Courts: Legal Doctrine, Policy, or Principles?
The Importance of Principles in Constitutional Interpretation
Case Freedom of Expression

by
Nelson Dordelly-Rosales[1]

Abstract

There is no doubt that in a democratic society, everyone from the simplest citizen to the highest public official is subject to the law. This means that there must be a clear understanding about what the law is. However, the Constitution, as the highest law of the land, is framed in language that leads an open field for its interpretation. Indeed, in any country where there is a Bill of Rights added to the Constitution, Courts struggle to determine the clear meaning of fundamental rights and freedoms. According to Ronald Dworkin, constitutional interpretation "reflects an underlying theory about the general character of law." Certainly, the constitutional jurisprudence emanated from the Courts provides a philosophical reading of the rights entrenched in the Constitution. There is not room for "mechanical deductions" when judges have to answer legal questions that refers to what H.L.A called the "penumbra of uncertainty." This is the case when judges have to choose between a narrow or broad conception of liberty or equality. The Court has to deal with complicate values, rules and practice that demand a deeper philosophical understanding of the law. Accordingly to Claire L' Heureux Dube, a former Judge of the Canadian Supreme Court of Justice suggests, sketching out such a theory is a job for the courts.

This paper offers an overview of legal doctrine and policy reflected in constitutional jurisprudence. Some examples are from Canada, USA and Venezuela, in this last nation, there is jurisprudence influenced by American philosophers. In general, the Court faces the problem of how to best achieve the judicial mandate of interpreting the constitution. Do courts refer to legal doctrine, policies or principles? How should judges go about in their interpretation of freedom of expression? The issues of constitutional

[1] Doctoral Candidate, Faculty of Law, University of Ottawa, Canada, 2010
LL. M. (University of Ottawa, Canada), M.Ed., University of Saskatchewan (Canada)
J.D. and B.H (Ed.) Catholic University Andres Bello,
Law Clerk to the Hon. Madam Justice Olga Dos Santos at the Supreme Court of Venezuela (2005). Called to the Bar of Caracas, Venezuela (2006) E-mail: ndord024@uottawa.ca

interpretation associated to legal doctrine, political power or both, has been a problem in contemporary constitutionalism. In this paper I argued that, a wise judicial decision-making should be guided by the overarching purpose of the principle(s) entrenched in each of the provisions and the goal and spirit of the constitution. The only job of judges is not to enforce the received wisdom that come from the Constitution itself in the lawsuits that come before them, but, to advance the cause of justice and the rule of law. In the view of the present author, the Constitution in a democratic country lends itself to a constructive approach of judicial interpretation -- invoking the judge's own wisdom. I envision how a central tenet of a principled conception of constitution, its focus on the purpose of principles directs toward solutions.

OUTLINE

Abstract

I. Do courts refer to Legal Doctrine or Principles?
- 1.1. The Natural Law tradition
- 1.2. Legal Positivism
- 1.3. Legal Realism
- 1.4. Liberalism
- 1.5. Critical Legal Studies (CLS):
  - a. Feminist Jurisprudence
  - b. First Nations Jurisprudence
  - c. Critical Race Theory
  - d. Gay/Lesbian/Queer Theory
  - e. Critical Disability Theory
- 1.6. Ronald Dworkin's adjudication theory

II. Do courts refer to Political decision-Making?

- a) Judicial Activism
- b) The Democratic Dialogue

III. How should courts go about Freedom of Expression?

Conclusion

1. Do courts refer to legal doctrine or Principles?

Given the progressive changes, evidenced in contemporary societies, it is impossible to understand current debates without understanding the leading theories of jurisprudence.[2] The purpose of this debate has been the pursuit of a better understanding of the nature and function of law, which itself is a complex and controversial phenomenon.[3] These theories have been conflicting because the goals of each one are distinct; they have been the creation from history and tradition, as well as contemporary conceptions.[4] Below, I will show how each theory has been criticized.

1.1. The Natural Law Tradition:[5] In general, to say that "a constitutional text is authoritative for judges is to say that they are justified in using it as the highest law of the land, that is, law that prevails when in conflict with ordinary law, such use is that of "judicial review."[6] Constitutional judicial review is the power of the Supreme Court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice. [7] Natural law thinking is a quest for absolute values, justice and truth. This theory proposes that the validity of any law depends not just on its form but on its content; there is an integral relationship between law and morality. This theory has been considered as an assertion of faith in a particular set of values. In this sense, for many authors, this theory is inherently ambiguous, relative and subjective; merging law with moral criteria that has caused confusion, although at different times "it has played conservative, liberal and even revolutionary roles."[8] Recently, in Canada, U.S. Judge Scalia attacked this theory by saying

---

[2] Nelson Dordelli-Rosales"Constitutional Judicial Review: Is it a Legal Doctrine or a Political Power, or Both? The Eclectic Approach for Constitutional Interpretation" paper presented at the University of London, UK England, June 2008 http://www.iglrc.com/sessions.html

[3] Gerald L. Gall, *The Canadian Legal System* (Toronto: Carswell, 1990)

[4] Emerson Tiller and Frank Cross, (2005) 'What is Legal Doctrine?', in *North Western University School of Law, Public Law and Legal Theory Papers* 41, pp. 2-18

[5] This theory is incorporated in the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights, The American Constitution, and The Universal Declaration of Human Rights enacted by the United Nations, according to Gall, *supra*, at 11

[6] Michael S. Moore, "Natural Rights, Judicial Review , and Constitutional interpretation" in Jeffrey Goldsworthy and Tom Campbell, ed., *Legal Interpretation in Democratic States* (Burlington: Ashgate Publishing, 2002) at 207

[7] D.M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review*. (Toronto: Carswell, 1990)

[8] Richard F. Devlin, Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education"

that "we have become addicted to abstract moralizing… It is blindingly clear that judges have not greater moral capacity than the rest of us to decide what is right."[9] The notion of this theory as the 'living tree' mode of judicial interpretation "simply encourages judges to make anti-democratic decisions that extend rights to questionable groups such as bigamists and pederasts…What democracy means is that the majority rules… If you don't believe that, you don't believe in democracy,"[10] the judge asserts.

