THE INTERPRETATION OF HUMAN RIGHTS: THE CHALLENGE*

The Honourable Mr. Justice Michel Bastarache**

No one today doubts the tremendous creativity of the courts. Lord Diplock said in the famous *Inland Revenue Commissioners*[1] case, in 1982, speaking about the judicial review of government action, that the development of the system of administrative law was "one of the greatest achievements of the English Courts" in his lifetime. The activity of the courts in the last twenty years has in fact revolutionized public law and transformed the role of the courts in the eyes of society.[2] This is due in large part to the influence of the culture of human rights that has grown throughout the world and produced enforceable legal principles. Judicial and constitutional review have indeed put into question the nature of the interpretative process and the limits of judicial discretion, in light of the separation of powers.

The literal approach to interpretation has disappeared as well as the idea that judges discover the law rather than "construct" it.[3] Nevertheless, law is not made by judges in the application of an arbitrary process; it is the result of judicial interpretation and the determination of the underlying rationale of the legislative scheme under review. Obviously, there are many approaches in this area and this has been the case for a significant period of time. Lord Simonds and Lord Denning clashed over the possibility for a judge to be guided by the rationale of the law in *Magor and St. Mellons Rural District Council* v. *Newport Corporation* in 1952.[4]

---

* This text was prepared for the purpose of a speech made at the annual meeting of the Canadian Jewish Law Students Association, January 29, 2000.

** Mr. Justice Bastarache is a Justice of the Supreme Court of Canada.

[1] *Inland Revenue Commissioners* v. *National Federation for Small Businesses and Self-Employed Ltd.*, [1982] A.C. 617 at 641.

[2] See Lord Irvine of Lairg, "Activism and Restraint: Human Rights and the Interpretative Process," [1999] 4 *E.H.R.L.R.* 350; and Lord Harry Woolf, "Judicial Review – The Tensions Between the Executive and the Judiciary" (1998), 114 L.Q.R. 579.

[3] See L. H. Tribe, "Comment" in A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) 71.

[4] [1952] A.C. 189 at 191.

Academics continue to debate the relative merit of theories developed by H.L.A. Hart[5] and R. Dworkin.[6]

Closer to home, we have conflicting views of constitutional interpretation that result mostly from the application of the very general language of the *Canadian Charter of Rights and Freedoms*. More recently, guidance from decisions of the European Court of Human Rights and Supreme Courts in other countries have caused us to adopt a new comparative ethos. The only conclusion one might reach today in looking at this is that the linguistic texture and universal nature of human rights has accorded judges a significant margin of interpretative autonomy. Still, one has to be conscious of the fact that courts do not operate in a vacuum and must respect the nature and purpose of the judicial function. The growth of judicial review, the explosion of the regulatory power, the adoption of the *Charter* and the nature of the questions under review have increased public scrutiny and forever changed the role of the judiciary. That role is more and more central to the functioning of a modern democracy and requires great efforts to maintain judicial independence and public confidence in the judiciary.

This leads one to the subject of activism and restraint in the interpretation of human rights. The underlying issue here is that of the proper approach to the interpretative task. The constitutional theory on which interpretation rests is one of balance: the Court cannot rewrite the law to secure the effective implementation of the *Charter*, nor can the Court invent law to force Parliament or legislatures to discharge their obligations to implement human rights. The Court is limited by the text of the law and by precedent. But the Court does have a fundamental contribution to make. In order to understand that contribution, one must first note that there is a difference between reviewing legislation by looking into what the legislators intended to say and what they actually said, preventing maladministration, and recharacterizing issues as constitutional rights.

In many cases, it will suffice to develop the common law, as in *R.* v. *Rose*,[7] to obtain a proper resolution of the issue. In that case, the issue of fairness of the trial could be addressed in the charge to the jury or, in extreme cases, by giving the prejudiced party a limited right of reply. There was no need to expand constitutional

---

[5] H.L.A. Hart, *The Concept of Law*, 2nd ed. (London: Belknap Press, 1994) chap. VII.

