of course we do, and that should be clear to all. I can tell you that the judiciary does contribute to changing the law because I have participated in making changes in such cases as *Cahoon* v. *Franks*[17], *Piché* v. *The Queen,*[18] and *Ares* v. *Venner,*[19] to name some.

Lord Radcliffe, who struggled mercilessly with himself all his life with the role of the judge in law reform, had this to say in an address delivered just after he retired from the Bench, "... there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help?" And then he went on to say, and this is a point I will come back to: "The legislature and the judicial process respectively are two complementary sources of law-making, and in a well ordered state each has to understand its respective functions and limitations."

Three years later, in 1967, at a lecture delivered at Harvard University, he restated his view:

> I do not believe that it was ever an important discovery that judges are in some sense lawmakers. It is much more important to analyse the relative truth of an idea so far-reaching; because unless the analysis is strict and its limitations observed, there is real danger in its elaboration.[20]

So I would urge upon you that whether the judiciary makes law, as that term is used in ordinary language, should no longer be a matter of serious debate. In the Civil Law, at least since Geny published in 1899 his magnificent *Méthode,* it is hardly disputable that even the judicial interpretation of the Code Civil, far from being predominantly analytical, has been immensely creative.

The difficult and essential question is not whether judges do or even should make law, but rather, in the seventies, in a democratic Canadian society, what are the limits of the role of the judiciary in law reform, particularly in this day when law reform commissions abound, and will the essential function that the Court performs in our society be strengthened or weakened by increasing its law-making power? This is a question about which reasonable men may differ.

You have often heard judges say in the course of their judgment, "This is a matter for the legislatures, not for the courts". For what reasons does a

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[17] [1967] S.C.R. 455, 63 D.L.R. (2d) 274.

[18] [1971] S.C.R. 23, 11 D.L.R. (3d) 701.

[19] [1970] S.C.R. 608, 73 W.W.R. 347, *rev'g* 70 W.W.R. 96.

[20] Lord Radcliffe, "The Lawyer and his Times", in *The Path of the Law From 1967,* ed. Arthur E. Sutherland (Cambridge, Massachusetts: Harvard Law School, 1968) at 14.

judge reach that conclusion? On what grounds does a judge decide that an issue raised in the controversy before him cannot be decided in one way by him because it is a question of policy more fit for legislative resolution? I cannot give you a definitive answer to that question; indeed there is so much to say about the role of the judiciary in law reform that it is difficult to know where to begin. What I wish to do, however, is to address myself to the question impressionistically, leaving you, I hope, with some sense of the urgency of the question and its magnitude.

Initially, I will discuss the implications of holding that judges do not make law at all, but simply mechanically apply pre-existing rules; then I will assert that the legislature and the courts are co-partners in law-making and that an intelligent discussion of their respective roles ought to begin with that assumption; thirdly, I will briefly discuss the three possible forms of judicial law-making, the common law, statutory interpretation, and constitutional law; then finally I will discuss some of the institutional characteristics of the courts which define and limit their role in law reform.

There is a view widely accepted by the bench and bar in Canada that the judge must not, in reaching his decision, take into consideration political and social issues or public policy and opinion. Those who hold that view argue that the bench, in reaching its decision, must use only traditional legal techniques.

Their appeal to authority is unimpressive. Traditionally the common law grew and became a civilizing force in our society only because it considered social, political and economic facts. Indeed, every rule of law is simply an earlier court's decision about how competing interests and values ought to be reconciled.

So if a court now accepts the argument that it should not consider economic and political facts in reaching its decision, and thus treats legal questions as if today's society does not exist, it is only deluding itself in thinking it is not being political; what it is doing is basing its legal analysis upon rules that were formulated and might reflect an age of a very different social, economic and political philosophy. While it is true that the Court might not be inroducing today's politics into today's law, what it does, by ignoring social and economic facts, and this is the ineluctable reality of such a posture, is introduce yesterday's politics into today's law. It is like trying to solve consciousness III problems with consciousness I assumptions, if you will pardon the allusion.