1.2. Legal Positivism: this theory separates law from morality and argues that the rights of all people are written in the constitutional text. This theory has been under vigorous attack in the 20th century. It has been caricatured as holding that words have meanings in themselves, so that laws, being official words, do not need interpretation, and provisions can not always be interpreted and applied literally. According to Goldworthy, "pure literalism, maintaining that statutes should always be understood and applied strictly according to their literal meanings, is not feasible."[11] Among the most recent claims of positivism's critics are that this theory is "an archaic notion of 'frozen rights' that do not evolve with the times," Judge Binnie says that judges who make a fetish of determining the 'original intent' of constitutional drafters are deflecting their responsibility, weakly saying that "I'm only following orders."[12] The rigidly constitutional system erected in Venezuela in 1961 made judges believed that the required task of judges was to rule under the grounds of the written text. Drawing together a range of prominent writers in legal positivism, such as John Austin, Thomas Hobbes, Hans Kelsen, H.L.A Hart, Joseph Raz, and John Gardner, is possible to identify different attributes associated to legal positivism, some of which are entrenched in Venezuela's jurisprudence. In the era of the 1961 Constitution to ensure the correct legal interpretation, judges focused meticulously on the set of requirements established in written legislation, independently of popular will or practical moral reasoning. In fact, judges at this Court refused to consider extralegal preferences, dismissing any controversies

---

(2001) 27 *Queen's L.J*. at 161

[9] The Globe and Mail, "Senior U.S., Canadian judges spar over judicial activism." (February 17, 2007) A2

[10] *Ibidem*

[11] Jeffrey Goldsworthy, "Legislative Supremacy, and Legal Positivism" in Jeffrey Goldsworthy and Tom Campbell, eds., *Legal Interpretation in Democratic States* (Burlington: Ashgate Publishing, 2002) at 45

[12] The Globe and Mail, *supra* at A2

that attempted to request more than just the application of the constitutional text.[13] As in case *Lola y Laura Gutierrez v. Enriquecimiento sin Causa*, one of the first cases in 1962 to deal with constitutional provisions, the Court assumed the difficult task of assessing the literal meaning given to the words of the constitution, and thus the true intentions of the sovereign rules:

> This Court, based on the spirit and purpose of the founding fathers of the Constitution, ascertain that the alleged Section 49 of the Constitution, intend the briefness and summary outline of legal procedures, and left other specific provisions under a subsequent law, especially those which could be heard on appeal. Indeed, the founding father were careful to regulate the defense of personal freedom, called habeas corpus, omitting other constitutional rights and freedoms that could be protected by constitutional remedies, such as Amparo. It is clear that this omission was deliberate and intentional, leaving the protection of constitutional rights in suspense until legislation is promulgated. It reveals the clear intention of deferring the effective implementation of constitutional rights to the proper legislation."[14]

In case *Nestor Moreno v. Municipalidad Distrito Federa* in 1964, the Court repeatedly stated interpretation of constitutional rights must follows the legislator's intention, which provides a true meaning to the constitution. [15] In *Maria Eugenia Diaz v. Military Tribunal (1981)* a Venezuelan journalist was released from prison based on arguments of textual interpretation of the hierarchical legal system. The Supreme Court under the influence of the jurisprudence theory of legal positivism relied on the ordinary meaning of the Constitution to determine the scope of freedom of expression. In this case, the journalist was held in custody and prosecuted by a Military Tribunal because she published an article in the newspaper *El Diario de Caracas*, entitled *Guyana-Venezuelan Strategic Game* that compromised the national security, "violating article 50 of the Military Law." According to the judge, in the Venezuelan Constitution, every citizen is entitled to due process, entrenched in Article 49, this also called *ius de non evocando*, meaning that no one can be

[13] Alfredo Acuña, *Corte Federal y de Casación.* (Caracas, Edit. Las Novedades, 1943)
[14] *Lola y Laura Gutierrez v. Enriquecimiento sin Causa* [18/01/1962] Corte Superior Segunda, Exp.8-62
[15] *Nestor Moreno v. Municipalidad Distrito Federal* [22/07/1964] C.S.J, Sala de Casacion. Exp.317-64

denied the natural court to which is entitled to. Therefore, this Court finds unconstitutional the Military Tribunal decision, because the only Court competent to deal with this matter is the Civil Criminal Court.[16] The effort to protect the fundamental right of freedom of expression resides on the inspiration of discovering concrete answers to apply logically the constitutional precepts.

1.3. Legal Realism: Within this theory, interpretation has become a process of creating new meaning rather than of ascertaining and enforcing an already existing constitutional meaning; thus, "in one sense, an ambivalent public understanding of the courts and suspicions of judicial hypocrisy pose a threat to judicial and democratic legitimacy. Yet, in another sense, public ambivalence and suspected hypocrisy may actually open up space for the exercise of legal power."[17] Positivists claim that realists underplay the importance of rules. Natural law lawyers accuse realists of "instrumentalist social engineering, devoid of any conception of the good."[18] Legal realism, including the sociological school of law, struggles for an objective exercise, because the ultimate grounds for the judges' constitutional interpretation, within certain unavoidable constraints, include their own 'political ideals and preferences, their own conceptions of what is required by the nation's ideals.' Based on the proposition that all judges are human, the goal should be the ideal enunciated by Chief Justice Marshall, who said that they are to apply the will of the law rather than their own wills.[19] Unfortunately, realism has become coupled with a certain vision of what a good society might look like –depending of the political prevailing political orientation. Drawing from prominent scholars, such as Oliver Wendell Holmes, Jerome Frank, Karl Llewellyn, Felix Cohen, Herman Oliphant, Roscoe Pound, there are different attributes associated to legal realism, some of which are entrenched in Venezuela's jurisprudence. In this regards, Roberto Gargarella says that in the era of the Constitution of 1999, "defenders of participatory democracy proposed the establishment of a variety

