Canada-United States Law Journal

Volume 3 | Issue Article 13

January 1980

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Professor Tribe: Why do you regard it unfortunate that the courts are lagging, rather than describing it as remarkable and progressive that the legislatures are leading?

Professor Schmeiser: I, of course, regard it as a good thing that the legislatures are leading. However, I do not find that surprising because Canadian legislative theory has always looked at Parliament as the champion of liberty and as the final court of the land. In Canada today there is a federal bill of rights and provincial bills of rights in all jurisdictions. There is a Human Rights Commission in every province of Canada and a Federal Commission as well. Thus, in Canadian jurisprudence it is not remarkable for Parliament and the legislatures to be doing what they, in theory, ought to be doing, namely, protecting the rights of the individual. That has always been a strong Canadian Parliamentary tradition.

What is interesting, however, is that the courts always went hand in hand with that process and where the legislature failed to act or had acted unwisely the Court, by very imaginative means, assisted the legislature in its work. That has generally been the Canadian judicial tradition except for the last ten years.

Student Question: I would like to ask Justice Mosk about the exclusionary rules. One of the criticisms of that rule is that the sanctions do not fall on the offending officer and hence there is no incentive for improvement in the future. Are you satisfied with the present administration of the exclusionary rule or do you think some of the alternatives suggested by Chief Justice Burger should be pursued?

Justice Mosk: The problem is that I have seen no indication that any alternative works. As far as I know, at least in my state and any state I am familiar with, there is no record whatsoever of any law enforcement officer ever being disciplined for having illegally seized evidence that ultimately resulted in a conviction. Until some viable alternative is proposed I see no other alternative than to remove the inducement from a law enforcement officer to obtain evidence illegally by indicating to him that it will not result in any favorable legal proceeding.

Student Question: Are the respective courts becoming paternal and if so are they thereby passing on the rights of the individual for the common interest as those courts themselves perceive those interests?

Professor Schmeiser: I certainly would not describe our court as becoming paternalistic. I would have considered it more paternalistic when it was more concerned about violations of individual rights. I think that the trend is away from that.

Justice Mosk: I think courts serve a very useful function when they are a bulwark against the shifting tides of public opinion. This can operate both in a liberal climate and a conservative climate. In the United

States I think of Franklin Roosevelt's presidency and the New Deal as a period when we had what was called a conservative court which was a bulwark against what it believed to be excesses of the New Deal period.

At a later period during the excesses of the McCarthy era, when witch hunting was quite common and fashionable, we had a liberal court which was able to withstand those tides of public opinion. Accordingly, by having a Court that is impervious to shifting public opinion we have, I think, a rather effective check and balance system.

Professor Peter Junger: Professor Schmeiser, is there a possibility that the passage of the Canadian Bill of Rights has led the Canadian Court to a strict constructionist position at the same time the Parliament has been led to a position as protector of the citizenry leaving the Canadian people with less protection of the citizen's rights than they would have had if the Bill had not passed. Is that a possibility?

Professor Schmeiser: It is a possibility. The short answer is that I do not know. In my speech reference was made to the fact that Parliament is now amending the legislation which gave rise to the decision concerning the position of the Indian woman. Whether Parliament will in the future slough off its responsibility to the courts I do not know. It would be uncharacteristic but it is possible.

Steve Kane: I would like to address this question to both members of the panel. During previous World Wars and more recently during the crisis in Canada, individual liberties have been suspended under the guise of national emergency or wartime acts. How can this type of abridgement of fundamental rights be justified? Freedom of speech is not really needed to say how much we approve of our government, but it is needed to say how much we do not approve of it, particularly during times of such crises.

Professor Schmeiser: I think it is a legitimate proposition to suggest that in times of emergencies human rights can be restricted or abridged. I think it is intellectually sound. That, of course, depends on what kind of human rights you are talking about. There is presently a document called the International Covenant on Civil and Political rights to which approximately forty countries are signatories. Canada is one of them. The Covenant lists all of the fundamental rights that one could reasonably expect to enjoy, but it makes the point that in time of emergency when the safety of the State itself is threatened these rights can, in fact, be abridged.

The Covenant does go on to say that some rights cannot be abridged. It spells out which ones can and which ones cannot be abridged. Therefore, I think, in accepting the proposition that there are certain rights that can and must be abridged in times of extreme emergency one has to be more specific and look at the particular kind of right which is being contended for.

Justice Mosk: I would have to agree with that. I think survival is the first function of organized government. In national emergencies the United States has curtailed certain liberties. During the Civil War Lin-

coln prevented the use of habeas corpus. During World War II our country excluded persons of Japanese origin and interned some of them.

Even though that has been roundly criticized in commentaries and legal journals it was subsequently approved by the United States Supreme Court. I would like to believe that if we have a future national emergency there would be no restrictions of our constitutional rights, but I think in practicality I have to recongize that there probably would be if we were faced with another World War.

