Introduction

I must preface my talk by indicating that I will illustrate my general remarks by reference to the relatively recent Canadian experience with judicial review under a constitutionally entrenched Charter of Rights and Freedoms and also by reference to my own experience on the bench. In keeping with true judicial tradition, I will state at the outset that the views I express are solely my own and do not purport to represent the views of the Canadian judiciary as a whole, or even of my immediate colleagues on the Ontario Court of Appeal.

Let me then suggest first that, if it is to succeed, judicial review must be compatible with democratic principles. That, I say, is not a modest enterprise. For the mandate given to judges is to assert minority rights against the expressed will of the majority. However, if judges can do so in a morally persuasive way, their judicial pronouncements should eventually form part of the political culture of the majority. In that way, democracy is ultimately vindicated. This, of course, merely requires that judges be ahead of their times, something that, historically, they have not been famous for.

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Finally, you will be relieved to know that my purpose today is not to review the rich and abundant literature on the legitimacy of judicial review and the political theories that may serve to bridge the concepts of democracy and the so-called government by unelected judges. Rather, I wish to examine what kind of judicial system will best respond to the mandate of enforcing a constitutionally entrenched Bill of Rights and what the expected rites of passage are likely to be for judges trained under a British model of parliamentary supremacy moving into an era of broadly based judicial review of the constitutionality of statutes.

Democracy and judicial review

The process by which a society gives itself a Bill of Rights could be viewed as the ultimate exercise of democratic power.

Judge Arbour graduated in 1970 with a LL.L (with distinction) from the University of Montreal, was admitted to the Quebec Bar and then served as law clerk. After a short time as a research officer for the Law Reform Commission she joined the faculty of the Osgoode Hall Law School in 1974 and was appointed Associate Professor in 1977. She became Associate Dean in July 1987 and held this post until her appointment as a judge of the Supreme Court of Ontario in December 1987. She was elevated to the Ontario Court of Appeal in February 1990. Judge Arbour has published widely in the field of criminal law and on constitutional matters. She has also spoken at a number of legal and judicial conferences. Until her appointment to the Bench she was the Vice President of the Canadian Civil Liberties Association.
as the ultimate exercise of democratic power. It is the choice of a democracy to submit itself to the principle of legality. To the extent that a justiciable constitutionally entrenched Bill of Rights is democratically enacted, either through the regular parliamentary process or through a referendum, it may be said that the legitimacy of the judiciary in constitutional adjudication is simply not open to question. This position was stated very forcefully by Mr. Justice Lamer, now Chief Justice of Canada, in a case that reached the Supreme Court of Canada relatively shortly after the Canadian Charter of Rights and Freedoms came into force in Canada in April of 1982.

Mr. Justice Lamer expressed the view that the legitimacy of judicial review was not open to question in Canada, since the clear intent of the drafters of the Charter was to confer this very power upon the judges. Furthermore, the learned jurist distinguished between the courts pronouncing on the constitutionality of legislation, which is clearly within their constitutional mandate, and the courts passing upon the wisdom of legislation, which is not. It might be said that the first proposition addresses more directly the question of the legality, rather than the legitimacy, of judicial review. It is legal – indeed, it is constitutionally mandated in Canada – that judges determine whether a statute or the actions of an agent of the state comply with the constitution. However, the political legitimacy of the exercise of judicial power may not be answerable by pointing only to its legality. That legitimacy is at stake every day, in every decision rendered and every judicial opinion expressed. Arguably, the closer judges get, or are perceived to get, to the wisdom or the merits of legislation, rather than staying in the more technical realm of constitutionality, the more they put their institutional legitimacy in issue. Some will even say that the difference between constitutionality and merits is very tenuous at best and imperceptible for the public at large.

The Supreme Court of Canada has had to pronounce on the constitutionality of abortion laws, on the issue of public funding for minority schools, the testing of cruise missiles in Canadian air space and the validity of criminal prohibition against hate propaganda, to mention a few areas where constitutionality and merits may not easily be discernable even by an educated public.