---

[16] *Maria Eugenia Diaz v. Military Tribunal* [15/12/1981] C.S.J Sala de Casacion Penal. Exp:122-81

[17] Keith J. Bybee (2005) "Legal Realism, Common Courtesy, and Hypocrecy," in *Law, Culture and the Humanities, Association for the Study of Law, Culture and the Humanities*, Vol. 1, No. 1, 75-102

[18] Devlin , *supra* at 177

[19] *Ibidem*

of institutional mechanisms, capable of ensuring a much stricter connection between the representative and the people."[20] This particular model engenders an active judicial power eager to accomplish social justice. As means to achieve the whole potential of constitutional rights, the new Constitution of Venezuela in 1999 empowered the Supreme Court to participate actively on society's most controversial issues. This Constitution incorporated the Constitutional Chamber to the Supreme Court. [21] The scope of its constitutional authority is so far beyond any other Court in the country, it goes from striking down national, regional, and municipal legislation, to establishing the constitutionality of international treaties. The Constitutional Chamber inside of the Supreme Court began to regulate constitutional issues in benefit of constitutional rights, establishing a more flexible approach to accomplish the social interest on which the constitution was based.[22] Since the Constitution of 1999 explicitly establishes that the jurisprudence emerging from the Constitutional Chamber is binding to every court in the country, this highest constitutional jurisdiction took considerable free play to adopt an active function of distributive policies on constitutional grounds. Judges acknowledge the external factors that are underlying constitutional disputes, the economic, political, and historical context. The implication of this conception is the flexibility that judges have to deal with changing social conditions and the subjectivity of constitutional rulings. Cases regarding the right to freedom of expression in the era of the 1999 Constitution have been facing new policies, such as the policy of *truthful and impartial information*, which has been entrenched in Provision 58 of Constitution, and is interpreted within the philosophic underpinning of Provision 2 of Constitution in which Venezuela constitutes a *democratic state of social law and justice*. Interpretive practices in the last decade have been controversial. To critics, some practices have privileged some views over others that have impacted freedom of the press and speech in Venezuela. In these practices, decisions are based on arguments that deal with adjusting decisions to points of view as preferences of the dominated Social State conception. For instance, in *Rafael J.*

---

[20] Roberto Gargarella, Pilar Domingo and Theunis Roux. *Courts and social transformation in new democracies : an institutional voice for the poor?* (Aldershot: Ashgate, 2006) at 23

[21] Constitution of the Bolivarian Republic of Venezuela, 1999

[22] Remarks of Justice Francisco Carrasquero, "Palabras del Magistrado Dr. Francisco Carrasquero Lopez con motivo de la Apertura Judicial" Enero 15th, 2008 Online: http://www.tsj.gov.ve/informacion/miscelaneas/ DISCURSO_APERTURA_JUDICIAL2008.doc

Chavero Gazdik (2002) the Court decided to cancel part of the Provisions 223-226 of the old Venezuelan Penal Code due to "discrepancies" between these provisions and the current philosophy of the Constitution: "corresponds to the law and judges to resolve these contradictions."[23] According to Provision 57 of the Constitution of 1999 people can freely express their thoughts, ideas or opinions. The person who makes use of freedom of expression "assumes full responsibility for it." The case explains that, "in a democratic state, whose values are freedom, ethics and political pluralism, the political fact must be taken into account when measuring the act of abuse of the right to free expression because, otherwise, those involved in the political struggle will become a eunuch, as they could not explain to his followers, or those wishing to accompany their ideas and goals."[24] The judge criticizes the use of literal interpretation of the laws, "which a priori or a posteriori impact on freedom of expression and would become an obstacle to political pluralism and the clash of ideas that should characterize a democratic system; ideas and concepts that often emerge from facts, assumptions or real-with which consubstantiate the message."[25] The judge explains that democracy is not only a political system but a form of coexistence. For the interpretation of the rules on liability, arising from the misuse of freedom of expression, the judge has to describe the abuse, recklessness, intent and if such abuse comes from those who practice politics.[26] The judge also highlights the principle of *truthful and impartial information* contained in Provision 57 of the new Constitution, which according to him, should be interpreted in light of 'collective values', embodied in the *Democratic* and *Social State of Law and Justice,* which is beyond the values of individual truth, democracy and autonomy. As might have been expected, the determination of the "social value" of the protected expression became the guide in Constitutional interpretation. Thus, in case, *Radio Caracas TV (RCTV) v. Provision 192 of Telecommunications Law* (2006) the Constitutionality of the new Telecommunications Law's ability to limit freedom of expression was interpreted based on the argument that,

---

[23] *Rafael Chavero Gazdik* [2002] T.S.J Sala Constitucional. # 241 Exp. 01-0415
[24] *Ibidem*
[25] *Ibidem at 24*
[26] *Ibidem at 24*

> the right of freedom of expression and thought is not absolute, because its development is limited to the observance of certain values and Constitutional principles, so that although freedom of expression can not be subject to prior censorship (direct or indirect) there are areas where, notwithstanding such prohibition, can prevent the spread of ideas, concepts, etc., if there is a breach of that Constitutional Provision.[27]

Flexibility imposes the equilibrium among values:

> "Values are called to live together harmoniously, through to production of mutual concessions and this implies sufficient flexibility to allow its alignment. Thus, collisions or conflicts between values and rights, which are inherent in the flexible nature of the Constitution, allow maintaining the harmony of the system, setting the balance point in consideration of the circumstances and Constitutional principles."