[6] R. Dworkin, *Law's Empire* (Oxford: Clarendon Press, 1986) chap. 9.

[7] [1998] 3 S.C.R. 262.

protections under s. 11(*d*) of the *Charter* to cover limited procedural arrangements. When applying the *Charter*, however, it is particularly important to consider the proper scope of s. 1, with special attention to two issues that concern more than the *Oakes*[8] methodology. In *Egan* v. *Canada*,[9] La Forest J. cautioned against undue formalism in the application of the *Oakes* test and insisted that enough attention be given to the policy component of s. 1. The first issue relates to the characterization of the law under review. The object and purpose of the law must be examined in its proper historical context, in light of the actual goals of Parliament or the legislature. The perspective must be that of the political actor. The danger that mischaracterizing the law will lead to an unrealistic application of s. 1 was addressed by the majority in *Delisle*[10] and the minority in *M.* v. *H.*[11] The second issue is that of determining the rational foundation for a s. 1 exception. It is when a court is deciding what constitutes a rational foundation that it is most likely to be seen as acting subjectively and interfering with the democratic will of Parliament or a legislature. The question posed in this regard is rather simple: When is a decision demonstrably justified as good, just, or correct, and according to what norms? What norms are essential to a free and democratic society? How does the intended result of the legislative intervention influence the analysis? In other words, does it have to be shown that the motive of the legislature is actually valid, or is the inquiry directed at establishing whether the motive is well founded without having to be proven that it is actually valid? In a recent article published in the *McGill Law Journal*,[12] Luc Tremblay examined the object of the inquiry in a very creative manner. I will borrow his approach to make my point regarding the application of s. 1.

If it is accepted that s.1 requires government to give its motive, to demonstrate that it is held honestly, what then are the facts that it will have to prove in order to justify the restriction on *Charter* rights? Are these facts moral, political, institutional, scientific, religious, or social? Obviously, the government must justify, not just explain. Therefore, the facts have to give real support to the intervention. But in many instances, facts have a lot to do with beliefs or desires. For example,

---

[8] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[9] [1995] 2 S.C.R. 513.

[10] *Delisle* v. *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

[11] [1999] 2 S.C.R. 3.

[12] Luc B. Tremblay, "La justification des restrictions aux droits constitutionnels: la théorie du fondement rationnel" (1999), 44 *McGill L.J.* 39.

in *Thomson Newspapers*,[13] The Supreme Court of Canada held that the restriction on the publication of polls in the last days of an election was not justified under s. 1. If it is accepted, for the sake of argument, that the true motivation for the restriction was the desire to impose a rest period before the vote, and that this was a good thing with regard to the functioning of the democratic process in the eyes of the government, how is the court to decide whether the restriction is demonstrably justified?

The answer has to be in the application of standards and values that have more importance than the will of Parliament and that are logically superior because they are part of the fundamental underpinnings of a modern free and democratic society.[14] Many questions on psychology, human responses and feelings can be rationally justified without evidence. Our problem is with value judgments concerning what is justified. In fact, government must justify a value judgment. The value judgment can take into account morality (polygamy is proscribed),[15] economic policy (marketing boards are essential),[16] social policy (criteria to access social benefits are valid),[17] and public protection (non unionization of the RCMP).[18] Should judges decide whether the government is right on these issues? Or should they decide whether its justification is plausible in the given area and consistent with the general requirements of a free and democratic society? The ideals of a free and democratic society embrace fundamental values of equality, liberty, human dignity, peace and security, but abstract and undefined values should not be used to easily override the decisions of Parliament and legislatures concerning the common interest or the conception of a just society. Tremblay suggests that what is justified, then, is that which is motivated by a genuine public purpose, is practically necessary and has a rational basis that can be supported after a normative analysis of the area of intervention. If judges do not substitute their own appreciation of what is good or required for that of Parliament, but limit their analysis to the requirements of a rational basis for the legislative choice, they will avoid undue activism without compromising their essential function.