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In that sense, it is probably inevitable that the enactment of an entrenched Bill of Rights will lead to the legalization of politics. Judicial review is often referred to as constitutional supremacy, in contrast with parliamentary supremacy. The expression "constitutional supremacy" suggests the dominance of a legal document over all forms of social and political institutions. With it follows a real danger that politics will be superceded by legalism, politicians by lawyers, parliamentarians by judges, the reality of power by the rhetoric of rights and substance by form.

As courts are drawn into political disputes and are given the power to strike down legislation, claims will arise of government by the judges. Not surprisingly, there seems to follow an increased public interest in who the judges are and how they are appointed. As the legitimacy of judicial review of legislation is brought into question, so is the legitimacy of the judiciary itself. From the legalization of politics emerges the politicization of the judiciary and the case for a representative judiciary, consistent with democratic principles.

The case for a representative judiciary

While attending a recent conference on Women and the Law in Montreal, I was reminded of a fact apparently unconnected to my topic today and yet, on reflection, very revealing. When I was born, women had had the right to vote, in my home province of Quebec, for only seven years. At the national level, women had been recognised as "persons" by a judgment of the Privy Council which overruled the Supreme Court of Canada, in 1929, for the purpose of determining whether they were eligible to become senators. Women were only made eligible to serve as jurors, in Quebec, after I graduated from law school in 1970.

The history of women in the Canadian judiciary – and probably elsewhere as well – is currently being written, with a lot of "firsts" and a great deal of political visibility. This immediately raises two basic questions, which I propose to explore with you today. On the one hand, how can a society structure a legitimate judiciary with a significant number of its citizens unrepresented? On the other hand, if judges are required to be impartial, can they be expected to represent segments of society? In other words, as long as judges are intelligent, learned and impartial, should it otherwise matter who they are?

One must then first tackle the ideal of judicial impartiality. Impartiality, as a judicial virtue, is often used to mean the opposite of bias. That is, judges should not hear a case if they have a personal interest in the outcome or if they have a preconceived view about what the outcome should be. I like to think that this is the limited extent to which justice should be blind. Impartiality in that sense refers to a conscious choice, an alertness and a striving for neutrality between the litigants, and openmindedness towards their respective factual positions. It has been suggested that judicial impartiality requires more than the avoidance of conscious bias. In the American Judicature Society's 1975 Handbook for Judges, Judge Shientag writes that judges must constantly strive to neutralize the unconscious effect of their baggage of values, assumptions, attitudes and beliefs so as to recognize and overcome their true liability to prejudice.

This hidden threat to judicial neutrality is sometimes referred to as cultural bias or cultural blindness. It is clear to me that the more homogeneous the judiciary is, the easier it is for judges to believe that they have achieved the ideal of impartiality. Impartiality becomes quickly equated with uniformity. A somewhat facile syllogism comes into play: judges are impartial, I am like the other judges, therefore, I am impartial. Not only do individual judges then cease to examine their own cultural biases, but the judiciary as a whole becomes convinced of its logical, dispassionate, cold neutrality.
The arrival on the bench, in significant numbers, of members of the legal community who have not historically acceded to the judiciary, challenges the settled understanding of the notion of impartiality, if only by disturbing the homogeneity of the bench. There is, as of today, an insufficient number of women on the bench in Canada to draw a significant profile of their contribution as a group to judicial life. Studies are starting to emerge in the United States. There is a current debate, for example, among feminists, about whether women judges speak in the so-called “different voice” that psychologist Carol Gilligan argues expresses the different moral reasoning of women.

Studies like that of Carol Gilligan have suggested that women’s ethical sense is different from men’s. Gilligan claims that women are raised to develop an ethic of caring which makes them approach conflicts and dispute resolution not in terms of winning and losing, but in terms of maximizing the preservation of relationships. Applied to law, such a theory would suggest that it is highly unlikely that women would have invented the adversary system. Many women reject the claim that they bring a different perspective to their adjudicative functions solely because they are women. A person acting in a professional capacity can hardly be reduced to her gender. However, unless we believe that justice is delivered by disembodied intellects driven by abstract logic, there is no doubt that a person’s gender, her race, class, upbringing and natural tastes and talents will contribute to her views of the world and of the outcome of a particular case.

However, the paradox of the accession of women and minority groups to judicial power is ever present in the decision to emphasize or rather to judicial power is ever present in the social institutions of power, and there are some considerable risks in seeing history repeat itself.