According to the Court there was not need to provide *amparo* or protecting RCTV (Radio Caracas TV station) because, "there not an imminent threat and would not be achievable by the accused."[28] Other cases such as *Luisana Rios et al. v. Venezuela (2004), Elias Santana v. the President of the Republic (*2001) freedom of expression is restricted on the basis of the *Democratic* and *Social State of Law and Justice*. According to *Herman Escarra* (2001), the leading doctrine in Venezuela is using discriminatory regulations about the *so-called crimes of opinion*. Recent critics have adopted a pessimistic view and have claimed that the Venezuelan Constitution is questionable and that judicial review is nothing more than a cover for political decision-making by unaccountable and undemocratic judiciary.

1.4. Liberalism or liberal political theory: This legal theory also has been criticized. 'Equality theory,' 'legal reasoning,' 'enlightenment rationalism' and 'neutral principles' of constitutional law are just values that have no enduring basis in principle, but are mere social constructs calculated "to legitimate white supremacy."[29] Thus, the rule of law is a 'false promise of principled government'

---

[27] *RCTV v. Article 192 Telecommunications Act* [11/07/2006] T.S.J. Sala Constitucional, Exp. 1381

[28] *RCTV , supra*

[29] J.J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory: Racism and the Law* (Halifax:
Fernwood Publishing, 1999) at 788

and it serves as an instrument of oppression and domination.[30] For different critics liberalism is 'incoherent', 'internally inconsistent' and 'self-contradictory;'[31] liberalism has no core determinative ideas, and as a political philosophy it is thoroughly pluralistic.

1.5. Critical Legal Theory or Critical Legal Studies (CLS or Crit): The CLS has been considered as 'profoundly pessimistic' theory,[32] which exhibits a bias against other conceptions of the good and the right in a pluralistic setting. In general, feminist jurisprudence,[33] First Nations Jurisprudence,[34] critical race theory,[35] gay/lesbian/queer theory,[36] and critical disability theory,[37] as part of the postmodernist left, have focused on political issues. These groups are called the 'new realists,' an amalgam of traditional legal realism and modern cynism.[38] According to the notable philosopher Ronald Dworkin, the CLS "have so far been spectacular and even embarrassing failures."[39] The CLS "commitment to neutrality ultimately results in the collapse of the distinction between the good and the right and drowns both domains in the sea of subjectivity."[40]

1.6. Dworkin's adjudication theory: The most influential American legal philosopher of our time, Ronald Dworkin has made an impact in the early years of the last decade in some Venezuelan jurisprudence. Thus, diverse constitutional rulings made by the Supreme Court of Venezuela relied on Dworkin's adjudication theory.[41] Dworkin's basic claim is that a principle

---

[30] *Ibid* at 788
[31] A. Altman, *Critical legal studies: a liberal critique* (Princeton: Princeton University Press, 1990) at 57
[32] Pyle, *supra* at 796
[33] S.B. Boyd and E.A. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 C.J.W.L. 1-18
[34] James Youngblood Henderson, "First Nations Jurisprudence and Aboriginal Rights," Retrieved March 15th, 2007 from: http://www.usask.ca/nativelaw/fnjar/
[35] Pyle, *supra* at 792
[36] Timothy E. Cook, "The Empirical Study of Lesbian, Gay, and Bisexual Politics: Assessing the First Wave of Research," *The American Political Science Review*, Vol. 93, No. 3 (Sep., 1999), pp. 679-692
[37] Dianne Pothier and Richard Devlin (Eds.) "Critical Disability Theory Essays in Philosophy, Politics, Policy and Law" (Washington: University of Washington Press, 2006) 352 pp.
[38] Gall, *supra* at 15
[39] *Law's Empire* (Cambridge: Harvard University Press, 1986) at 274
[40] Altman, *supra* at 57
[41] Ronald Dworkin, A Matter of Principles (Cambridge: Harvard University Press, 1985) at 77 and 79

provides the Court reason for deciding constitutional controversies, fundamentally to accomplish justice or fairness, without the help of political, economic, or social context. Indeed, Dworkin's adjudication theory is a major contribution to a philosophical understanding of the role of the judiciary in a constitutional democracy. In *Herman Escarra* (2001), the judge defends Dworkin's view that, "judicial decisions are political decisions, at least in the broad sense that attracts the doctrine of political responsibility."[42] The judge advocates the 'construction" approach to interpret the meaning of freedom of expression.

> The tradition of culture (cultural atmosphere that surrounds the legal system), and the legal principles are the primary sources, which are the guide thread that makes possible the right decision: these are not only sources of integration (gaps in the law) but of interpretation. Thus, the problem of legal truth is fronético (of phronesis, wisdom, knowledge of the value) and not epistemological (the epistemic, science). [43]

The judge mentions that 'arguments of principles' are the primary sources and defends the "legal truth," which is one of the purposes of free speech. In general, criticisms to judicial review of constitution increasingly have been characterized in the last decade by critics as illegitimate/undemocratic: the handing over of political decisions to the unelected Court that are highly dependable of the executive power.