To suggest that judges should not consider societal facts also ignores the very ends that law seeks to serve in our society. There may have been a time, and Roscoe Pound has suggested there was, when the function of law was to preserve peace and, later, to keep the status quo; at such a time the symbol of law as certain and unchanging was appropriate to its function. Pound suggested, however, that now the function of law is the maximum satisfaction of human wants. If we accept that assumption, that law is now essentially concerned with the reconciliation of competing interests and values, and I rather suspect it always has been, then in an era in which change is so overwhelming, when society's interests and values are changing

so rapidly that we stand in the danger of being subjected to "cultural shock", a device to reconcile those values which remains static and timeless is incongruous. Laws are obeyed not because they symbolize absolute certainty, or because they symbolize a body of men sitting and mechanically applying a body of fixed rule, but because they reflect the better aspirations and values of the community.

I find it hard to believe that the public will cease to believe in the fairness and probity of the courts if the Courts lay down new laws from time to time. Indeed, if anything, faith in the courts will increase; faith, that is, in the day-to-day dispensation of justice. Thus to take all social and economic factors into account in a definition of the rule of law is not only permissible but indispensable.

Those who oppose the notion that the law courts should take an active part in the adaptation of the law to social problems usually argue that to do so would sacrifice certainty, the primary virtue of the law. Unquestionably, to be an effective instrument of social control, the law must be certain so that people can foresee the consequences of their acts. However, it is an illusion that the law gains certainty when judges engage in mechanical application of so-called prior existing rules of law; and also, of course, the need for certainty, predictability and stability must be reconciled with the need for continuing social change. Continual change in legal rules is inevitable. If the purpose of the law is to achieve the best possible balancing and adjustment of the diverse interests in society, then the value of certainty ought to be weighed in the balance along with all the other competing values. I see no reason why certainty should be an absolute value, as if people valued only certainty, and indeed if we remove the talismanic aura from the concept I believe often it would not even weigh heavily in the balancing of interests.

It helps, I think, in understanding the role of the judiciary in law reform if we begin with the assumption that in the final analysis both the courts and the legislature are pursuing the same ultimate goal — the common good of the people — which means, at a slightly lower level of abstraction, human dignity and individual freedom for all.

Defining law as an instrument of government, Lord Wright has written,

> Law is not an end in itself. It is a part in the system of government of the nation in which it functions, and it has to justify itself by its ability to subserve the ends of government, that is, to help to promote the ordered existence of the nation; and the good life of the people.

I think it is useful in discussing the role of the judiciary in law reform to distinguish the three possible areas or judicial law-making: deciding a case according to the common law, statutory interpretation, and constitutional interpretation, because the considerations for judicial law reform are different for each of these areas.

In our legal system the phrase "the Common Law" is most commonly used to refer to judge-made law as distinguished from statute law. I think everyone would agree that our whole legal heritage derives from the common law which originated at a time when the courts were the prime law-makers. Everyone that is except those who would cling to the ancient Blackstonian

fiction that the rules applied in the early decisions were not made by the judges but were merely derived from custom discovered and declared. Thus by definition the common law deals with problems which have not been resolved by legislative action. It would seem incongruous then if the courts, having in the first instance made the law, did not assume a share of the responsibility for reforming it.

Some judges, however, feel that they cannot undertake law reform because they are bound by precedent, and that precedent is sufficient justification for deciding a case in a certain way. This theory of jurisprudence has been variously called, primarily by its critics, "legal fundamentalism", "formalism", "the phonographic theory of law", "mechanical jurisprudence".

As Lord Denning has said, "to such judges the doctrine of *stare decisis* means: 'Stand by your decisions and the decisions of your predecessors, however wrong they are and whatever injustice they inflict.' "

There are at least three reasons why such a theory of the judicial process is inadequate: firstly, the number of fact-combinations that may occur is infinte, indeed no two cases can be identical; secondly, once we admit that we can overrule our own previous decisions, then we must admit that at least in some instances we use a different method of reasoning to justify a conclusion; and thirdly and most importantly, our society is constantly producing new problems, new needs, and new community attitudes and values. Cases decided at a time when such needs and values did not exist cannot possibly apply to solve these new problems. Indeed it is almost certain that the common law would no longer exist if great judges had not, from time to time, accepted the challenge and boldly laid down new principles to meet new social problems.