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What the literature suggests is quite revealing: a 1987 American study of 14 women appellate court judges from 12 different states has concluded that, generally, women tended to be at either extreme of the spectrum of judicial opinions expressed. They were either extremely conservative or extremely liberal. However, in cases involving “women’s issues” such as family law, sex discrimination, sexual assault, medical malpractice in obstetrics, etc, all women tended to rally at the liberal extreme of the spectrum.

Does this suggest that the appointment of women and members of visible minorities will aggravate the perception that the judiciary has been politicized by the Bill of Rights and has consequently lost some of its essential neutrality? I believe that precisely the opposite is the case. For one thing, pluralism on the bench can only increase the public’s perception that the courts are a fair and responsive forum. It testifies to a just society in which power is shared. More importantly, it brings to official adjudication a point of view that would otherwise be absent. The capacity to listen to a different point of view, particularly in appellate adjudication where collegial deliberation is the norm, can only increase impartiality by forcing a confrontation with cultural bias.

Differences between individual judges will, of course, never be greater than the differences between the members of the legal profession from which they are recruited. Indeed, the great equalizer that law school is said to be creates a process of socialization that is likely to mute gender or racial differences, at least among those who are sufficiently non-radical ever to be candidates for judicial appointment. I do not say that disparagingly. The business of judging is hardly the stuff that revolutions are made of. Indeed, for the most part, except perhaps in constitutional adjudication, the judge’s function is largely to ensure compliance with existing norms. However, as courts move into the realm of full scale judicial review, under a constitutional Bill of Rights, the increased scope for policy choices traditionally reserved to the political arena highlights the subjective content of individual judges’ decisions. The recruitment of judges who believe that their function is merely to “apply” the law and who deny that they in any way contribute to its making may no longer be appropriate as it would vest in them power without responsibility. Even those who think it is bad that judges make law would agree that it is worse for judges to make law by accident while denying that they are doing it.

The idea of a “representative” judiciary is not novel; it has both constitutional and conventional roots in Canadian federalism, for instance. The Canadian constitution requires that three out the nine judges on the Supreme Court of Canada be from the province of Quebec. Convention, very strictly enforced, distributes the remaining 6 seats by regions. Other conventions, once strict, have adjusted to the times. Until the early 1970’s, the three Quebec judges on the Supreme Court would break down into two francophone Catholics and one anglophone Protestant – two from Montreal, one from Quebec City. In the last twenty years, this convention has lost its force as the Quebec appointments now seem to be consistently of bilingual francophones. Therefore, when one speaks of the need for the judiciary to represent various segments of society, in the Canadian context one would be talking about an adjustment or an expansion of existing criteria for the selection of judges from geographical, linguistic and religious criteria only, into criteria that take into account gender, race, ethnic origin, physical disability or other characteristics of groups historically under-represented in the judiciary. The legitimacy of the judiciary can therefore be ensured by opening up its composition.

Moreover, a strong case can be made for judicial education. The diversification of the bench cannot be achieved overnight. Meanwhile, there is every reason to believe, based again on the Canadian experience,
Judges must be introduced to the judgment writing. Judges no longer hiding behind erudite Latin maxims write for lawyers or even for the typical litigants before them. The setting of the agenda for judicial intervention largely because of their inability to set the agenda for their intervention. Judges may make laws, but they cannot decide in which area of social or economic policy they will legislate. The setting of the agenda for judicial reform is in the hands of litigants. Particularly in a system rooted in adversarial litigation, it is imperative that lawyers be up to the challenge of judicial review. This requires creativity, imagination and courage, as well as the willingness to stay intellectually alert and, to a large extent, to reconsider some of the basic tenets of litigation. For instance, the role of a public prosecutor, in our system the Crown Attorney, may have to be slightly less adversarial when the constitutionality of a criminal statute is challenged by an accused prior or during his trial. There is something vaguely unpalatable in having an agent of the very government that celebrates the virtues of a Bill of Rights at the time of its enactment, argue systematically, at every opportunity, that either it does not apply or it does not mean what it says. The old adversarial reflex of always arguing the opposite of whatever position is adopted by the opponent does not necessarily serve the best interests of the parties in constitutional litigation.