In other order of ideas, not only in the United States but in Canada, [44] -- and also in the Constitution of Venezuela[45] – the Supreme Court has the power to overturn the executive act, or order a public official to act in a certain manner, if it believes the law or act to be unconstitutional or to be contrary to law in a free and democratic society. The court has "the power to strike down a law."[46] Thus, the mandate of the Supreme Court of Canada is "[t]o advance the cause of

---

[42] *Herman Escarra* [19/07/2001] Exp. 01-1362 case # 1309 In this case, the judge includes some ideas from Dworkin, Ronald *Taking rights seriously*. (Cambridge: Harvard University Press, 1999)
[43] *Herman Escarra* [19/07/2001] Exp. 01-1362 case # 1309
[44] E.R. Alexander, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" (1990) 40 *University of Toronto Law Journal* 1.
[45] Constitution of the Bolivarian Republic of Venezuela, 1999
[46] P. W. Hogg and A.A. Bushell, "The Charter dialogue Between Courts and Legislatures" (1997) 35 Osgood Hall L.J. at 84

justice in hearing and deciding, as final arbiter, legal questions of fundamental importance…and the Court is committed to the rule of law, independence of impartiality and accessibility to justice."[47] However, there are substantial disagreements as to how the power of judicial review should be exercised, if it should be exercised at all. Among the emerged questions are: Was the power of judicial review implicit in the Constitution, or was it the creation of the Supreme Court? Answers to these questions characterize the current debate. Below I will briefly discuss some issues of this debate:

- **Judicial Activism***.* For Roach, judicial activism emerges in a cumulative fashion when judges (1) write their personal preferences into the law; (2) extend their judgments beyond what is needed to settle a dispute; (3) use rights as trump cards; and (4) displace the legislature's role by having the final word. [48] This author concludes at the end of his book that opportunities for judicial activism are far more limited than critics allow or alternatively that the Court has sought ways of engaging Parliament or accommodating it. Whether a decision is characterized as judicial activism is often a matter of political polemic. The application of law with perfect neutrality has become an important problem for law theory and for democratic and liberal theory in the twentieth century. [49] Some authors consider that "unelected judges are qualified to act as social engineers who possess a greater level of expertise in deciding morally laden issues than doctors, engineers or the legislative."[50] For some scholars, this problem began as the assertion by a judicial body of a legal power under the written constitution. For others the problem began historically before the Charter. For others, it is just a matter of applying too much flexibility to a "living tree." For Robert Martin, the problem is the court. His most recent book, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined*

---

[47] Supreme Court of Canada."Mandate and Mission." Retrieved March 11, 2007 from: http://www.scc-csc.gc.ca/aboutcourt/sccmission/index_e.asp

[48] K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: IrwinLaw, 2001). 352 pp.

[49] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the paradox of Liberal Constitutionalism*, ed. (Don Mills: Oxford University Press, 2001) 176-181

[50] B. McLachlin, "The Role of the Courts in the Post-Charter Era: Policy-Maker or Adjudicator?" (1990) 39 *University of New Brunswick Law Journal* 43.

Our Law and Our Democracy,[51] demonstrates the author's concern as to the impartiality in the practice of judicial review. For Christopher Manfredi the problem is the paradox of Liberal Constitutionalism; his recent book, *Judicial Power and the Charter: Canada and the paradox of Liberal Constitutionalism.*[52] He suggests that the transformation of constitutional supremacy into judicial supremacy in the very process of enforcing the former has become an important feature of Canadian politics.

- **Democratic Dialogue**. As a reaction to this controversy, a provocative response from the ranks of Charter supporters emerged in 1997 calling for a 'democratic dialogue' between the judges and the legislators with the publication of an article coauthored by Peter Hogg and Allison Bushell (who explain that dialogue emerges out of Section 1 and Section 33 of the Charter).[53] The article's empirical data revealed what the authors felt was the inherent dialogic character of Charter litigation. "The Supreme Court did not have the last word on the meaning of the Charter after all. Instead there were "legislative sequels" or parliamentary replies to Court rulings that reshaped the law as pronounced by the justices."[54] Following a critique of the article *Six Degrees of Dialogue: A Response to Hogg and Bushel* by Manfredi and Kelly[55] and a rejoinder by its authors *Reply to Six Degrees of Dialogue,*[56] commentary by different authors, added further assessments of the idea and provided their contributions to the Charter debate. Equally as significant, references to the notion began to surface in Supreme Court opinions in Vriend *v.* Alberta.[57] *The Supreme Court on Trial* published by Kent Roach,[58] Professor at the University of Toronto, presents the first book-length argument supporting the dialogic conception of the Charter and the Court. In this book, Roach fends off

---

[51] Robert Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal: McGill-Queen's University Press, 2003)
[52] Christofer Manfredi, *Judicial Power and the Charter : Canada and the Paradox of Liberal Constitutionalism.* 2nd Edition. Don Mills, Ont.: Oxford University Press, 2001
[53] P. W. Hogg and A.A. Bushell, "The Charter dialogue Between Courts and Legislatures" (1997) 35 Osgood Hall L.J. at 84
[54] *Ibidem*
[55] C.P. Manfredi and J. B. Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" *in Osgood Hall Law Journal*. 37 1999
[56] P. W. Hogg and A. A. Thornton "Reply to 'Six Degrees of dialogue' in HeinOnline 37 Osgood Hall L.J. 529, 1999
[57] Vriend v. Alberta [1998] 1 SCR 493
[58] Roach, *supra* at 352

accusations of overweening judicial activism. Picking his way through various decisions, he argues with regard to the first condition that judges are constrained by the need to justify their choices as "good-faith interpretations of the text and the precedents,"[59] a defense that takes judicial opinions at face value and presumes a great deal about the justices' intentions. He then points out that the Court has created new and flexible remedies. It has delayed declarations of invalidity to allow Parliament time to respond to its decisions and has "read in" or "read down" remedies so that laws are modified rather than invalidated in their entirety; these are non-dictatorial remedies that for Roach show that "Canadian judges have been careful to craft gentle, patient, and flexible remedies; the Court through its actions and opinions recognizes that democracy is enhanced when Parliament and legislatures respond to its decisions."[60] *The Charter Dialogue between Courts and Legislature*[61] explains that a 'democratic dialogue' emerges if there is fault to be found in Charter litigation. In this sense, Roach[62] tells critics to look to the legislatures for failing to participate appropriately in the dialogue facilitated by the Charter and cheered on by the Court. The dialogue ideally should be open and robust with each actor vigorously arguing its case while remaining civil with one another and respectful of the other's responsibilities. Hogg and Bushell argue that judicial review is legitimate in Canadian democratic society because of its commitment to the rule of law. Judicial review, they say, is a doctrine which is fundamental to the constitutional democracy of Canada, and "the decisions of the Court almost always leave room for a legislative response."[63] These authors proposed the "beginning of a *[Jurisprudential*] dialogue with the purpose to develop a democratic strategy as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole."[64] This normative debate, with particular applications to judicial cases and doctrine, largely defines Canadian

