Contemporary Legal Realism

The Honourable Malcolm H. Rowe*

I. A FREE AND DEMOCRATIC SOCIETY?

Section 1 of the *Canadian Charter of Rights and Freedoms* refers to a "free and democratic society".[1] Was the Charter intended to preserve, promote and advance such a society that already existed in Canada? Or, instead, is the Charter the means to transform Canada so that it will become what it had never before been, a "free and democratic" society? What kind of society was Canada in 1982 and is it today?

Throughout your education, especially in university, you have been taught that the ideals of liberal democratic society are deceptions, window dressing for a system that profits from and seeks to maintain exploitation and discrimination. You have been told that it is simple-minded to believe the "comforting fairy tales" on which the legitimacy of liberal democracy is based.

Those whose views are shaped by post-modernism and critical theory present themselves as intellectually and morally superior. In this view, democracy is not about counting votes; rather it is about achieving societal goals as defined by this cognoscenti. Their conception of a "free and democratic society" is to be achieved through societal transformation enabled by the Charter.

This conception of Canadian society — as inherently exclusionary and repressive — and, thus, requiring societal transformation by means of the Charter so as to become "free and democratic" — calls to the fore the role of courts. How will judges respond?

Will they embrace the role of "hero judge", prominent in the vanguard of such transformation? Or will they adhere to a more traditional adjudicative role, and as a consequence be snubbed or ignored? Is it not tempting to bask in celebrity rather than to languish in obscurity?

Since 1982, courts have had authority to over-ride decisions taken by those who are elected. For motivated lawyers this now feels "natural". They see it simply as "the Rule of Law". They celebrate their role as "Guardians of the Constitution". They are enthused by the societal transformation being brought about by the Charter. They have a sense of mission and confidence.

Why have courts been urged to expand their role in public policy? For counsel, it is to achieve goals that their clients have not achieved through the electoral process. For academics it is a means to become influential in the transformation of society. Proudly, they see themselves as an intellectual elite spearheading a mission to shape

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* Puisne Justice, Supreme Court of Canada.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

a more just society — as they conceive it.

But, have lawyers and judges become intellectually and morally superior to their fellow citizens? Or are they simply more powerful? The Charter gives courts enhanced authority. This enables them to engage in societal transformation, but it does not compel them to do so. The choice as to how judges use their enhanced authority is one that they themselves make, urged on by others.

II. INCREASING POLARIZATION

This choice is being made as liberal democracies are becoming more polarized. By this I mean a breakdown in shared views and a re-conception of society as comprised of opposing groups. This follows from de-legitimizing what has historically bound us together as citizens and from portraying our society as one that is inherently discriminatory and exploitative.

Where such views prevail, de-platforming those who do not share these views is not repressive. To the contrary, it is liberating. That is the central idea in "Repressive Tolerance", an essay by Herbert Marcuse, a leading figure in the Frankfurt School of Critical Theory. I quote:

> [T]olerance cannot be indiscriminate and equal with respect to the contents of expression, neither in word nor in deed; it cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation. Such indiscriminate tolerance is justified in harmless debates . . . But society cannot be indiscriminate where . . . freedom and happiness themselves are at stake: here, certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.[2]

This is an extreme of polarization. By contrast, let me quote from Barack Obama:

> Our politics have become so polarized these days that all of us across the political spectrum seem so quick to assume the worst in others unless they agree with us on every single issue . . . We build all manner of walls and fences around ourselves, and then we wonder why we feel so alone. We don't trust each other as much because we don't take the time to know each other.[3]

Liberty of expression and the ongoing exchange of ideas are the enemies of polarization, just as they are the friends of mutual understanding and a shared sense of the common good. By contrast, the enforcement of ideological orthodoxies tends to deepen division and sow discord. Such orthodoxies undermine liberal democracy as they deny its legitimacy as a free society.

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[2] Herbert Marcuse, "Repressive Tolerance" in Robert Paul Wolff, Barrington Moore & Herbert Marcuse, *A Critique of Pure Tolerance* (Boston: Beacon Press, 1969) 81 at 88.