The rationale of using precedents to intelligently solve legal problems is not to apply them mechanically and thus relieve the judge of any social responsibility in reaching his decisions, but rather it is at once more complex and more pragmatic.

An overwhelming proportion of decided cases, however, no longer deal with the common law, they are concerned with statute law. The extent to which the judiciary will engage in law reform in interpreting statutes will, of course, depend upon the method of interpretation they use.

It is true, as attested by Pollock, that English judges, and I need hardly add, Canadian judges, have often tended to interpret statutes "on the theory that Parliament generally changes the law for the worse and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds." There are notable exceptions, of course, and most judges do interpret statutes on the basis that the judicial function should be one of active assistance in the progressive development of the law. But with the proliferation of statutes the problems of judicial interpretation of statutory language becomes more acute every year.

In Canada at least, the traditional manner of interpreting statutes is to look at the meaning of the words to determine the intent of the legislature. That approach has been subjected to at least two telling criticisms. Firstly,

analytical linguists contend that words do not have meanings, but only uses; and secondly, legal realists assert that there is nothing in reality which can be identified as legislative intent. If those criticisms are valid, then what is the function of the court in interpreting statutes?

The answer, I think, is clear if I am right that the courts and the legislatures are not competitive organs of government, but rather they have a co-operative role to play in furthering the common good. The method of statutory interpretation suggested by that statement is what has sometimes been called the purposive approach. Perhaps the court's function should be to search for the legislative purpose of a statute and then interpret the statute to further that purpose.

This, of course, has implications for Canadian jurisprudence because it means that if the purpose of the statute cannot be determined by reading it through, then extrinsic aids such as legislative history must be resorted to.

Not only is the purposive method of interpretation the only realistic way to use the legislative intent; it is the way in which legislators almost certainly expect judges to behave. And so long as judges forward the broad purposes of the legislation and not private opinions or policies of their own, they are acting within limits of the judicial function.

In common law and statute law we have the supremacy of the legislature in the sense that the legislature can, by a simply majority, amend the court's ways; in constitutional litigation this link is missing, and that fact, as well as the generality of the language used in the Constitution, makes, I think a fundamental difference in assessing the role of the judiciary in law reform in constitutional cases. As Chief Justice Hughes of the United States Supreme Court once said, "The Constitution is what the judges say it is." As we witness the great difficulty of our governments in agreeing on an amending formula, let alone an amendment to our constitution, I am sure it is fair to say that statement applies with equal force to Canada. Thus, in a very real sense, the Court is the final arbiter in constitutional matters.

It is of vital importance then that if the Constitution is to remain a living social and economic force, the Court's decisions cannot take on a dogmatic or final form, and we cannot resort to the pretence that the constitution is devoid of, or remote from, political and social issues.

It is even more vital now that the Court has assumed a responsibility for judicial review under the Bill of Rights that the day of conceptual jurisprudence be over in the area of constitutional law. We can no longer speak of constitutional interpretation as though it were entirely a matter of defining words, discovering original intentions and identifying controlling precedents.

I have always believed that one of the court's vital roles in a democracy is to protect individuals and minorities. Democratic theory does not always insist on the right of a majority immediately to effect its every desire. And although, as we have seen in the United States, the court's legislative power at the constitutional level can be fraught with danger, it may be the only way yet devised for preventing the "tyranny of the majority", as Mill termed it, for imposing on the minority.

As I mentioned earlier, in the formative era of the common law the judges virtually made the law. We are all familiar with Lord Coke and how he created the *mandamus* jurisdiction of the King's Bench, Chief Justice Holt who, at times, wrote in his opinions treatises on areas of the law, for instance, the law of the bailor-bailee relationships in *Coggs* v. *Bernard*,[21] and, of course, Lord Mansfield whose creative faculty was legendary and who singlehanded wrote the law of commercial practice and quasi-contract.