[59] Roach, *supra* at 141
[60] Roach, *supra* at 154 and 176
[61] Hogg and Bushell, *supra* at 79
[62] Roach, *supra* at 239-251
[63] Hogg and Bushell, *supra* at 82
[64] *Ibid* at 105

constitutional theory. However, Canada's emphasis is on respect for the rule of law.[65]

III. How should judges go about in their interpretation of freedom of expression? What judges should ultimately value when interpreting constitutions[66] is really an interesting issue. The problem is not if interpretation is legal doctrine or political power or both.[67] The problem is, I think, a 'matter of principles.' According to the American scholar Ronald Dworkin, constitutional interpretation requires reliance on 'principles,' no policies; and from Israel, Chief Justice Aharon Barack's purposive theory of interpretation relies on the objective 'purpose' of the constitutional text. Dworkin and justice Barack recognize that the mandate for judicial decisions come from the constitution itself rather than from the judge. According to these authors, the role of the judge in a democratic society is to bring about the realization of the rule of law. The view of the present author runs in the same direction. However, I shall suggest a constructive account of constitutional interpretation, invoking the judge's own wisdom to achieving the recognized purpose of the constitutional principles for the protection and preservation of rights and freedoms. The Constitution in a democratic country lends itself to a constructive approach of judicial interpretation, in which, both, principles *and* purposes are integrated towards a stronger commitment to a rights-based constitutional democracy. In seeking to determine what other rights not expressly mentioned in the constitution, or in the absence of a law regulating other rights inherent to individuals, or having Articles of the Constitution that are within a very abstract language, such as general provisions of the Constitution in favor of fundamental principles that refer implicitly to basic civil rights like 'freedom of expression', the judges have no choice but to engage in what the purpose of the principles of the constitution ought to say. This means that generosity is an appropriate

---

[65] Oliver Peter C., The Constitution of Independence (Oxford: University Press, 2005)
[66] Peter W. Hogg, "Canada: From Privy Council to Supreme Court," in Jeffrey Goldsworthy, ed., Interpreting Constitutions, (Oxford: Oxford University Press, 2006 at 55-100
[67] Nelson Dordelli-Rosales, "Constitutional Judicial Review: Is legal Doctrine or Political Power, or both? Toward Eclecticism for Constitutional rights Interpretation" Conference presentation in *the First Annual McGill Graduate Legal Studies Conference: Law as Transformation*, McGill, Canada. March 2008. http://glsa.mcgill.ca/ABSTRACTS.pdf

attitude. In this sense, Justice Botswana has said in the *Attorney-General v. Dow*:

> "the very nature of a constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and that where rights and freedoms are conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed."[68]

A pronouncement by Lord Wilberforce in the Privy Council stated that the antecedents and forms of fundamental rights provisions called for: "A generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[69] In addition, Lord Sankey in the *Edwards case* said that the primary implication of a 'living tree' metaphor was that a constitution should receive a generous interpretation; that is, the provisions of the Constitution Act 1867 should not be 'cut down' by a 'narrow and technical construction,' but should rather be given 'a large and liberal interpretation.'[70]

The *Edwards case* decided that women were 'persons' and accordingly eligible to be appointed to the Senate. The Court also has taken the same approach with the Charter and calls for a "generous interpretation, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." [71] The 'living tree' metaphor in Canada has implied that the Constitution should receive a "generous, large and liberal interpretation."[72] That is, the principle of 'progressive' (or dynamic) interpretation has characterized constitutional judicial review in Canada during these last decades. This cannot mean that judges must abandon the scientific path; only that the scope of

---

[68] Botswana -- Attorney-General v. Dow, Appeal Court, 1994 (6) BCLR 1 (locus stand) 07/03/1992

[69] *Minister of Home Affairs v Fisher* case(1979) 3 All E.R. 21, at 25 (appeal from the colony of Bermuda). Retrieved February 15th, 2007 from: http://www.internationaljusticeproject.org/pdfs/Conteh-writing-2.pdf

[70] *Edwards case* (n90) 136 cited by Peter W. Hogg in

[71] Hogg , *supra* at 88

[72] Edwards case (490) 136 cited by Peter W. Hogg in "Canada: From Privy Council to Supreme Court," in Jeffrey Goldsworthy and Tom Campbell, eds., *Legal Interpretation in Democratic States* (Burlington: Ash gate Publishing, 2002)*)* at p. 87

science must be widened to take into account the ego that experiences itself as spirit, which it does in the act of thinking. However, the last debates have pointed out that there also exists a 'purposive' kind of interpretation[73] pejoratively called 'judicial activism'[74] to describe those decisions that are perceived to endorse a particular agenda. This type of interpretation is 'purposive' when legal rules must be interpreted in light of the purposes they are meant to serve.[75] *Purpose*, is an expression of the internal relationship (which changes according to the type of text) between the intent of the specific author ('subjective') and the intent of any reasonable author ('objective'); thus, unlike different legal theories, "legal purpose is not simply authorial intent at a high level of abstraction." [76] However, when I understand rights as integration through a principled-purposive interpretation of the constitution, this approach is an *expeditious means toward a greater end*: a more just world, through freedom, transparency and the protection of democracy. This supposes that the values that justify judicial review practice, even if varied and complex form an integrated whole. In large part, the tension between these two elements – principle and purpose - comes out of the strategy of building an interpretive model on an underlying theory in which the interplay between these two elements play an important role in the judges' commitment to act in accordance to the constitution. According to Kazuyuki Takahashi, "constitutionalism is the strategy for freedom, designed to ensure that political power is exercised in conformity with the constitution, guaranteeing fundamental rights and the separation of powers."[77] For instance, Canada establishes a system of control by common law courts and civil law courts. Canada's modern constitutionalism is a model for other nations.[78] In modern constitutionalism "the rule of law