---

[13] *Thomson Newspapers Co.* v. *Canada (Attorney General)*, [1998] 1 S.C.R. 877.

[14] One also notes that, obviously, there are questions that are not dependant on expert opinion and must be considered as part of judicial knowledge in the general sense.

[15] *Criminal Code*, R.S.C. 1985, c. C-46, s. 293.

[16] *Canadian Egg Marketing Agency* v. *Richardson*, [1998] 3 S.C.R. 157.

[17] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[18] *Supra* note 10.

In addressing the appropriate approach to the s. 1 analysis, particular attention has been paid to the need for the courts to understand the limits of their role in our society. In *Thomson Newspapers*, and again in *M.* v. *H.*, the requirements of deference were articulated. The context of the legislation is particularly important in determining the deference to be afforded to the legislature. The commonly held proposition that the degree of deference can be determined by simply distinguishing between legislation that pits the State against the individual and legislation that mediates between different groups of people is overly simplistic. A court should consider a variety of factors when assessing if deference should be afforded in determining whether a limit has been demonstrably justified in accordance with s. 1. In *Thomson Newspapers*, the following factors were considered to be of importance: the vulnerability of the group which the legislator seeks to protect,[19] that group's own subjective fears and apprehension of harm,[20] and the inability to measure scientifically a particular harm in question or the efficaciousness of a remedy.[21] These factors do not represent rigid categories of justification, but rather support the argument that the standard of proof required to demonstrate justification depends on the context.

This reflects the fact that there is, indeed, a new role for the courts in the XXIst Century. This new role has brought attention to various roles of the courts in developing the law over the past centuries. These functions have existed since the creation of our legal system and are not devoid of judicial activism as described by some critics.

One example of this possibility is the decision of the Supreme Court of Canada in *Chartier* v. *Chartier*.[22] This case required the Court to determine whether a person who stands in place of a parent to a child within the meaning of the *Divorce Act* can unilaterally give up that status. The provincial courts of appeal had developed two lines of authority, one allowing unilateral withdrawal from the parental relationship, another prohibiting it. In commencing an examination of the words of the statute, it was noted that the policies and values reflected in the *Divorce Act* must relate to contemporary Canadian society and that the general principles of

---

[19] See *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 88.

[20] See *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, *per* McLachlin J. at p. 857.

[21] See *R.* v. *Butler*, [1992] 1 S.C.R. 452 at p. 502.

[22] [1999] 1 S.C.R. 242.

statutory interpretation support a modern understanding of the words "stands in the place of a parent." The Court concluded that the common law doctrine of *in loco parentis*, developed as it was in a time when it was morally offensive for a man to be held responsible for another man's child, was rooted in the values of the IXXth Century patriarchy and was not helpful in determining the scope of the words in the *Divorce Act*. In this way, the traditional common law concept was abandoned in the *Divorce Act* to make the law consistent with present values.

Today we stand on the edge of a new millennium. Many are donning clairvoyant hats and offering predictions of what we should expect in the future. In closing, there are various predictions on the role of the courts in developing the law in the new century, based on the trends that I have observed.

First and foremost, a further shift in the law away from formalism, towards a more principled approach to legal decision-making, is a true possibility. Over the past century, we have moved substantially from the old English system of writs, in which a right existed only if there was a procedure with which to enforce it. We are now moving past the time when the "old forms of action" could "return to rule us from their graves."[23] This shift is apparent in the court's rejection of procedural and substantive formalism and developments in the law of evidence illustrate this shift. In the *R.* v. *Khan*[24] and *R.* v. *Smith*[25] line of cases, the Supreme Court examined the underlying rationale of the hearsay rule and its exceptions. In doing so, the Court created what has become known as the principled approach to hearsay which relies on the twin requirements of necessity and reliability. This question was again before the Court in *R.* v. *Starr*,[26] in which the interrelationship between the categorical approach and the principled one where traditional exceptions to the traditional hearsay rule come into play is questioned. How do these approaches relate? Can a categorical and a principled approach co-exist, or does one trump the other? What are the relative merits of either approach? What are the trade-offs between flexibility and certainty?