As judges are perceived as becoming more politicized by media publicity which tends to surround their decisions in constitutional cases, they are more vulnerable to public criticism and, frankly, often in need of public vindication, if that is felt to be justified after an assessment of their conduct by their peers. A Judicial Council is a useful forum for the articulation of a Code of Conduct for judges and for the hearing of allegations of improper conduct. Often cases brought before the Council are re-examined to facilitate the proof of facts and in terms of the methodology and limitations of disciplines that the parties are likely to start calling upon in support of their case. Statistics and planning, for example, may start to play a role in the factual disposition of a constitutional dispute. The days are now over when judges could count on a comfortable life on the bench if, in addition to knowing the ins and outs of their own discipline, they could understand the jargon of the odd psychiatrist or accountant.

Judicial education may also want to concern itself with techniques of judgment writing. Judges no longer write for lawyers or even for the immediate litigants before them. The politics of judicial language will affect the legitimacy of the institution. The hiding behind erudite Latin maxims may no longer be an acceptable substitute for clear, direct and accessible language.

This is all to say that the legitimacy of the judiciary is linked to its intellectual vibrancy and social responsiveness. And that, in turn, requires institutional support for educational resources. Equally essential to the legitimacy of a properly composed judiciary is the need to reconcile independence and accountability. Judges must obviously have security of tenure. However, just as impartiality and diversity are not incompatible, I believe that the independence of the judiciary is not threatened but is enhanced by putting in place a system responsible for the articulation and the policing of judicial ethics.

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The need for a critical legal discourse: the role of the Bar and of legal academics

It is trite to remark that for all the power vested in them by a Bill of Rights, judges differ from legislators largely because of their inability to set the agenda for their intervention. Judges may make laws, but they cannot decide in which area of social or economic policy they will legislate. The setting of the agenda for judicial reform is in the hands of litigants. Particularly in a system rooted in adversarial litigation, it is imperative that lawyers be up to the challenge of judicial review. This requires creativity, imagination and courage, as well as the willingness to stay intellectually alert and, to a large extent, to reconsider some of the basic tenets of litigation. For instance, the role of a public prosecutor, in our system the Crown Attorney, may have to be slightly less adversarial when the constitutionality of a criminal statute is challenged by an accused prior or during his trial. There is something vaguely unpalatable in having an agent of the very government that celebrates the virtues of a Bill of Rights at the time of its enactment, argue systematically, at every opportunity, that either it does not apply or it does not mean what it says. The old adversarial reflex of always arguing the opposite of whatever position is adopted by the opponent does not necessarily serve the best interests of the parties in constitutional litigation.

The enterprise of breathing life into a Bill of Rights calls for a joint effort of Bench and Bar in rethinking many of the procedural and substantive rules that have otherwise served common law development very adequately. The formation of interest groups, anxious to litigate public interest issues, creates tremendous pressure to expand the concepts of standing and the right to intervene in litigation. The rules of evidence must be re-examined to facilitate the proof of facts, sociological facts for example, that did not traditionally form part of the basis upon which disputes were resolved by the courts. In my view there is a real danger of judges expanding the scope of judicial notice as an acceptable method of proof when the issue at bar requires an understanding of some element of social reality and the litigants have failed to provide the court with admissible evidence on point. The danger, of course, is that of the judge becoming a witness, neither a true expert witness nor a witness subjected to the rigours of cross-examination, on an issue often central to the case. Nothing will threaten more the legitimacy of the judiciary than to have judges treat constitutional issues with less rigour, both in terms of the proof of facts and in terms of the required legal analysis, than they bring to other fields of adjudication. There as elsewhere, judges cannot be held captive to unsophisticated or
careless litigants who have not laid the proper foundation to the constitutional proposition that they advance. Early in constitutional adjudication, judges must articulate the basic framework under which constitutional scrutiny will be undertaken. Rules with respect to burden of proof must be called into play to defeat insufficiently proven claims.