[73] Hogg, *supra* at 88
[74] Roach, *supra at* 239-251
[75] Altman, *supra* at 63
[76] Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at xi.
[77] Kazuyuki Takahashi, "Why Do We Study Constitutional Laws of Foreign Countries and How?" in Vicki Jackson and Mark Tushnet, ed., Defining The Field of Comparative Constitutional Law (Westport: Praeger, 2002) at 35
[78] Nelson Dordelli-Rosales "Constitutional democracy: Canada and Venezuela" Conference Presentation in the University of Oxford, UK. March, 2009. British Association for Canadian Studies.44th Annual Conference http://sites.google.com/site/bacsconference2009/conference-programme

focuses on the legal control of executive power by the court."[79] As a public lawyer, I believe that there are many advantages of ensuring judicial independence and separation of powers which are important in a Constitutional democracy.

Conclusion: When I understand constitutional interpretation as principled-purposive as the 'strategy' for freedom, designed to ensure that political power is exercised in conformity with the constitution, guaranteeing fundamental rights and the separation of powers, this conception both requires and fosters a new understanding of constitutional interpretation. As I said earlier, the terms of a democratic *Constitution* calls on judges to be the arbiters of constitutional validity, both in terms of division of powers (an important constitutional principle), and in terms of respect for fundamental rights or principles. In this constitutional framework, the role of the politician and the role of the judge are very different. "The political role is to initiate the debate and to vote according to judgment on what is best for the country. The judicial role, by contrast is to resolve legal disputes formulated by others, impartially on the basis of the facts and the law."[80]The question for discussion still remains alive: How Judges should go about Freedom of Expression? The right to freedom of the press and speech only can be ensured in a democratic state that preserves and protects the enjoyment of human rights, according to the Constitution and to the American Convention of Human Rights: Provision 13 of the American Convention of Human Rights expresses that freedom of thought and expression includes freedom to seek, receive, and inform. Based on the American Convention of Human Rights, this right only can be enjoyed in a free and democratic society,[81] which means, that the State is obligated to protect and preserve democracy as the only system that respects Human Rights.

---

[79] *Ibidem* at 49

[80]Remarks of the Right Honourable Beverley McLachlin, P.C. Respecting Democratic Roles November 22, 2004 http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm04-11-12-eng.asp

[81] Nelson Dordelli-Rosales, "Venezuelan Constitutional Democracy: Are there Lessons to be learned from Canadian Constitutional Democracy?" in *Mapping Emergent Terrains, Contesting Rigidified Traditions: The First Annual Graduate Student Conference of the Toronto Group for the Study of International, Transnational, and Comparative Law*. Univ. of Toronto, Law Faculty, Jan.2008 http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/7/0/0/0&contentId=1591

Bibliography

Alexander E.R. "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" (1990) 40 *University of Toronto Law Journal* 1

Altman, A. *Critical legal studies: a liberal critique* (Princeton: Princeton University Press, 1990)

Barak, Aharon. *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005)

Beatty, D.M. *Talking Heads and the Supremes: The Canadian Production of Constitutional Review*. (Toronto: Carswell, 1990)

Behn Robert. *Rethinking Democratic Accountability* (Washington, D.C.: The Brookings Inst., 2001)

Black's Law Dictionary. 6 ed. St. Paul MN: West Publishing Co., (1990)

Botswana -- Attorney-General v. Dow, Appeal Court, 1994 (6) BCLR 1 (locus standi) 07/03/1992

Boyd, S.B. and Sheehy, E.A. "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2C.J.W.L. 1-18

Bybee, Keith J. (2005) "Legal Realism, Common Courtesy, and Hypocrecy," in *Law, Culture and the Humanities, Association for the Study of Law, Culture and the Humanities*, Vol. 1, No. 1, 75-102

Campbell, Tom. "Grounding Theories of Legal Interpretation" in Legal *Interpretation in Democratic States* (Burlington: Ash gate Publishing, 2002)

Campbell, eds., *Legal Interpretation in Democratic States* (Burlington: Ashgate Publishing, 2002)

Cook, Timothy E. "The Empirical Study of Lesbian, Gay, and Bisexual Politics: Assessing the First Wave of Research," *The American Political Science Review*, Vol. 93, No. 3 (Sep., 1999), pp. 679-692

Cooter, Robert D. *The Strategic Constitution* (New Jersey: Princeton University Press, 2000)

Craig, Paul and Tomkins, Adam. *The Executive and public law: power and accountability in comparative perspective* (Oxford: University Press, 2006).

Devlin, Richard F. "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 *Queen's L.J*.