[3] Barack Obama, Democratic National Convention, United Center, Chicago (August 20, 2024), online: *TIME* https://time.com/7013313/barack-obama-2024-dnc-speech-full-transcript/.

III. LEGAL REALISM

This is a prelude to my topic, "Contemporary Legal Realism". To recall, Legal Realism was developed over a century ago as a means to better understand what judges do, rather than what they say they do. Legal Realism is about recognizing that people tend to use their authority to advance personal preferences and that judges are not immune from this human trait.

It is urged on us, as lawyers, that we can lead society to transcend our shameful past and present. Where elected institutions fail, courts will remedy the failures, guided by an intellectual elite whose vision is shaped by post-modernism and whose mission is defined by critical analysis. This approach contemplates, indeed requires, courts to decide more and more public policy.

To the extent that courts keep close to their traditional adjudicative functions, they will remain trusted in their role. To the extent they reach more deeply into public policy, they risk becoming embroiled in political controversy. Where this is so, will not governments tend to choose judges who share their views? By this means, will not courts become politicized, as they have not been?

In all this, what is the role of the Charter? I consider three questions. What is the scope of constitutional law? What is the proper relationship between the legislature, the executive and the courts? And is legal methodology important, or is achieving a preferred outcome all that matters?

1. The Scope of Constitutional Law

Courts decide questions of constitutional law. The greater the scope of constitutional law, the greater the range of questions that courts decide. Thus, there is an incentive to expand the scope of constitutional law where one wishes to extend the range of questions that courts can decide. But how can the scope of constitutional law be expanded? There are three ***main*** ways.

The first is to give each right its maximum scope. This is presented as a "large and liberal interpretation". As to societal concerns, they are addressed under section 1, the analysis of which often turns on balancing "salutary benefits versus deleterious effects". This is the most policy-laden component of the *Oakes* test. It gives judges the greatest ambit to give effect to their own views.

A second way is to add to the constitution by "recognizing" additional rights based on unwritten principles. This approach was advanced in *Toronto (City) v. Ontario (Attorney General)*;[4] on that occasion it did not succeed. Academic articles are a fertile source of such unwritten constitutional rights; these are urged on courts in contrast to mere "textualism".

A third way is to constitutionalize what is said to be international law. But often

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[4] *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34 (S.C.C.).

what is advanced is not international law. Rather, it is merely the views of selected academics or an assertion that Canada is bound by a pronouncement of an international body that lacks binding legal effect. Jurisprudence — notably *Quebec (Attorney General) v. 9147-0732 Québec inc.*[5] — recognizes the place of international law in constitutional interpretation, one that is carefully structured. Adherence to sound methodology is needed to maintain this relationship.

2. The Proper Relationship Between the Legislature, the Executive and the Courts

The central idea of the separation of powers — between the legislature, executive and courts — is that each institution has their own lane and that each should stick to it. While the Charter protects rights enumerated in it, counsel are calling for ever more public policy to be treated as questions of constitutional law. Such constitutional "totalism" would collapse the separation of powers into a plenary supervisory role for courts over public policy.

3. Is Legal Methodology of Importance or Only Achieving a Desired Result?

By contrast, if you are of the view that law should *constrain* judges, then you attach significance to methodology. But if what matters is achieving a desired outcome, then the law *enables* judges and the constraints of methodology are an irrelevance or, worse, an unacceptable impediment.

Coherent methodology, consistently adhered to, properly structures how courts decide legal questions. Whether we pursue *ad hoc* results-based decision-making or whether we choose decision-making guided by methodological constraints is bound up with how we see the Rule of Law. I commend to you Lord Bingham's book, *The Rule of Law*,[6] for the traditional view.

IV. CLOSING

Canada is blessed by its traditions and enriched by its history, while bearing the consequences of harsh decisions, neglect and indifference. Like other societies, we manifest the imperfections that inhere to the human condition. As a liberal democracy we will continue to understand ourselves differently as society develops. Through the courts we seek justice under law. But the primary engines of societal development should remain the free exchange of ideas and the uneven but proven path of democratic institutions. Above all, I am confident in the good will of Canadians.

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[5] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

[6] Tom Bingham, *The Rule of Law* (United Kingdom: Clays, 2010).