Peter Robertson: I have a two-part question which grows out of the evolution in our Supreme Court of the definition of discrimination. My first question is whether my perception is accurate that in the long run if state government is really viably solving economic problems, do not state Supreme Courts have to begin to give to their own state government agencies the power to enforce antidiscrimination policies.

I am told there is not a chance that will ever happen in Canada because the courts do not do any investigation of legislative history but take the word of the statute literally. My question is whether my perception is accurate or whether there is some hope that some day Canadian antidiscrimination laws might be interpreted in a similarly broad fashion?

Justice Mosk: My answer is many of the state courts, including my own, have been in the forefront of supporting moves and indeed compelling moves to eliminate discrimination. For example, the California Supreme Court under Chief Justice Roger Traynor declared antimiscegnation statutes to be invalid. This was many years before a similar case reached the United States Supreme Court. Our court also ordered unions to be free of discrimination holding that a closed union is incompatible with efforts to achieve freedom from discrimination.

The problem, however, with wholesale support of administrative agencies as implied in your question is that they raise some problems, serious problems. I am sure there will be those who disagree with me here but there are problems of reverse discrimination.

We talk rather blithely about affirmative action but I suggest what this means to one person is not what it means to another. Affirmative action to some people means racial quotas, and I suggest too that racial quotas are not deserving of judicial support nor even of administrative support.

Efforts to eliminate discrimination should get support from both administrative agencies and from the courts, but there is a distinction between eliminating discrimination and discriminating against some persons in favor of other persons because of race. That is discrimination too.

Professor Schmeiser: I do not think that the Canadian approach to defining instances of discrimination has been restrictive. Taking the long view I think it has been the opposite. Moreover, I would like to point out that there is no barrier in Canada to provincial legislation which protects human rights or which prevents discrimination because there is no constitutional barrier.

Remember that we operate under a theory of the supremacy of Parliament so that if the legislature enacts legislation in opposition to discrimination, as all of them have done, the courts really do not have any constitutional right to intervene.

There also is no barrier in Canada to affirmative action. Some of the provinces have recently enacted statutes which instruct human rights commissions to engage in affirmative action programs. I do not know of any constitutional attack on that kind of position.

David Thompson: Professor Schmeiser, in your last answer you dealt with the supremacy of Parliament and in all of your other answers you have been dealing directly with the decisions on individual rights as against the State and the sovereignty of Parliament. You have indicated that at varying times in Canadian judicial history the Court has come to the fore in asserting the rights of the individual and at other times it has been the Cabinet. It seems to me that the only hope for the individual is this rather clumsy method of recognizing inconsistencies in laws such as the Indian Act which is after all 100 years old and doing something about it after the fact, perhaps four, five years after there has been lengthy litigation on the problem. I am wondering what solution or perhaps the better question would be, what body do you see as really more appropriate to settling these problems. Do you think this more clumsy approach will be more successful in the long run?

Professor Schmeiser: My answer might be biased because of my background, but in my view it is much better to have these matters dealt with by politicians and in that sense by society as a whole, rather than by the courts. I am not a great fan of the American practice of judicial review. Let me give you some examples. I do not think that capital punishment ought to be decided by the courts. I think it ought to be decided by the legislative bodies of the country. I do not think that the abortion question ought to be decided by the courts. I think it ought to be decided, in our case, by Parliament. There are many of these areas such as the question of proper police powers. My only personal view is that in the long run it is better if they are aired in the public arena through the political process rather than through the judicial process.

I quite appreciate, as a student of American constitutional law, that many of you will disagree with me, but having watched both systems operate in the past twenty-five years I still prefer the Canadian system and I think that in fact our system has worked equally as well.

Professor Yuri Luri: My questions are to Professor Schmeiser. Do you not think that the character of human rights claims in the 1960's is distinguishable from those of the 1970's? Or in other words, the Supreme Court did not vary from the principles which it established in the cases of the 1960's.

My second question is in regard to your idea that capital punishment must be legislated and must not be decided by the Court. My question is, does that mean the Court would not have a right to refuse to enforce statutorily-mandated capital punishment?

Professor Schmeiser: I am afraid I am about to eat ground glass, to use Professor Tribe's words. In my view, some of the cases which were decided in the 1950's in Canada would be decided differently today. Similarly if some of the cases today had arisen in the 1950's in Canada they would have been decided differently.

Now, that does not negate your point, with which basically I agree, that the claims for rights which are made today are more refined, more specific, and more advanced; but you can always draw those kinds of distinctions.

With respect to capital punishment my view is that the final decision on capital punishment ought to be made by Parliament subject, of course, to a power of clemency. The decision ought to be a political, executive and legislative matter rather than a judicial matter to the extent that the courts ought not to have the right to abstain from the imposition of capital punishment.

I personally oppose capital punishment and I would resort to all kinds of schemes and endeavors to block it, but as a political matter I feel that that decision is best made by Parliament in the Canadian context, not by our Supreme Court.