Bills of Rights: promising different things to different people

Quite apart from the fact that judges will bring their own cultural background to the interpretation of a new constitutional Bill of Rights, the document itself, its history as well as its language, send a different message to its various constituencies. The early years of litigation under the Canadian Charter of Rights and Freedoms, which came into force in April of 1982, are revealing. There were various degrees of political and cultural readiness, across Canada, for the reception of an American style model of judicial review. The Charter clearly meant different things to different people. Quebec, of course, was not a party to the constitutional accord which led to the enactment of the Charter and the provincial government of the day was strongly opposed to the enactment of the Charter. It is thus fair to say that in some circles the Charter had very little legitimacy.

Not surprisingly perhaps, Charter litigation in English Canada began early and focused almost exclusively on the legal rights and the fundamental freedoms. Basically then, that part of the country was adapting to the Charter era its long standing interest and expertise in criminal law, criminal procedure and civil liberties. In contrast, Charter litigation in Quebec brought into the courts the entire political discourse surrounding language and education rights.8

This, in my view, illustrates that a Bill of Rights is not a universally acceptable, self-applying document, capable, by the compelling force of its language, to bring about a better society. Rather, the Bill of Rights is a product of its own culture, its popular reception is somewhat unpredictable, as is the enthusiasm that potential litigants will show for taking their political disputes to the courts.

The most difficult task for the drafters of a constitutional document such as a Bill of Rights – and for early judicial interpreters – is to recognize and accept that the Bill of Rights will be used in the future to meet a social and political reality unimagined by the framers.

Not only must the rights and freedoms be interpreted, but the rules of constitutional adjudication must be fashioned. These rules, judge-made for the most part, can either promote or defeat the prospects of constitutional adjudication on the merits.

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Therefore, the more the constitutional document itself spells out the scope and operation of judicial review, the more it alleviates potential problems of legitimacy in the exercise of constitutional power. In that sense, the most important sections of the Canadian Charter of Rights are the sections that define the scope of its application, declare the supremacy of the Charter over all other laws and invite the courts to invalidate incompatible statutes, state the method by which courts are to express reasonable limits on rights stated in absolute terms, and provide for available remedies. Finally, the most important, and indeed the most controversial, clause in the Canadian Charter is the provision that sets out the limit to judicial review itself by permitting legislation to be validly enacted notwithstanding the Charter.

Conclusion

Canada will celebrate next April the tenth anniversary of the coming into force of its Charter of Rights and Freedoms. Much will be said and written in assessing a decade of judicial review. Canadians, I suspect, have become more litigious, as they became more "rights conscious". Single issue lobbies multiplied, alongside and within traditional political parties, as groups emerged of previously unconnected individuals seeking the vindication of the same constitutional right: language, religion, equality, etc . . .

It will also be a period to reflect on the judiciary. I suspect that it will emerge as a more pluralistic institution, younger as a consequence, and more willing to take its proper place in the development of the law and the articulation of public policies.

If the verdict is that the Canadian judiciary has lived up to the expectations of the Charter, the credit will be shared broadly and there will be many explanations for that success. I will single out one factor which, in my view, contributed greatly to the change over from quasi-absolute parliamentary supremacy to wider-ranging judicial review, and that is the three year delay in the coming into force of the equality rights. Next year will only be a partial tenth anniversary. Section 15 of the Charter did not come into force until April of 1985.

Section 15 provides as follows: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In my view, the interpretation of section 15 was and continues to be the major challenge faced by Canadian courts in applying the Charter. It is the section that has the broadest potential for social engineering and, as a consequence, is the one that puts the legitimacy of the judiciary squarely into question. The three year moratorium allowed the various legislative authorities to conduct an audit of their existing statutes and to correct any blatant affront to section 15, so as to avoid undue litigation.
Just as importantly, it allowed academics the opportunity to explore various theories of equality and to test the ideas in the literature without premature judicial decisions vindicating a narrow point of view. Finally, it allowed judges to ease into judicial review, through the more familiar route of criminal procedure and into the abstract but better established doctrine of fundamental freedoms.

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There is something intellectually unattractive about the piecemeal granting of fundamental rights. Yet, once again, realism may dictate a result that cold logic would foolishly reject. The judiciary, like other social institutions, must be eased into its new constitutional role. Because if it loses its legitimacy, society will have lost its public forum in which to test, vigorously and without fear, the often clashing demands of democracy and morality.

**FOOTNOTES**