These were all great judges, and would unquestionably be great judges in any age; however, on the other hand, at the time they sat on the bench there was a peculiar opportunity and need for judicial law reform. It is clear from the history of England that the pace of change was great in those times and Parliament was unwilling to assume any responsibility for law reform, nor was it equipped to. It did not have the large staff of well trained legal personnel it now has, nor had it developed the procedures necessary for comprehensive law reform. Of course the whole history of the common law has been a constant give and take between consolidation and progress, between legal technicians and the creative jurists, and I have often thought that a social history of the law concentrating on those factors which may have influenced the judges of the time in assessing their role in law reform would be of great interest.

I now wish to turn to some of the institutional characteristics of the courts which define and limit their role in law reform. Rather than talking in absolute, transcendental terms, this, it seems to me, is the proper manner in which to define the court's role.

The adversary system, the method common law countries use to resolve disputes between parties, imposes severe constraints upon policy formulation by the courts and judicial law reform. The adversary system is a concept which seems to invite unanalytical thinking, and in essence it embodies two different principles: first, that the parties to a cause of action should be able to define for themselves the content and theory of the controversy, and second, that the parties alone should investigate and carry forward the cause of action. This means that the procedure of the court is admirably suited for finding adjudicative facts concerning the parties to the controversy, who did what, when, where and who, but ill-suited for finding legislative facts or facts that do not immediately concern the parties but which may be vitally necessary for policy-making.

The courts have attempted by numerous means to overcome this handicap and to unearth the range of facts required for sound judgments on policy questions. In some cases this has even meant going beyond the evidence and materials brought before it by the immediate parties.

The Brandeis brief, so-named because it was Justice Brandeis when he was at the bar who first used it, has often been suggested as a possible means for the court to inform itself of economic and social facts.

It is simply a brief or factum to which is appended social and economic data that the court may wish to utilize in reaching its decision. There are, however, serious limitations on its use. If the economic or social facts which

it presents are facts upon which the controversy might turn, then those facts should unquestionably be adjudicated and put on the record, rather than merely appended to a factum. An appellate court is not organized to try issues of fact. A point that is sometimes overlooked is that Brandeis never used his brief to prove the "truth" of a fact, rather he used it in cases in which legislation was being challenged as infringing on "substantive due process", that is, the legislation was an unreasonable infringement on freedom of contract, and thus Brandeis merely cited the material to justify as reasonable the legislation in question.

In one respect, however, the limitation on the courts' law-making power imposed by the adversary system is its very strength, and renders it an admirable institution for law reform in some cases. In those cases in which the decision does not involve the allocation of widely held and diffuse public values and where the parties to the action represent all the interests that are competing in the solution of the problem, the court, by focussing on the concrete fact situation before it where the consequences of its holding can be plainly seen is probably the best equipped institution to effect law reform.

A further problem of judicial law reform is that the court's decisions act retroactively, and since the decision is reached in the context of a specific controversy the court's holding governs the case before it. This may work considerable hardship on a defendant who has relied on the old rule, and also on any potential defendants against whom a cause of action has accrued.

It seems to me that in the end of any discussion about re-assessing the role of the judiciary in law reform, we ought to come around to this question: What place do we want the law courts to occupy in the Canadian society of the future? Justice Holmes once remarked: "Behind every scheme to make the world over lies the question, 'What kind of world do you want?' "

First, I think that we ought to admit, with candour that in the total picture the role of the court in law reform will not be the major one. The legislature, with the aid of the law reform commissions, must play the major role.

Let me conclude by saying that the systematic re-examination and evaluation of our law with a view to improvement is essential, especially in an age of sweeping social change. And it will be your responsibility as lawyers to create and support institutions necessary to achieve that end, whether the institutions be law reform commissions, law schools or the courts themselves. If the appellate courts at a later time assume a more effective role in law reform than they have in the past, it will be because of the law students of today, and the legal education they acquire which stimulates them to study and evaluate in a constructively critical way the key ideas of the legal system and all of its principles and rules as the most effective way of achieving justice between citizen and citizen and between government and the citizen.