Another example of the move away from formalism is apparent in recent administrative law decisions. The "question of law" issue was reexamined, for

---

[23] *Doyle* v. *Northumbria Probation Committees*, [1991] 4 All E.R. 294 (Q.B.), *per* Henry J.

[24] [1990] 2 S.C.R. 531.

[25] [1992] 2 S.C.R. 915.

[26] [2000] 2 S.C.R. 144.

instance, in *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*,[27] as was the "fashioning of remedies" in *Canadian Union of Public Employees, Local 301* v. *Montreal (City)*.[28] In the area of obligations, the Supreme Court has broken down barriers and exclusionary rules once associated with the distinctions between contract, tort, and equity. The clarity and predictability of formalism was judged too conservative for modern times. Policy considerations militated for concurrency of causes of action and similarity of damages in contract and tort (*BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*),[29] and tort and breach of fiduciary duty (*Norberg* v. *Wynrib*).[30] There can also be simultaneous breach of contract and fiduciary duty (*Hodgkinson* v. *Simms*).[31] What is clear is that the Supreme Court is willing to "think afresh, without hindrance of history and the language of another and differently situated epoch."[32]

A second trend is the development of individual and group-based rights since the adoption of the *Charter*. This trend, so obvious in our Court's development of procedural rights, equality rights and language rights, is an extremely significant element in the role of the courts as instruments of change in the law. Its merits and demerits have been fleshed out in a wide body of academic literature. What remains to be seen are the limits to this kind of legal reasoning. How far can equality rights be extended? How will other types of undefined unfairness be addressed in future cases? What are the limits to freedom of expression?

The third trend, fueled in part by technological advances, is the introduction of other sources of law into our jurisprudence, particularly the increased use of international law, comparative law and even Aboriginal law. "Globalization" has perhaps become a cliché, but there can be no doubt that more and more issues are coming before Canadian courts involving international agreements and customary law. The conception of international law as exclusively concerning state-actors has become a fiction as the subject-matter and sheer quantity of international regulation has expanded. Though the approach that international instruments inoperative

---

[27] [1997] 2 S.C.R. 890.

[28] [1997] 1 S.C.R. 793.

[29] [1993] 1 S.C.R. 12.

[30] [1992] 2 S.C.R. 226, add. reasons [1992] 2 S.C.R. 318.

[31] [1994] 3 S.C.R. 377.

[32] R. Johnson, J. McEvoy, T. Kuttner, W. MacLauchlan, *Gerard V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) at 131.

domestically can create legitimate expectations has been rejected in Canada, the Supreme Court has accepted that international law may play a role in interpreting the Constitution, statutes and even the common law.[33] Likewise, the citation and use of foreign judgments has become more and more regular in Canadian legal decisions. This is in addition to the formidable challenges presented by the recent recognition of Aboriginal law and procedures. The limits of these developments are not yet apparent. Will our legal system really evolve from an essentially unitary doctrinal structure to a much more pluralistic one, with competing valid normative orders? Can these other norms be accommodated within the current system?

The days when judges and lawyers could credibly claim to be discovering an immutable truth in the law are gone forever. While common law incrementalism, rules of statutory interpretation and the doctrine of *stare decisis* each play a role in both developing the law and restraining judicial activism, recent trends suggest that judges need to look further in the Herculean task of painting the law in its best light. We need to consider several issues: the principles underlying the past categorical approaches, our Charter rights and other sources of legal inspiration and experience. Will these constraints be enough to achieve the correct balance between the courts and the legislature in their continuing dialogue of legal development? This, of course, is something that can only be answered by the Court.

---

[33] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.