Duxbury, Neil. *Jurists and judges: an essay on influence* (Oxford: Portland, 2001)

Dworkin, Ronald. *Law's Empire* (Cambridge: Harvard University Press, 1986)

Dworkin, Ronald. *Justice in Robes* (Harvard: Harvard University Press, 2006)

Gall, Gerald L. *The Canadian Legal System* (Toronto: Carswell, 1990)

Goldsworthy, Jeffrey. "Legislative Supremacy, and Legal Positivism" in Jeffrey Goldsworthy and Tom Griffith, John A. G. *The Politics of the Judiciary* (Manchester: Manchester University Press, 1977)

Globe and Mail. "Senior U.S., Canadian judges spar over judicial activism." (February 17, 2007) A2

Henderson, James Youngblood. "First Nations Jurisprudence and Aboriginal Rights," Retrieved March from:15th, 2007 from: http://www.usask.ca/nativelaw/fnjar/

Heureux-Dube, C.L. "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall L.J.at 503

Hogg, Peter W. "Canada: From Privy Council to Supreme Court," in Jeffrey Goldsworthy, ed., *Interpreting Constitutions*, (Oxford: Oxford University Press, 2006

Hogg, Peter W. "Canada: From Privy Council to Supreme Court," in Jeffrey Goldsworthy and Tom Campbell, eds., *Legal Interpretation in Democratic States* (Burlington: Ashgate Publishing, 2002)

Hogg, P.W., and Thorton, A.A. "The Charter Dialogue Between Courts and Legislatures" (1999) *Policy Options Politiques* 19; longer version in (1997) 35 *Osgoode Hall Law Journal* 75

Hogg, P. W., and Thornton, A. A. "Reply to 'Six Degrees of dialogue' in HeinOnline 37 Osgoode Hall L.J. 529 1999

Hogg P. W. and Bushell, A.A. "The Charter dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75-124

Ignatieff, Michael. *The Rights Revolution* (Toronto: Anansi Press, 2000) at 29

Joyaux, Georges J. "Victor Cousin and American Transcendentalism" in *The French Review*, Vol. 29, No. 2 (Dec., 1955)

Kazuyuki Takahashi. "Why Do We Study Constitutional Laws of Foreign Countries and How?" in Vicki Jackson and Mark Tushnet, ed., *Defining the Field of Comparative Constitutional Law* (Westport: Praeger, 2002)

Lewin, Leif*. Democratic Accountability Why Choice in Politics is Both, Possible and Necessary*, (Cambridge: Harvard University Press, 2007). Available electronically in: http://www.hup.harvard.edu/pdf/LEWDEM_excerpt.pdf

Manfredi, C.P. and Kelly, J. B. “Six Degrees of Dialogue: A Response to Hogg and Bushell” *in Osgoode Hall Law Journal*. 37 1999

McLachlin, B. "The Role of the Courts in the Post-Charter Era: Policy-Maker or Adjudicator?" (1990) 39 *University of New Brunswick Law Journal* 43.

Manfredi, Christopher P. *Judicial Power and the Charter: Canada and the paradox of Liberal Constitutionalism*, (Don Mills: Oxford University Press, 2001) 176-181

Martin, Robert. *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our and Our Democracy* (Montreal: McGill-Queen's University Press, 2003)

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1994)

Minister of Home Affairs v Fisher Case (1979) 3 All E.R. 21, at 25 (appeal from the colony of Bermuda).Retrieved February 15th, 2007 from: http://www.internationaljusticeproject.org/pdfs/Conteh-writing-2.pdf

Moore, Michael S. “Natural Rights, Judicial Review, and Constitutional interpretation” in Jeffrey Goldsworthy and Tom Campbell, ed., *Legal Interpretation in Democratic States* (Burlington: Ashgate Publishing, 2002)

Nedelsky, Jennifer. “Reconceiving Rights as Relationship” (1993) 1 *Rev. Const. Stud*,
1-26

Pothier, Dianne and Devlin, Richard (Eds.) *Critical Disability Theory Essays in Philosophy, Politics, Policy, and Law* (Washington: University of Washington Press, 2006) pp. 352

Peerenboom, Randall. “Varieties of rule of Law: An Introduction and Provisional Conclusion” in Peerenboom, Randall. *Asian, Discourses of rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (New York: Routledge, 2004)

Pyle, J.J. *Race, Equality and the Rule of Law: Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999)

Roach, K. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). 352 pp.

Russell, Peter. *Constitutional Odyssey*, (Toronto: university of Toronto Press, 1993) at 10

Sen, Amartya. *Development as Freedom* (New York: Anchor, 1999)

Shientag, B.L. “The Virtue of Impartiality” in Winters, ed., *Handbook for judges* (The American Judicature Society, 1975)

Silberman, Abella. “The Judicial Role in a Democratic State” (Keynote Address, 1999 *Constitutional Cases Conference, Osgoode Hall Law School, York University*, 7 April 2000) 1-9

Simpson, Jeffrey. *Struggling for a Canadian Vision* (Toronto: HarperCollins Publishers, 1993)

Simpson, Jeffrey. *The Friendly Dictatorship,* (Toronto: McClelland & Steward, 2001)

Steiner, George. *Strategic Planning* (NY: The Free Press, 1997)

Supreme Court of Canada, Remarks of the Right Honourable Beverley McLachlin, P.C. “Judging in a Democratic State” June 3, 2004, Retrieved March 2, 2007 from:
http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/democraticstate_e.asp

Supreme Court of Canada. “Mandate and Mission” Retrieved March 11, 2007 from:
http://www.scc-csc.gc.ca/aboutcourt/sccmission/index_e.asp

Tiller, Emerson and Cross, Frank. (2005) ‘What is Legal Doctrine?’ in *North Western University School of Law, Public Law and Legal Theory Papers* 41, pp. 2-18

Tuck, Richard. “Scepticism and Toleration in the Seventeenth Century” and Alan Ryan, “A More Tolerant Hobbes?” in *Justifying Toleration: Conceptual and Historical Perspectives*, ed. Susan Mendus (New York: Cambridge University Press, 1988), 8, 21-60

Waluchow, W. J., “ The many faces of legal positivism” in Published in *University of Toronto Law Journal*, Volume XLVIII, Number 3, Summer 1998. Retrieved from:
http://www.utpjournals.com/product/utlj/483/483_waluchow.html

Wilson, B. “Will Women Judges Really Make a Difference?” (1990) 28 Osgoode Hall L.J. 507-522